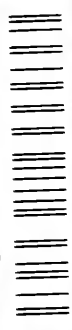


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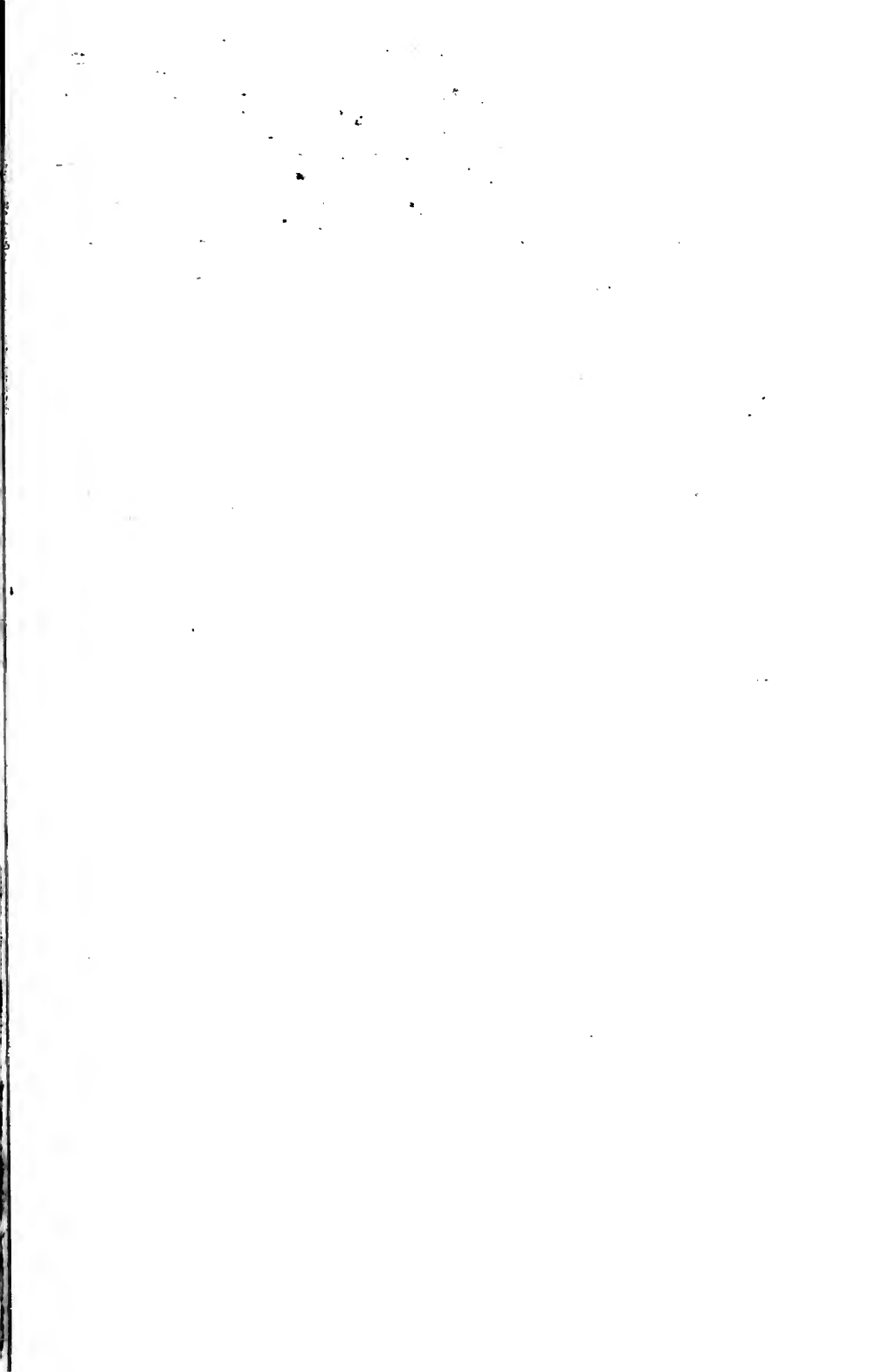
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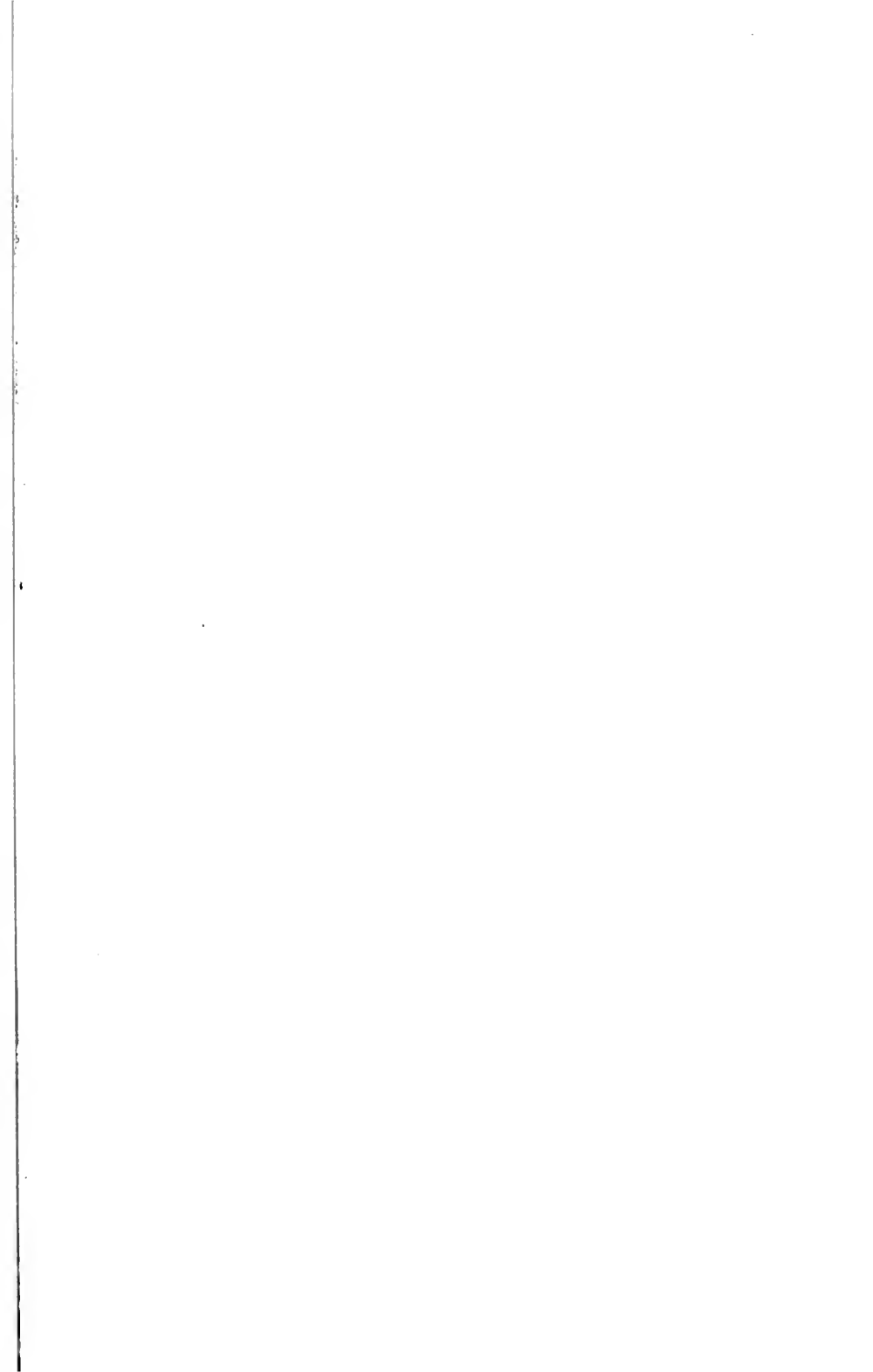
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A TREATISE  
ON  
THE LAW OF LIENS

COMMON LAW, STATUTORY, EQUITABLE  
AND MARITIME

By  
LEONARD A. JONES

AUTHOR OF MORTGAGES, LANDLORD AND TENANT, COLLATERAL  
SECURITIES, REAL PROPERTY

THIRD EDITION, REVISED AND ENLARGED

By  
EDWARD M. WHITE

IN TWO VOLUMES

VOLUME TWO

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## PREFACE TO THIRD EDITION

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Numerous statutes have been enacted and very many rulings have been made by the courts on the subject of liens since the publication of the last edition of this work. In this revision the author has made a diligent effort to set out the substance of such statutes and has cited a very large number of the decisions of the courts made during the last twenty years. He has found it necessary to add many new sections and parts of sections and to add many annotations and authorities supporting the new text.

Old section numbers have been retained to better facilitate the finding of the great number of references to former editions cited so generally by the courts. Where new sections have been added they have been designated by letters following the old section numbers.

EDWARD M. WHITE.

September 1, 1914.



## PREFACE

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Ten years ago, I published a treatise on the Law of Mortgages of Real Property. This was followed by two other treatises which were intended to complete the consideration of the general subject of mortgages,—one upon Railroad Mortgages, and the other upon Chattel Mortgages. In the Preface to the first edition of the latter work, published seven years ago, I said:—

“I have regarded these volumes upon different phases of the subject of mortgages as constituting in fact one work covering the whole subject: and I have, therefore, referred from one treatise to another as freely as I would to other sections of the same treatise. It is my purpose to follow this method still further, in the preparation of two other treatises,—one upon Pledges, including Collateral Securities, and one upon Liens,—which with those I have already published, will form a complete series of works on Property Securities. The three forms of security upon property—Mortgages, Pledges, and Liens—will then be treated in works which are not only separately complete, but which will also have reference to the relations of the subjects to each other.”

The task which I then set for myself I now complete in publishing the present work upon Liens. Much hard labor—all of it, so far as authorship is concerned, being my own personal labor—has gone into these seven volumes. The favor with which the profession has received the works of this series, heretofore published, I attribute largely to the fact that I have dealt with the subjects at close quarters, so to speak; that is, I have sought to examine the subjects in such detail as to enable me to state and discuss all the difficult

and doubtful questions that have arisen and been passed upon by the courts. Many of these might have been hidden or passed by under a statement of an elementary principle; but as these works were intended for the practising lawyer, rather than the student, I have deemed it my province to find out the uncertainties in the law, and, if I could, to refer them to some principle, or to classify them, and at least to state them, if I could do no more.

The subjects with which these works deal have their full share of intricate questions; and the subject of Liens not less than the others. A formidable difficulty in making a satisfactory treatise upon the subject of Liens has been encountered in the statutory law which forms so important a part of it. It is not so much that new liens have been created by statute, as that the common law liens upon personal property, as well as equitable liens upon both personal property and real property, have been in many instances modified or enlarged. By statute, moreover, maritime liens have been in like manner affected. Finally, many liens have been created which had never been asserted at law or in equity, or in the admiralty. The statutory law is, however, no less important than the judicial, to a complete understanding of the subject; and, besides, the decisions of the courts are largely based upon the statutes, and can be understood only by reference to them. I have therefore deemed it essential to state the statute law, sometimes in the language of the statutes, and sometimes briefly and in substance. This part of the work has been more difficult than any other.

L. A. J.

Boston, June 4, 1888.

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| 1753. Montana.  |   |
| 1754. New Hampshire.  |   |
| 1755. New Jersey.   |   |
| 1756. New York.   |   |
| 1757. North Carolina.   |   |
| 1758. Ohio.   |   |
| 1759. Oregon.   |   |
| 1760. Pennsylvania.   |   |
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| 1762. Tennessee.  |   |
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# LIENS UPON REAL PROPERTY

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## VOLUME II

### CHAPTER XXIII.

#### GRANTOR'S OR VENDOR'S IMPLIED LIEN FOR PURCHASE-MONEY.

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| 1062. | Grounds of the doctrine.                                | 1077. | Protection of innocent purchaser.                             |
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1095.	Effect of indorsement of note without recourse to carry the lien.	1102a.	Defenses.
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		1103a.	Recovery of attorney's fee in equity to enforce lien.
		1104.	Marshalling assets.

§ 1061. **Nature of the lien.**—It is a doctrine of the English courts of chancery that a vendor has a lien upon the land sold and conveyed by him, for the purchase-money, as against the vendee and his heirs, although he has taken no distinct agreement or separate security for it. There is a natural equity, it is said, that the land shall stand charged with so much of the purchase-money as is not paid at the time of the conveyance.<sup>1</sup>

<sup>1</sup> Chapman v. Tanner, 1 Vern. 267, per the Lord Keeper; Hiscock v. Norton, 42 Mich. 320, 3 N. W. 868; Warren v. Fenn, 28 Barb. (N. Y.) 333, per Potter, J.: "It has become one of the best established principles of natural equity, and the courts should ever be prompt to maintain it in its full vigor, that estates are to be regarded as unconscientiously obtained, when the consideration is not paid." And see Beal v. Harrington, 116 Ill. 113, 4 N. E. 664; Phillips v. Schall, 21 Mo. App. 38; Pratt v.

Clark, 57 Mo. 189, 191; Bennett v. Shipley, 82 Mo. 448; Barrett v. Lewis, 100 Ind. 120, 5 N. E. 910; Poe v. Paxton, 26 W. Va. 607; Pintard v. Goodloe, Hemp. (U. S.) 502, Fed. Cas. No. 11171, affd. 12 How. (U. S.) 24, 13 L. ed. 877; Dunton v. Outhouse, 64 Mich. 419, 31 N. W. 411; Bates v. Childers, 5 N. Mex. 62, 20 Pac. 164, quoting text; McKinnon v. Johnson, 54 Fla. 538, 45 So. 451; Wendell v. Prunco, 127 Ill. App. 319; Larscheid v. Hashek Mfg. Co., 142 Wis. 172, 125 N. W. 442; Minah Consol. Min.

It is also said that the principle of the doctrine originates in trust.<sup>2</sup>

But only in a few cases has the vendor's right been regarded as in the nature of a trust for his benefit, the purchaser taking the property subject to a trust for the payment of the purchase-money.<sup>3</sup> "Upon principle," says Lord Eldon, "without authority, I cannot doubt that. It goes upon this; that a person, having got the estate of another shall not, as between them, keep it, and not pay the consideration."<sup>4</sup>

The only other ground upon which it has been suggested that the doctrine rests is the supposed intention of the parties; and on this point Chief Justice Gibson remarks:<sup>5</sup> "The implication that there is an intention to reserve a lien for the

Co. v. Briscoe, 32 C. C. A. 390, 89 Fed. 891; Hubbell v. Henrickson, 175 N. Y. 175, 67 N. E. 302.

<sup>2</sup> Blackburn v. Gregson, 1 Bro. Ch. 420, per Lord Loughborough: "Lord Bathurst doubted whether there was such an equitable lien. Fawell v. Heelis, Amb. 724. It becomes, therefore, of great consequence that it should be spoken to—it struck me always that there was such a lien, and that it was so from the foundation of the Court. A bargain and sale must be for money paid, otherwise it is in trust for the bargainor. If an estate is sold, and no part of the money paid, the vendee is a trustee: then, if part be paid, is it not the same as to that which is unpaid?" And see Acton v. Waddington, 46 N. J. Eq. 16, 18 Atl. 356, affd. 46 N. J. Eq. 611, 22 Atl. 56.

<sup>3</sup> Dickerson v. Carroll, 76 Ala. 377; Briscoe v. Bronaugh, 1 Tex. 326, 333, 46 Am. Dec. 108; Flanagan v. Cushman, 48 Tex. 241, 244; Sen-

ter v. Lambeth, 59 Tex. 259; Morgan v. Dalrymple, 59 N. J. Eq. 22, 46 Atl. 664, affd. 60 N. J. Eq. 466, 46 Atl. 666.

<sup>4</sup> Mackreth v. Symmons, 15 Ves. 329. As to the time when this doctrine was established, Lord Eldon said: "I take that to have been the settled doctrine at the time of the decision of Blackburn v. Gregson; which case so far shook the authority of Fawell v. Heelis as to relieve me from any apprehension, that Lord Bathurst's doctrine can be considered as affording the rule, to be applied as between the vendor and vendee themselves, and persons claiming under them." And see 1 White & Tudor's Lead. Cas. in Eq. 289; Kettlewell v. Watson, 21 Ch. Div. 685, 702; Eubank v. Finnell, 118 Mo. App. 535, 94 S. W. 591; Rewis v. Williamson, 51 Fla. 529, 41 So. 449.

<sup>5</sup> Kauffelt v. Bower, 7 Serg. & R. (Pa.) 64, 76, 10 Am. Dec. 428. Mr. Pomeroy, 3 Eq. Jur. (3d ed.) 1252, rejecting these theories, ac-

purchase money, in all cases where the parties do not, by express acts, evince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass."

This lien is an equitable lien. A lien at law is founded upon possession, and consequently there can be no lien at law in favor of the vendor for the purchase-money after he has executed an absolute conveyance. His right is independent of possession, and exists in equity only. It is purely of equitable cognizance.<sup>6</sup>

§ 1062. **Grounds of the doctrine.**—As to the grounds of the doctrine, Chief Justice Gray,<sup>7</sup> in a careful review of the subject, says: "The theory that a trust arises out of the unconscientiousness of the purchaser would construe the non-

counts for this lien as an instance of the higher importance, consideration, and value given to real property over personal property.

<sup>6</sup> *Upland Land Co. v. Ginn*, 14 Ind. App. 431, 42 N. E. 1028.

<sup>7</sup> *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449. Chief Justice Gray, after examining the sources from which it has been supposed the doctrine of this lien is derived, says: "The most plausible foundation of the English doctrine would seem to be that justice required that the vendor should be enabled by some form of judicial process to charge the land in the hands of the vendee as security for the unpaid purchase-money. And the restriction of the doctrine to real estate suggests the inference that the Court

of Chancery was induced to interpose by the consideration that by the law of England real estate could neither be attached on mesne process, nor, except in certain cases, or to a limited extent, taken in execution for debt." In conclusion he decides against adopting in Massachusetts "a doctrine which has never been supposed by the profession to be in force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has shown, tends to promote uncertainty and litigation; and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties."

performance of every promise, made in consideration of a conveyance of property to the promisor, into a breach of trust; and would attach the trust, not merely to the purchase-money which he agreed to pay, but to the land which he never agreed to hold for the benefit of the supposed cestui que trust." As to the natural equity of the lien, the learned Chief Justice quotes with approval the argument of counsel in an English case,<sup>8</sup> not answered by the court: "It is called a natural lien; but it certainly is not so with respect to personalty, which, if once delivered, it is conclusive, though concealed from all mankind; and there seems as much natural equity in the case of personalty as realty."

The objection, that the establishment of this lien is in contravention of the policy of the statute of frauds, is met by the reply that the lien is really a constructive trust, and that the statute is admitted to have no application to a trust arising in this manner.<sup>9</sup> "It is not perhaps," says Judge Story, "so strong a case as that of a mortgage implied by a deposit of the title-deeds of the real estate, which seems directly against the policy of the statute, but which nevertheless has been unhesitatingly sustained."<sup>10</sup>

**§ 1063. How far adopted in this country.**—The doctrine of a vendor's lien for the purchase-money prevails in quite a number of the states,<sup>11</sup> and in the other states the doc-

<sup>8</sup> In *Blackburne v. Gregson*, 1 Cox Ch. 90, 100, 1 Bro. Ch. 420. Under the civil law, to which the origin of the vendor's lien is referred, the purchase-price of personal property was secured in the same way; but neither in England nor America has the rule been extended to personalty.

<sup>9</sup> *Warren v. Fenn*, 28 Barb. (N. Y.) 333; *Wood v. Lester*, 29 Barb. (N. Y.) 145, 152; *Mims v. Macon & W. R. Co.*, 3 Kelly (Ga.) 333, 341. And see *Womble v. Battle*,

3 Ired. Eq. (N. Car.) 182, per Nash, J.; *Acton v. Waddington*, 46 N. J. Eq. 16, 18 Atl. 356.

<sup>10</sup> 2 Story's Eq. Jur. (13th ed.), § 1218, and see § 1221.

<sup>11</sup> The doctrine prevails in: Alabama: *Gorden v. Bell*, 50 Ala. 213; *White v. Stover*, 10 Ala. 441; *Bradford v. Harper*, 25 Ala. 337. Also applies to exchanges: *Burns v. Taylor*, 23 Ala. 255; *Wood v. Sullens*, 44 Ala. 686; *Carver v. Eads*, 65 Ala. 190; *Wilkinson v. May*, 69 Ala. 33; *Wagner v. Brinkerhoff*,

trine has either been rejected from the beginning, or, having prevailed at one time, has since been expelled by statute, al-

123 Ala. 516, 26 So. 117. Arkansas: Shall v. Biscoe, 18 Ark. 142; Campbell v. Rankin, 28 Ark. 401; Turner v. Horner, 29 Ark. 440; Lavender v. Abbott, 30 Ark. 172; Refeld v. Ferrell, 27 Ark. 534; Stephens v. Shannon, 43 Ark. 464; Chapman v. Liggett, 41 Ark. 292. California: Salmon v. Hoffman, 2 Cal. 138, 56 Am. Dec. 322; Sparks v. Hess, 15 Cal. 186; Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142; Gallagher v. Mars, 50 Cal. 23. It is also provided by statute that one who sells real estate shall have a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. Civil Code 1906, § 3046. Tutt v. Davis, 13 Cal. App. 715, 110 Pac. 690. Colorado: Francis v. Wells, 2 Colo. 600. North and South Dakota: Same statutory provisions as in California. North Dakota: Rev. Code 1905, § 6281. District of Columbia: Ford v. Smith, 1 McAr. (D. C.) 592. Florida: Bradford v. Marvin, 2 Fla. 463; Wooten v. Bellinger, 17 Fla. 289, 300; Rewis v. Williamson, 51 Fla. 529, 41 So. 449; Johnson v. McKinnon, 45 Fla. 388, 34 So. 272. Idaho: Rev. Code 1908, § 3441. Illinois: Moshier v. Meek, 80 Ill. 79; Keith v. Horner, 32 Ill. 524; Boynton v. Champ- lin, 42 Ill. 57; Dyer v. Martin, 5 Ill. 146; Wing v. Goodman, 75 Ill. 159; Kirkham v. Boston, 67 Ill. 599; Wilson v. Lyon, 51 Ill. 166; Croft v. Perkins, 174 Ill. 627, 51 N. E. 816. The lien is not viewed with favor by the law. Kern v. School Directors of School Dist. No. 821-2, 155 Ill. App. 62; Robinson v. Appleton, 124 Ill. 276, 15 N. E. 761. Indiana: Yaryan v. Shriner, 26 Ind. 364; Mattix v. Weand, 19 Ind. 151; Deibler v. Barwick, 4 Blackf. (Ind.) 339; Warford v. Hankins, 150 Ind. 489, 50 N. E. 468; Borrer v. Carrier, 34 Ind. App. 353, 73 N. E. 123. A note given in consid- eration of a devise is a purchase- money note and the vendor's lien therefor may be enforced. Bal- lard v. Camplin, 161 Ind. 16, 67 N. E. 505. Iowa: Grapengether v. Fejervary, 9 Iowa 163, 74 Am. Dec. 336; McDole v. Purdy, 23 Iowa 277; Johnson v. McGrew, 42 Iowa 555; Jordan v. Wimer, 45 Iowa 65. But criticised in Pier- son v. David, 1 Iowa 23; Porter v. Dubuque, 20 Iowa 440. Now must be reserved in deed to avail against grantee's conveyance. Code 1897, § 2924. This statute does not apply to sales made be- fore its enactment. Jordan v. Wimer, 45 Iowa 65. Kentucky: Thornton v. Knox, 6 B. Mon. (Ky.) 74; Ledford v. Smith, 6 Bush (Ky.) 129; Tierman v. Thur- man, 14 B. Mon. (Ky.) 277; Emi- son v. Risque, 9 Bush (Ky.) 24. But it is now provided by statute that the grantor shall not have a lien against bona fide purchasers and creditors unless he states in his deed what part of the consid-

though it may be that in a few states the question of its existence has not been definitely decided. In the courts of the

eration remains unpaid. Stats. 1909, § 2358; *Ross v. Adams*, 13 Bush (Ky.) 370; *Ashbrook v. Roberts*, 82 Ky. 298, 6 Ky. L. 317; *Lucy v. Hopkins*, 11 Ky. L. 907, 13 S. W. 518; *Barnett v. Salyers*, 11 Ky. L. 465, 12 S. W. 303; *White v. Taylor*, 107 Ky. 20, 21 Ky. L. 602, 52 S. W. 820. In Louisiana, there is a vendor's privilege upon immovables, but under the Code it has no effect against third persons unless recorded in the parish where the property to be affected is situated. Rev. Civ. Code 1900, arts. 3249, 3274. See *Pedesclaux v. Legare*, 32 La. Ann. 380; *Succession of Clay*, 34 La. Ann. 1131; *Labouisse v. Orleans Cotton-Rope & Mfg. Co.*, 43 La. Ann. 245, 9 So. 204; *Succession of Osborn*, 40 La. Ann. 615, 4 So. 580. Maryland: *Carr v. Hobbs*, 11 Md. 285. Michigan: *Payne v. Avery*, 21 Mich. 524; *Carroll v. Van Rensselaer*, Harr. (Mich.) 225; *Dunton v. Outhouse*, 64 Mich. 419, 31 N. W. 411. Minnesota: *Duke v. Balme*, 16 Minn. 306 (Gil. 270); *Selby v. Stanley*, 4 Minn. 65 (Gil. 34); *Walter v. Hanson*, 33 Minn. 474, 24 N. W. 186; *Hammond v. Peyton*, 34 Minn. 529, 27 N. W. 72. Mississippi: *Dodge v. Evans*, 43 Miss. 570; *Pitts v. Parker*, 44 Miss. 247. It has been applied to a sale of a leasehold estate. *Richardson v. Bowman*, 40 Miss. 782. Missouri: *Bennett v. Shipley*, 82 Mo. 448; *Delassus v. Poston*, 19 Mo. 425; *Marsh v. Turner*, 4 Mo. 253; *Pratt v. Clark*, 57 Mo. 189. Montana: Same as Cali-

fornia. Code (Civ.) 1895, § 3930. Nevada: *Reese v. Kinkead*, 18 Nev. 126, 1 Pac. 667. New Jersey: *Herbert v. Schofield*, 9 N. J. Eq. 492; *Corlies v. Howland*, 26 N. J. Eq. 311; *Dudley v. Dickson*, 14 N. J. Eq. 252; *Graves v. Coutant*, 31 N. J. Eq. 763; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Acton v. Waddington*, 46 N. J. Eq. 16, 18 Atl. 356. New Mexico: *Bates v. Childers*, 4 N. Mex. 347, 20 Pac. 164. New York: *Smith v. Smith*, 9 Abb. Pr. (N. S.) (N. Y.) 420; *Stafford v. Van Rensselaer*, 9 Cow. (N. Y.) 316; *Chase v. Peck*, 21 N. Y. 581; *Bach v. Kidansky*, 186 N. Y. 368, 78 N. E. 1088, affg. 106 App. Div. 502, 94 N. Y. S. 752. Ohio: *Williams v. Roberts*, 5 Ohio 35; *Brush v. Kinsley*, 14 Ohio 20; *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115. Oklahoma: Same as California, with this clause added: "subject to the rights of purchasers and incumbrances, in good faith without notice." One who sells real property has a special or vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer, subject to the rights of purchasers and incumbrances in good faith, without notice. Comp. Laws 1909, § 4137; Laws 1895, p. 164. A vendor under above statute, without surrendering possession, may sue to enforce his vendor's lien for balance of purchase-money. *Craggs v.*

United States the doctrine has never been affirmed, except where established by the local law of the different states.<sup>12</sup> The doctrine, even in those states that have adopted it, has frequently been criticised and deplored as inconsistent with the general policy prevailing in this country of making all matters of title depend upon record evidence.<sup>13</sup>

The doctrine is no more satisfactory now than it was in

Earls, 8 Okla. 462, 58 Pac. 637. Oregon: Pease v. Kelly, 3 Ore. 417; Coos Bay Wagon Co. v. Crocker, 6 Sawyer (U. S.) 574, 4 Fed. 577. In the late case of Kelly v. Ruble, 11 Ore. 75, 4 Pac. 593, the majority of the courts express doubts of the existence of the lien. But this doubt seems to be dispelled by the later cases. Gee v. McMillan, 14 Ore. 268, 12 Pac. 417, 58 Am. Rep. 315; First Nat. Bank v. Salem Capital Flour Mills Co., 39 Fed. 89. Rhode Island: Kent v. Gerhard, 12 R. I. 92, 34 Am. Rep. 612. And see Perry v. Grant, 10 R. I. 334. Tennessee: Ross v. Whitson, 6 Yerg. (Tenn.) 50; Brown v. Vanlier, 7 Humph. (Tenn.) 239; Jones v. Ragland, 4 Lea (Tenn.) 539. But in the latter case it is said that the lien has become, "if not quite a myth," only "a floating equity," or "capacity to acquire a lien." Texas: Pinchain v. Col-lard, 13 Tex. 333; White v. Downs, 40 Tex. 225; Yarborough v. Wood, 42 Tex. 91, 19 Am. Rep. 44; Brown v. Christie, 35 Tex. 689; Flanagan v. Cushman, 48 Tex. 241; Senter v. Lambeth, 59 Tex. 259. Wisconsin: Willard v. Reas, 26 Wis. 540. The right to a vendor's lien may be abolished by statute, but where there is no statute, the death of the vendee does not de-

stroy the right. Berger v. Ber-ger, 104 Wis. 282, 80 N. W. 585, 76 Am. St. 877.

<sup>12</sup> Bayley v. Greenleaf, 7 Wheat. (U. S.) 46, 5 L. ed. 393; McLearn v. McLellan, 10 Pet. (U. S.) 625, 640, 9 L. ed. 559; Chilton v. Braid-en, 2 Black (U. S.) 458, 17 L. ed. 304; Rice v. Rice, 36 Fed. 858.

<sup>13</sup> See Chief Justice Marshall's remarks in Bayley v. Greenleaf, 7 Wheat. (U. S.) 46, 51, 5 L. ed. 393, per Wales, J.; Rice v. Rice, 36 Fed. 858, per Treat, J., in Conover v. Warren, 6 Ill. 498, 502, 41 Am. Dec. 196; Yancey v. Mauck, 15 Grat. (Va.) 300; Philbrook v. Delano, 29 Maine 410, per Shipley, C. J.; Kauffelt v. Bower, 7 Serg. & R. (Pa.) 64, 10 Am. Dec. 428, per Gib-son, J.; Wellborn v. Bonner, 9 Ga. 82; Briggs v. Hill, 6 How. (Miss.) 362, 38 Am. Dec. 441. In the recent case of Hammond v. Peyton, 34 Minn. 529, 27 N. W. 72, Mr. Justice Berry said: "It is to be regretted that the idea of a grantor's lien was ever admitted, especially in this country, where registration of transactions affect-ing real estate is so generally pro-vided for and practiced." And it was frequently condemned in the courts of Virginia before it was abolished by statute. McCandlish v. Keen, 13 Grat. (Va.) 615, 621.



Lord Eldon's time; in fact, it is much less so. From the nature of the equity, there could be but few fixed rules regarding it; but it will be observed in following the American decisions, which are numerous, that there is hardly a rule upon the subject that has not been somewhere denied; that hardly any two states can be found in which the courts agree upon all the important points of the doctrine; and that the cases are not rare in which the decisions in the same state are irreconcilable.<sup>14</sup> The remark of Lord Mansfield, that "the

<sup>14</sup> It is to be noticed that, within a few years, several states have abolished this implied lien, and that strong expressions of disapprobation of the doctrine have been used in others. Moreover, the practical tendency in the older states is to rely upon formal instruments for security when security is wanted. It may be doubted, therefore, whether this doctrine will long survive. Mr. Pomeroy, 3 Eq. Jur. 1251, says: "No other single topic belonging to the equity jurisprudence has occasioned such a diversity and even discord of opinion among the American courts as this of the grantor's lien. Upon nearly every question that has arisen as to its operation, its waiver or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in different states, and sometimes even in the same state, are directly conflicting. It is practically impossible to formulate any general rules representing the doctrine as established throughout the whole country." The doctrine is rejected or not adopted in the following states: Arizona: Baker v.

Fleming, 6 Ariz. 418, 59 Pac. 101. Connecticut: Not adopted, and may be considered in doubt. Atwood v. Vincent, 17 Conn. 575; Chapman v. Beardsley, 31 Conn. 115; Meigs v. Dimock, 6 Conn. 458, 464; Hall v. Hall, 50 Conn. 104; Watson v. Wells, 5 Conn. 468. In the case first cited, Church, J., said: "In this state, we have not yet had occasion to resort to it." Delaware: Budd v. Busti, 1 Har. (Del.) 69; Godwin v. Collins, 3 Del. Ch. 189, 199, *affd.* 4 Houston (Del.) 28; Rice v. Rice, 36 Fed. 858. Georgia: Now abolished by statute, although it formerly existed. Code 1911, § 3373; Graham v. Richerson, 115 Ga. 1002, 42 S. E. 374; Jones v. Janes, 56 Ga. 325; Broach v. Smith, 75 Ga. 159. Kansas: Denied. Simpson v. Munde, 3 Kans. 172; Brown v. Simpson, 4 Kans. 76; Smith v. Rowland, 13 Kans. 245; Greeno v. Barnard, 18 Kans. 518. Maine: Considered and rejected in Gilman v. Brown, 1 Mason (U. S.) 191, 219, Fed. Cas. No. 5441, *affd.* 4 Wheat. (U. S.) 255, 4 L. ed. 564; Philbrook v. Delano, 29 Maine 410, 415. Massachusetts: Denied. Gilman v. Brown, 1 Ma-

more we read, the more we shall be confounded," is not without its application here.

The inquiry in every case is, whether there are other equities superior to his lien, or whether it has been waived by any act of the party claiming it. "Its existence," said Mr. Justice Potter,<sup>15</sup> "depends upon and is controlled by no well settled rules, but, on the contrary, the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the particular case; that is, whether or not a case of natural equity is established, and, if so, whether it is not made to yield to higher or superior equities in some other person—whether the party is not to be

son (U. S.) 191, 219, Fed. Cas. No. 5441, *affd.* 4 Wheat. (U. S.) 255, 4 L. ed. 564; repudiated in *Alrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449. Nebraska: Rejected as contrary to policy of the law. *Edminster v. Higgins*, 6 Nebr. 265; *Ansley v. Pasahro*, 22 Nebr. 662, 35 N. W. 885. New Hampshire: Its existence questioned in *Arlin v. Brown*, 44 N. H. 102. North Carolina: Denied. *Womble v. Battle*, 3 Ired. Eq. (N. Car.) 182; *Henderson v. Burton*, 3 Ired. Eq. (N. Car.) 259; *Cameron v. Mason*, 7 Ired. Eq. (N. Car.) 180; *Smith v. High*, 85 N. Car. 93; *Hoskins v. Wall*, 77 N. Car. 249; *Moore v. Ingram*, 91 N. Car. 376; *White v. Jones*, 92 N. Car. 388; though it had been adopted in earlier cases. *Hickson Lumber Co. v. Gay Lumber Co.*, 150 N. Car. 281, 63 S. E. 1048. Oregon: Doubts of the existence of the lien in this state were expressed in the late case of *Kelly v. Ruble*, 11 Ore. 75, 4 Pac. 593; but the lien is established in the still later case of *Gee v. Mc-*

*Millan*, 14 Ore. 268, 12 Pac. 417, 58 Am. Rep. 315. Pennsylvania: Denied. *Kauffelt v. Bower*, 7 Serg. & R. (Pa.) 64, 10 Am. Dec. 428; *Hepburn v. Snyder*, 3 Pa. St. 72; *Stephen's Appeal*, 38 Pa. St. 9; *Hiester v. Green*, 48 Pa. St. 96, 86 Am. Dec. 569. South Carolina: Denied. *Wragg v. Comp. Gen.* 2 Desaus. (S. Car.) 509, 520. Vermont: Judicially adopted and strongly indorsed by *Redfield, C. J.*, in *Manly v. Slason*, 21 Vt. 271, 52 Am. Dec. 60, but immediately abolished by legislature. Stat. of 1851, ch. 47; Pub. Stats. 1906, § 2587. Virginia: Though it formerly existed, it is now abolished unless it be expressly reserved on the face of the conveyance. Code 1904, § 2474. West Virginia: Abolished, unless it be expressly reserved on the face of the conveyance. Code 1906, § 3110, ch. 75, § 1; Acts 1882, ch. 64; *Warren v. Branch*, 15 W. Va. 21.

<sup>15</sup> *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138, 41 N. Y. (2 Keyes) 64.

regarded as having waived it, or as having intended to waive or postpone it to another equity—or whether, by the acts, or omissions to act, or by the neglect of the party claiming such lien, to enforce it within a reasonable time, the right is not lost as being the superior claim. These considerations control and vary the result as equity demands.”

§ 1064. **When lien presumed to exist.**—The lien is presumed to exist in all cases unless an intention be clearly manifest that it shall not exist.<sup>16</sup> The vendee has the burden of repelling the presumption of a lien.<sup>17</sup> It being an incident of the transaction, it is excluded only by facts which show an intention to exclude it.<sup>18</sup> Want of knowledge on the part of the vendor that the law gives a lien, or a mere secret intention on his part not to claim it, does not affect the right.<sup>19</sup>

<sup>16</sup> Per Lord Eldon, in the leading case before cited; *Gilman v. Brown*, 1 Mason (U. S.) 191, 213, Fed. Cas. No. 5441, affd. 4 Wheat. (U. S.) 255, 4 L. ed. 564; *Seymour v. Slide & Spur Gold Mines*, 42 Fed. 633, 637, affd. 153 U. S. 509, 38 L. ed. 802, 14 Sup. Ct. 842; *Garson v. Green*, 1 Johns. Ch. (N. Y.) 308; *Allen v. Bennet*, 8 Sm. & M. (Miss.) 672, 681; *Truebody v. Jacobson*, 2 Cal. 269; *Schnebly v. Ragan*, 7 Gill & J. (Md.) 120, 28 Am. Dec. 195; *Clark v. Hall*, 7 Paige (N. Y.) 382; *Wilson v. Lyon*, 51 Ill. 166; *Dodge v. Evans*, 43 Miss. 570; *Fry v. Prewett*, 56 Miss. 783; *Joiner v. Perkins*, 59 Tex. 300; *Carver v. Eads*, 65 Ala. 190; *Wilkinson v. May*, 69 Ala. 33; *Dunton v. Outhouse*, 64 Mich. 419, 31 N. W. 411; *Royal Consol. Mining Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 110 Pac. 123; *Wagner v. Brinkerhoff*, 123 Ala. 516, 26 So. 117; *Davis v. Wilson*,

55 Ore. 403, 106 Pac. 795; *Noblett v. Harper*, (Tex. Civ. App.) 136 S. W. 519; *Archer v. Archer*, 147 App. Div. (N. Y.) 44, 131 N. Y. S. 661; *Selna v. Selna*, 125 Cal. 357, 58 Pac. 16, 73 Am. St. 47.

<sup>17</sup> *Wilkinson v. May*, 69 Ala. 33; *Coos Bay Wagon Co. v. Crocker*, 6 Sawyer (U. S.) 574, 4 Fed. 577; *Fenter v. McKinstry*, 91 Ill. App. 255; *Rittenhouse v. Swango*, (Ky.) 128 S. W. 299; *Wendell v. Pinneo*, 127 Ill. App. 319; *Zeigler v. Valley Coal Co.*, 150 Mich. 82, 113 N. W. 775; *Marshall v. Marshall*, (Tex.) 42 S. W. 353.

<sup>18</sup> *Carver v. Eads*, 65 Ala. 190; *Shorter v. Frazer*, 64 Ala. 74; *Sims v. Nat. Commercial Bank*, 73 Ala. 248; *Senter v. Lambeth*, 59 Tex. 259; *Shaw v. Tabor*, 146 Mich. 544, 109 N. W. 1046; *Finnell v. Finnell*, 156 Cal. 589, 105 Pac. 740.

<sup>19</sup> *Houston v. Dickson*, 66 Tex. 79, 1 S. W. 375.

"What shall be sufficient to make a case, in which the lien can be said not to exist," is always the inquiry to be made; and for this reason, so inconvenient and unsatisfactory is the doctrine that Lord Eldon said:<sup>20</sup> "It has always struck me considering this subject, that it would have been better at once to have held, that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not, exist."

This lien does not spring from any agreement of the parties, and is wholly independent of any such agreement. Moreover, the fact that there is a verbal agreement of the parties that the vendee shall reconvey the land if he does not pay the purchase-price does not prevent the enforcement of the lien; for such an agreement is void under the statute of frauds.<sup>21</sup>

Whenever the notice of the transaction is such that the existence of a lien is repelled, and consequently the lien does not arise by implication or operation of law, evidence can not be given of the declaration of the purchaser that the vendor would have a lien; for a right to charge lands, dependent upon the agreement of the parties, must be manifested by writing: it can not rest in parol.<sup>22</sup>

§ 1065. **Against whom the lien exists.**—The lien exists to the extent of the purchase-money against the purchaser and his heirs; against the dower right of the purchaser's wife;<sup>23</sup> against his privies in estate, and against subsequent pur-

<sup>20</sup> In the leading case before cited.

<sup>21</sup> *Gallagher v. Mars*, 50 Cal. 23; *Wendell v. Pinneo*, 127 Ill. App. 319; *Lewis v. Shearer*, 189 Ill. 184, 59 N. E. 580.

<sup>22</sup> *Stringfellow v. Ivie*, 73 Ala. 209.

<sup>23</sup> *Culbertson v. Stevens*, 82 Va. 406, 4 S. E. 607; *Roush v. Miller*, 39 W. Va. 638, 20 S. E. 663.

chasers who have notice of the nonpayment of the purchase-money; against those who take a conveyance of the estate without advancing any new consideration, so that they are not, within the meaning of the rule of equity, purchasers for value; and against voluntary assignees.<sup>24</sup> The lien is sustained against the vendee's heirs, because, if it was against conscience that he himself should have the land without paying for it, it is equally against conscience that his heirs should be allowed to hold it.<sup>25</sup> The lien also exists against an undisclosed principal who holds a mortgage, having loaned a part of the purchase price.<sup>25a</sup>

**§ 1066. The debt secured by the lien.**—There is no lien unless there is a debt for the purchase-money, and there is no such debt unless there is a purchase.<sup>26</sup> The lien covers interest on the purchase-money;<sup>27</sup> but it does not give the ven-

<sup>24</sup> *Acton v. Waddington*, 46 N. J. Eq. 16, 18 Atl. 356, affd. 46 N. J. Eq. 611, 22 Atl. 56; *Croft v. Perkins*, 174 Ill. 627, 51 N. E. 816; *Lucas v. Wade*, 43 Fla. 419, 31 So. 231; *Wilson v. Plutus Min. Co.*, 98 C. C. A. 189, 174 Fed. 317; *Wilson v. Shocklee*, 94 Ark. 301, 126 S. W. 832.

<sup>25</sup> *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46, 5 L. ed. 393; *Cole v. Scot*, 2 Wash. (Va.) 141; *Shirley v. Congress Steam Sugar Refinery*, 2 Edw. Ch. (N. Y.) 505; *Warner v. Van Alstyne*, 3 Paige (N. Y.) 513; *Hubbell v. Henrickson*, 175 N. Y. 175, 67 N. E. 302, revg. 73 App. Div. (N. Y.) 620, 76 N. Y. S. 1016; *Shines v. Johnson*, 18 Ky. L. 853, 38 S. W. 694. In California, by statute, the lien is valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value. Civ. Code 1906, § 3048.

<sup>25a</sup> *Harrison v. Schoff*, 101 Iowa 463, 70 N. W. 689.

<sup>26</sup> *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379. There can be no lien where the conveyance is voluntary. *Ostenson v. Severson*, 126 Iowa 197, 101 N. W. 789. See also *Eisman v. Whalen*, 39 Ind. App. 350; *Barror v. Carrier*, 34 Ind. App. 353, 73 N. E. 123; *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468; *Paris Grocer Co. v. Burks*, 101 Tex. 106, 105 S. W. 174. There can be no vendor's lien where there is no obligation to pay money. *Marchand v. Chicago, B. & Q. R. Co.*, 147 Mo. App. 619, 127 S. W. 387. The lien only extends to a definite purchase price. *Fostoria Gold Min. Co. v. Hazard*, 44 Colo. 495, 99 Pac. 758.

<sup>27</sup> *Succession of Richardson*, 10 La. Ann. 616. But not a subsequent note given for unpaid interest. *Fietsam v. Kropp*, 6 Bradw.

dor any claim to the profits of the land.<sup>28</sup> If the vendor has been in receipt of the rents under an agreement that he should collect and apply them to the debt, his right to them will cease upon the vendee's bankruptcy.<sup>29</sup>

The lien can not be extended to any other indebtedness of the vendee arising from other transactions.<sup>30</sup> When a note is given in part for purchase-money and in part for other consideration, it may be enforced as a lien for the part representing the unpaid price of the land, if it can be shown precisely what part of it was for that consideration.<sup>31</sup>

§ 1067. In whose favor the lien exists.—It arises upon the sale and conveyance by one partner to his copartner of his interest in copartnership lands, except as against the rights of copartnership creditors.<sup>32</sup> It exists for the amount of money allowed as owelty in partition. It becomes a valid charge upon the purpart, on account of which it is granted, so soon as the partition is made final by the decree.<sup>33</sup>

The lien arises upon an exchange of lands in favor of the grantor to whom a sum of money is payable for the excess in value of the lands conveyed by him;<sup>34</sup> and in favor of the

(Ill.) 144; *Triplett v. Lake*, 43 W. Va. 428, 27 S. E. 363; *Green v. Johnson*, (Tex. Civ. App.) 44 S. W. 6.

<sup>28</sup> *Little v. Brown*, 2 Leigh (Va.) 353; *Hall v. Scovel*, 10 N. Bank. R. 295.

<sup>29</sup> *Hall v. Scovel*, 10 N. Bank. R. 295.

<sup>30</sup> *Refeld v. Ferrell*, 30 Ark. 465; *Rutherford v. Gaines*, 103 Tex. 263, 126 S. W. 261.

<sup>31</sup> *Swain v. Cato*, 34 Tex. 395; *Russell v. McCormick*, 45 Ala. 587, 6 Am. Rep. 707. And see *Harris v. Hanks*, 25 Ark. 510; *Hicks v. Morris*, 57 Tex. 658.

<sup>32</sup> *Reese v. Kinkad*, 18 Nev.

126, 1 Pac. 667. Where one joint purchaser furnishes more than his share of the purchase-money and it is agreed that he is to be reimbursed out of the proceeds of the sale thereof, he is entitled to have the land charged with the debt to him. *Leiweke v. Jordan*, 59 Mo. App. 619.

<sup>33</sup> *Baltimore & Ohio R. Co. v. Trimble*, 51 Md. 99.

<sup>34</sup> *Bryant v. Stephens*, 58 Ala. 636; *Louisiana Nat. Bank v. Knapp*, 61 Miss. 485; *Drinkwater v. Moreman*, 61 Ga. 395; *Pratt v. Clark*, 57 Mo. 189; *Dawson v. Girard Life Ins. etc., Co.*, 27 Minn. 411, 8 N. W. 142; *McDole v. Purdy*,

grantor who has been deceived by false and fraudulent representations as to the value of the land he has taken in exchange, to the amount of the difference between the true and the represented value of such land.<sup>35</sup>

By some courts it is held that although the parties have fixed no price upon land taken in exchange, yet, upon a failure of the title, the value of the land may be ascertained, and a lien will be enforced for such value upon the land conveyed by the vendor who received the worthless lands.<sup>36</sup>

The lien does not arise in favor of one who advances money to the vendee at his request for the payment of part of the purchase-money due the vendor,<sup>37</sup> though he takes a note which recites a lien upon the land.<sup>38</sup>

**§ 1068. Lien in favor of tenant in common.**—It arises in favor of one tenant in common upon a sale of land, for a specified consideration payable to each;<sup>39</sup> and if all the grantors but one have been paid, and a part of the land sold by the grantee, the other grantor may enforce his lien upon the remaining land.<sup>40</sup> One tenant in common is not, however, entitled to a lien on the whole land, but only upon his interest therein.<sup>41</sup>

**§ 1069. Subject-matter of the lien.**—It has been held that this lien may arise upon the sale of a mere equitable interest.<sup>42</sup> The lien may exist in favor of an equitable owner.

23 Iowa 277; Claybrooks v. Kelly, 61 Tex. 634; Bennett v. Shipley, 82 Mo. 448.

<sup>35</sup> Williamson v. Woten, 132 Ind. 202, 31 N. E. 791; Rhodes v. Arthur, 19 Okla. 520, 92 Pac. 244; Leak v. Williams, 30 Ky. L. 782, 99 S. W. 630; Banks v. McQuatters, (Tex. Civ. App.) 57 S. W. 334.

<sup>36</sup> White v. Street, 67 Tex. 177, 2 S. W. 529.

<sup>37</sup> Chapman v. Abrahams, 61 Ala. 108.

<sup>38</sup> Gray v. Baird, 4 Lea (Tenn.) 212. Contra, Sparks v. Texas Loan Co., (Tex.) 19 S. W. 256.

<sup>39</sup> Exchange, etc., Bank of Knoxville v. Bradley, 15 Lea (Tenn.) 279.

<sup>40</sup> Hoskins v. Rowe, 61 Iowa 180, 16 N. W. 78; Norman v. Harrington, 62 Ala. 107.

<sup>41</sup> Abernathy v. Ross, 14 Ky. L. 282, 20 S. W. 222; Walker v. Sarven, 41 Fla. 210, 25 So. 885.

<sup>42</sup> Warren v. Fenn, 28 Barb. (N.

Thus a person who has purchased and paid for real estate, and has a right to a deed in his own name, upon selling and conveying it to a purchaser before obtaining the legal title, has a right in equity to a vendor's lien for the purchase-money.<sup>43</sup> If the vendor had no title at all, no lien results from the transaction; and if the vendor consents to the sale being considered as rescinded, and that the vendee may acquire the title from the real owner, he can not afterwards assert a lien upon the land by virtue of the outstanding purchase-money note, because the vendee holds no title by purchase from the vendor, but a title obtained from another source.<sup>44</sup>

The lien on an equitable title may no doubt be more uncertain, by reason of the danger that bona fide purchasers from the legal holder may intervene and destroy it. But, subject to that risk, it may be upheld.<sup>45</sup>

The vendor of a leasehold interest in real estate has an implied lien to secure the payment of the purchase-money.<sup>46</sup>

It is held to apply to sales made under process of law as well as to voluntary sales.<sup>47</sup>

Y.) 333; *Logwood v. Robertson*, 62 Ala. 523; *Ortmann v. Plummer*, 52 Mich. 76, 17 N. W. 703; *Johns v. Sewell*, 33 Ind. 1; *Fleece v. O'Rear*, 83 Ind. 200.

<sup>43</sup> *Loomis v. Davenport & St. Paul R. Co.*, 17 Fed. 301, 3 McCrary (U. S.) 489; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47, 56 Wis. 145, 14 N. W. 32, 21 Am. Law Reg. 208; *Fleece v. O'Rear*, 83 Ind. 200; *Dwenger v. Branigan*, 95 Ind. 221; *Jones v. Parker*, 51 Wis. 218, 8 N. W. 124; *Poe v. Paxton*, 26 W. Va. 607; *Board v. Wilson*, 34 W. Va. 609, 12 S. E. 778; *Walker v. Casgrain*, 101 Mich. 604, 60 N. W. 291.

<sup>44</sup> *Harper v. Wilkings*, 65 Miss. 215, 3 So. 455.

<sup>45</sup> *Ortmann v. Plummer*, 52 Mich. 76, 17 N. W. 703, per Campbell, J.

<sup>46</sup> *Richardson v. Bowman*, 40 Miss. 782; *Choate v. Tighe*, 10 Heisk. (Tenn.) 621; *Bratt v. Bratt*, 21 Md. 578; *Turkes v. Reis*, 14 Abb. N. Cas. (N. Y.) 26; *Cole v. Smith*, 24 W. Va. 287, 290. Contra, on the ground that a lease for a term of years is personal property. *Cade v. Brownlee*, 15 Ind. 369, 77 Am. Dec. 95.

<sup>47</sup> *Mims v. Macon & W. R. Co.*, 3 Ga. 333, 342; *Buford v. McCormick*, 57 Ala. 428.



The lien is necessarily confined to the particular tract of land for the purchase of which the debt arose.<sup>48</sup>

A married woman's separate real estate can be affected or charged by a vendor's lien.<sup>49</sup>

The widow's right to dower in the estate is subject to the lien for the purchase-money.<sup>50</sup>

The right of homestead is also subject to the lien.<sup>51</sup>

A vendor has no lien on crops raised by the vendee in possession until the vendor has taken possession, or has by some proceeding sequestered them; and he can not maintain replevin for them against the vendee or a third person in possession. Under the laws of North Carolina, making agricultural liens for advances superior to all others except landlords' liens, the vendor's lien is subject to such liens, even

<sup>48</sup> *Fietsam v. Kropp*, 6 Ill. App. 144. For a description of real estate held sufficient to support lien see *Halloway v. Vincent*, 143 Mo. App. 434, 128 S. W. 1009. There can be no lien for damages caused by false representations as to the value of the property taken by the vendor in payment for the land sold. *Graham v. Moffett*, 119 Mich. 303, 78 N. W. 132. See also *Rogers Development Co. v. Southern Cal. Real Estate Inv. Co.*, 159 Cal. 735, 115 Pac. 934.

<sup>49</sup> *Weinberg v. Rempe*, 15 W. Va. 829, 831; *Jackson v. Rutledge*, 3 Lea (Tenn.) 626, 31 Am. Rep. 655; *Kent v. Gerhard*, 12 R. I. 92, 34 Am. Rep. 612; *Ogle v. Ogle*, 41 Ohio St. 359. See post § 1115.

<sup>50</sup> *Fisher v. Johnson*, 5 Ind. 492; *Boyd v. Martin*, 9 Heisk (Tenn.) 382; *Martin v. Smith*, 25 W. Va. 579, 580; *Nutter v. Fouch*, 86 Ind. 451; *Noyes v. Kramer*, 54 Iowa 22,

6 N. W. 123. So by statute in Kentucky. Stats. 1909, § 2135. *Johnson v. Cantrill*, 92 Ky. 59, 13 Ky. L. 497, 17 S. W. 206; *Ratcliffe v. Mason*, 92 Ky. 190, 13 Ky. L. 551, 17 S. W. 438; *Grimes v. Grimes*, 141 Ind. 480, 40 N. E. 912; *Whetstone v. Baker*, 140 Ind. 213, 39 N. E. 868; *Bryson v. Collmer*, 33 Ind. App. 494, 71 N. E. 229.

<sup>51</sup> *McHendry v. Reilly*, 13 Cal. 75; *Bradley v. Curtis*, 79 Ky. 327, 2 Ky. L. 329; *Dudley v. Goddard*, 11 Ky. 480, 12 S. W. 302; *Claybrooks v. Kelly*, 61 Tex. 634; *Williams v. Samuels*, 90 Ky. 59, 13 S. W. 438; *Stanley v. Johnson*, 113 Ala. 344, 2 So. 823. If the lien covers homestead lands and other lands as well, the court may direct a sale of such other lands before allowing a resort to the homestead lands. *Carey v. Boyle*, 56 Wis. 145, 14 N. W. 32.

after the crops have been sequestered under proceedings to enforce the vendor's lien.<sup>52</sup>

**§ 1070. Lien under judicial sale.**—The lien arises as well under sales made by order of court,<sup>53</sup> and sales by executors, administrators, guardians, or mortgagees upon credit.<sup>54</sup> In Mississippi a lien for purchase-money is given on property sold under decree of the chancery court. It provides that the property shall be liable for the payment of the purchase-money, as if a mortgage had been executed by the purchaser, and had been duly recorded.<sup>55</sup> The lien exists from the time of the sale, and is superior to a judgment lien. In saying that there shall be a lien as if a mortgage had been given, the statute designates the manner in which the lien may be enforced.<sup>56</sup> In Texas it is provided that all notes executed for the purchase-money of real estate sold for a decedent's estate shall hold the vendor's lien against all persons having notice, express or implied.<sup>57</sup>

But if a statute provides for the sale of an infant's land upon an independent collateral security for the purchase-money, such as a bond with sureties, there is no lien upon the land in case the bond proves to be worthless. The taking of such security in ordinary private sales is a waiver by implication of the lien. It is only by analogy to cases of private contract that the vendor's lien can be invoked as applicable to judicial sales, and the same analogy governs in relation to the waiver of the lien.<sup>58</sup> When land is sold under a decree of court which could not have been rendered or confirmed

<sup>52</sup> Kellebrew v. Hines, 104 N. Car. 182, 10 S. E. 159.

<sup>53</sup> Stabler v. Spencer, 64 Ala. 496.

<sup>54</sup> Ferguson v. Shepherd, 58 Miss. 804; Tooley v. Gridley, 3 Sm. & M. (Miss.) 493, 517, 41 Am. Dec. 628; Barrett v. Lewis, 106 Ind. 120, 5 N. E. 910; Wright

v. Heffner, 57 Tex. 518; Jolly v. Stallings, 78 Tex. 605, 14 S. W. 1002.

<sup>55</sup> Code 1906, § 652.

<sup>56</sup> Walker v. Fuqua, 24 Miss. 640.

<sup>57</sup> Rev. Civ. Stats. 1911, art. 3517.

<sup>58</sup> Tate v. Bush, 62 Miss. 145.

except upon payment of the purchase-money, the lien is extinguished, and can not be revived.<sup>59</sup>

**§ 1071. For unliquidated claim.**—The lien does not exist as a security for an unliquidated and uncertain demand;<sup>60</sup> as, for instance, an obligation to support the vendor for life,<sup>61</sup> or to assume and pay the debt of another,<sup>62</sup> or to deliver a certain quantity of cotton.<sup>63</sup> It may be said, too, that when the sale is not made for a sum of money, but in consideration of a covenant or agreement to do certain things, the

<sup>59</sup> *Sims v. Sampey*, 64 Ala. 230, 68 Ala. 588.

<sup>60</sup> *Barlow v. Delany*, 36 Fed. 577; *Payne v. Avery*, 21 Mich. 524; *Hiscock v. Norton*, 42 Mich. 320, 3 N. W. 868; *Patterson v. Edwards*, 29 Miss. 67; *Sears v. Smith*, 2 Mich. 243; *Vandoren v. Todd*, 2 Green Ch. (N. J.) 397; *Harris v. Hanie*, 37 Ark. 348; *Peters v. Tunnell*, 43 Minn. 473, 45 N. W. 867; *Ross v. Clark*, 225 Ill. 326, 80 N. E. 275, 126 Ill. App. 460; *Cox v. Smith*, 93 Ark. 371, 125 S. W. 437, 137 Am. St. 89. *Contra*, *Jordan v. Wimer*, 45 Iowa 65. When proof is taken if the sum due is certain the lien may be enforced. *Jones v. Wolfe*, (Tenn.) 42 S. W. 216. In Alabama the rule is that when the consideration is the delivery of chattels, which are capable of reduction to a money value, a lien exists for the collection of such value upon a failure to deliver them in accordance with the terms of the contract. *Neel v. Clay*, 48 Ala. 252; *Smith v. Vaughan*, 78 Ala. 201; *Cordova Coal Co. v. Long*, 91 Ala. 538, 8 So. 765. The last-named case holds that when the consideration for the sale of

land to a corporation is the delivery by the vendee of its bonds, the vendor has a lien for their money value, if it can be ascertained. In an Iowa case the lien was allowed and enforced in an exchange of lands, for a deficiency in the value of the lands taken in exchange, on account of the fraudulent representations of the other party; *McDole v. Purdy*, 23 Iowa 277; and in a case before the Supreme Court of New York, land having been sold to a corporation to be paid for in its stock, upon failure to deliver the stock the lien was established. *Dubois v. Hull*, 43 Barb. (N. Y.) 26.

<sup>61</sup> *Camp v. Gifford*, 67 Barb. (N. Y.) 434; *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh. (Va.) 522; *McKillip v. McKillip*, 8 Barb. (N. Y.) 552; *Chase v. Peck*, 21 N. Y. 581; *Burroughs v. Burroughs*, 164 Ala. 329, 50 So. 1025, 28 L. R. A. (N. S.) 607n, 137 Am. St. 597; *Norris v. Archibald*, 29 Pitts. Leg. J. (N. S.) 289.

<sup>62</sup> *Chapman v. Beardsley*, 31 Conn. 115.

<sup>63</sup> *Harris v. Hanie*, 37 Ark. 348.

covenant or agreement is then itself the consideration, and in obtaining the covenant or agreement the vendor has been paid all he contracted for.<sup>64</sup> There can be no lien for damages caused by fraudulent misrepresentations as to value of chattels taken in exchange.<sup>64a</sup> And so, if other property be taken in exchange, the title of which is covenanted by the vendee, it is considered that the vendor has evinced an intention to rely upon that remedy, and has waived his lien.<sup>65</sup> A note payable in certificates of indebtedness is secured by the lien the same as if it were payable in money.<sup>66</sup>

If, however, the land be sold for a price or consideration in money, which it is agreed may be paid in the note of a third person, or in personal services, the lien exists and may be enforced, if the note is not delivered or the services rendered.<sup>67</sup>

The covenant or agreement of a purchaser of land to do specified acts, as part consideration for the conveyance, creates no lien on the land for its performance. The covenant or agreement is the consideration for which the vendor contracted, and, having received that, he has been paid. Thus, a covenant or agreement to erect buildings on the land creates no lien on it for the performance of the covenant or agreement.<sup>68</sup> If the vendor has conveyed the land, his rem-

<sup>64</sup> *Buckland v. Pocknell*, 13 Sim. 406; *Dixon v. Gayfere*, 17 Beav. 421, 21 Beav. 118; *Parrot v. Sweetland*, 3 Mylne & K. 655; *Ross v. Clark*, 126 Ill. App. 460.

<sup>64a</sup> *Graham v. Moffett*, 119 Mich. 303, 78 N. W. 132; *Womble v. Womble*, 14 Cal. App. 739, 113 Pac. 353. See, also, *Miller v. Denny*, 99 Ky. 53, 17 Ky. L. 1376, 34 S. W. 1079.

<sup>65</sup> *Hare v. Van Deusen*, 32 Barb. (N. Y.) 92; *Coit v. Fougere*, 36 Barb. (N. Y.) 195.

<sup>66</sup> *Deason v. Taylor*, 53 Miss. 697.

<sup>67</sup> *Young v. Harris*, 36 Ark. 162;

*Winters v. Fain*, 47 Ark. 493, 1 S. W. 711.

<sup>68</sup> *McDonald v. Elyton Land Co.*, 78 Ala. 382. In a recent case, however, in Missouri, where a purchaser, as a part consideration for the land, had stipulated to indemnify the vendor against all claims arising out of a contract for a lien of the land made by the vendor, and a judgment was recovered against him, it was held that he might enforce a lien for the amount. *Williams v. Crow*, 84 Mo. 298. See, also, *Elliott v. Plattor*, 43 Ohio St. 198, 1 N. E. 222.

edy is in an action for damages for breach of the covenant; but if he has not conveyed the land, he may of course refuse to execute a conveyance.

And so, if the purchase-price of one parcel of land be so blended in a mortgage with that of another that it can not be separated, no lien beyond the mortgage can be enforced.<sup>69</sup> If land upon which the parties fix no price be exchanged, through the purchaser's fraud, for worthless promissory notes of third persons, no right to a vendor's lien exists.<sup>70</sup> If the price be payable in some commodity other than money, though the price be fixed at a certain sum in money, the lien is lost.<sup>71</sup> The lien can only arise upon a sale of land. It does not exist for advances or services rendered the grantee by the grantor.<sup>72</sup> There can be no lien for the price of personal property put into improvements of real estate.<sup>72a</sup>

§ 1072. Lien where real and personal property sold together.—If land and personal property be sold together, under an entire contract for a gross price, and in the sale there is no agreement of the parties determining what part of the price is for the land and what part for the personal property, the presumption is that the vendor did not look to the land for payment, but relied exclusively on the personal responsibility of the vendee.<sup>73</sup> A vendor, by allowing the purchase-

<sup>69</sup> *Ortmann v. Plummer*, 52 Mich. 76, 17 N. W. 703.

<sup>70</sup> *Himes v. Langley*, 85 Ind. 77.

<sup>71</sup> *Hazeltine v. Moore*, 21 Hun. (N. Y.) 355; *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138, 41 N. Y. (2 Keyes) 64.

<sup>72</sup> *O'Connor v. Smith*, 40 Ohio St. 214.

<sup>72a</sup> *Slack v. Collins*, 145 Ind. 569, 42 N. E. 910.

<sup>73</sup> *Stringfellow v. Ivie*, 73 Ala. 209; *Wilkinson v. Parmer*, 82 Ala. 367, 3 So. 4; *Sykes v. Betts*, 87

Ala. 537, 6 So. 428; *McCandlish v. Keen*, 13 Grat. (Va.) 615; *Erickson v. Smith*, 79 Iowa 374, 44 N. W. 681, quoting text; *Peters v. Tunell*, 43 Minn. 473, 45 N. W. 867, 19 Am. St. 252; *Alexander v. Hooks*, 84 Ala. 605, 4 So. 417; *Griffin v. Byrd*, 74 Miss. 32, 19 So. 717; *Warner v. Bliven*, 127 Mich. 665, 87 N. W. 49. See, however, *Cole v. Smith*, 24 W. Va. 287; *Clarke v. Curtis*, 11 Leigh (Va.) 559, 37 Am. Dec. 625. In Kentucky it is held where realty and personalty are

money to be blended in a settlement with other items, is presumed to have waived his right to a lien therefor, and to rely exclusively upon the personal responsibility of the vendee.<sup>74</sup>

As to the subject-matter of the lien, it may be said in general that it attaches to the vendor's interest in the realty, whatever this interest may be; but the lien does not attach to anything that is severed from the realty, so that it becomes a chattel interest. Thus, if the owner of land sells and conveys to another all the coal, iron-ore, or other mineral in or under the land, with a license to dig and remove the same, the purchaser stipulating to pay a certain price per ton for the mineral, payable quarterly, the grantor has an implied lien on the coal and mineral not mined and removed for the purchase-money, which he may enforce by a sale of the coal and mineral not mined and removed. In such case the amount of the purchase-money, for which the lien may be enforced, is determined by the amount of the coal or other mineral mined and removed from the land, and not paid for in accordance with the contract at the time it is sought to enforce the lien.<sup>75</sup> But the lien does not attach to the coal or mineral mined and removed from the land, because such coal or mineral has by severance become personal property.<sup>76</sup> The lien attaches to the land alone, and not to the rents and profits of the land.<sup>77</sup> A sale of standing timber to be cut within a limited time is

sold together without separate valuation the vendor in the absence of intervening rights has a lien on the realty for the unpaid price of both realty and the personal property. *Doty v. Deposit Building & Loan Assn.*, 103 Ky. 710, 20 Ky. L. 625, 47 S. W. 433, 46 S. W. 219. See, also, *Honaker v. Jones*, 102 Tex. 132, 113 S. W. 748.

<sup>74</sup> *Erickson v. Smith*, 79 Iowa 374, 44 N. W. 681. Contra, *Doty v. Deposit Building & Loan Assn.*,

103 Ky. 710, 20 Ky. L. 625, 46 S. W. 219, 47 S. W. 433, holding that there is a lien on land for entire price of both. See, also, *Snyder v. Snyder*, 115 N. Y. S. 993; *Honaker v. Jones*, (Tex. Civ. App.) 115 S. W. 649.

<sup>75</sup> *Manning v. Frazier*, 96 Ill. 279.

<sup>76</sup> *Manning v. Frazier*, 96 Ill. 279.

<sup>77</sup> *Wilson v. Ewing*, 79 Ky. 549. 3 Ky. L. 362.

a sale of an interest in the land, and the vendor has a lien for the unpaid purchase-money.<sup>78</sup>

**§ 1073. Evidence to show note was accepted in payment.—**

It may be shown by parol evidence that a bond or note taken for the purchase-money was accepted in full discharge of the price of the land. "It is the vendor," says Sir John Leach,<sup>79</sup> "therefore, who in the first place attempts to raise an equity against the allegations of the deed; and if the vendor be permitted to repel the effect of the deed, by showing that the price was not paid, it must necessarily follow that the vendee must be at liberty to disclose the whole truth, and to explain the reason why that payment was not made." Parol evidence in such case does not vary or contradict any writing, as the lien does not exist by writing, and no writing is required to release it. Any act or declaration of the vendor which shows that he does not rely upon his lien now, or that he never relied upon it, or that he has abandoned the lien, will prevent its being established. Thus, where a father had conveyed land to his son, taking his notes for the price, and afterwards declared that he did not intend to collect the notes, it was held that such declaration clearly showed he did not intend to rely upon the lien or to enforce it, and consequently his representatives, after his decease, were not allowed to enforce it.<sup>80</sup>

**§ 1074. Lien generally not waived by taking note or bond.**

—But ordinarily the lien is not waived by taking a note or bond or other personal obligation of the purchaser alone, for the amount of the unpaid purchase-money.<sup>81</sup> The taking of

<sup>78</sup> *Summers v. Cook*, 28 Grant Ch. (U. C.) 179.

<sup>79</sup> In *Winter v. Anson*, 1 S. & S. 434. And see *Perry v. Grant*, 10 R. I. 334; *Doolittle v. Jenkins*, 55 Ill. 400; *Kirkham v. Boston*, 67 Ill. 599.

<sup>80</sup> *Moshier v. Meek*, 80 Ill. 79; *Peterson v. Carson*, (Tenn.) 48 S. W. 383; *Morris v. Fromlet*, 3 Ohio N. P. 287; *McKinnon v. Johnson*, 54 Fla. 538, 45 So. 451.

<sup>81</sup> *Mackreth v. Symmons*, 15 Ves. 329; *Manly v. Slason*, 21 Vt.

such written evidence of the debt does not by itself show an intention to rely exclusively upon the purchaser's credit. Nor does the fact that the time of payment is by such obligation postponed affect the lien, even if postponed during the lifetime of the vendor.<sup>82</sup> Nor is the lien waived or lost, as between the parties, by making the note for the purchase-money payable to a third person by the vendor's direction.<sup>83</sup> Nor is it lost in such case by the surrender of the original note to the vendee, and the taking of a new note in its stead.<sup>84</sup> But when it appears that the bond or note is all that the vendor intended to receive for the conveyance made by him, and that such personal security was substituted for the purchase-money, there is no lien.<sup>85</sup> The fact that the note or

271, 52 Am. Dec. 60. New York: *White v. Williams*, 1 Paige (N. Y.) 502; *Garson v. Green*, 1 Johns. Ch. (N. Y.) 308; *Warren v. Fenn*, 28 Barb. (N. Y.) 333. New Jersey: *Corlies v. Howland*, 26 N. J. Eq. 311; *Brinkerhoff v. Vansciven*, 4 N. J. Eq. 251; *Acton v. Waddington*, 46 N. J. Eq. 16, 18 Atl. 356, *affd.* 46 N. J. Eq. 611, 22 Atl. 56. Maryland: *Dance v. Dance*, 56 Md. 433; *Schwarz v. Stein*, 29 Md. 112; *Hurley v. Hollyday*, 35 Md. 469, 472; *Andrews v. Scotton*, 2 Bland (Md.) 629. Indiana: *Evans v. Goodlet*, 1 Blackf. (Ind.) 246; *Aldridge v. Dunn*, 7 Blackf. (Ind.) 249, 41 Am. Dec. 224. Tennessee: *Denny v. Steakly*, 2 Heisk. (Tenn.) 156; *Taylor v. Hunter*, 5 Humph. (Tenn.) 569. Kentucky: *Clark v. Hunt*, 3 J. J. Marsh. (Ky.) 553, 558; *Thornton v. Knox*, 6 B. Mon. (Ky.) 74; *Honore v. Bakewell*, 6 B. Mon. (Ky.) 67, 43 Am. Dec. 147. Texas: *Christian v. Austin*, 36 Tex. 540; *Pinchain v. Collard*, 13 Tex. 333. Ala-

bama: *Walker v. Struve*, 70 Ala. 167; *Bradford v. Harper*, 25 Ala. 337; *Plowman v. Riddle*, 14 Ala. 169, 48 Am. Dec. 92; *Knight v. Knight*, 113 Ala. 597, 21 So. 407. California: *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153. This rule applies equally to a check or draft. *Honore v. Bakewell*, 6 B. Mon. (Ky.) 67, 43 Am. Dec. 147; *Madden v. Barnes*, 45 Wis. 135, 7 Reporter (Ky.) 64, 30 Am. Rep. 703. Or certificate of deposit. *Mims v. Maccon & W. R. Co.*, 3 Ga. 333; *Knight v. Knight*, 113 Ala. 597, 21 So. 407; *Lyon v. Clark*, 132 Mich. 521, 94 N. W. 4; *Mansfield v. Dameron*, 42 W. Va. 794, 26 S. E. 527.

<sup>82</sup> *Winter v. Anson*, 3 Russ. 488, reversing 1 S. & S. 434; *Redford v. Gibson*, 12 Leigh (Va.) 332, 347.

<sup>83</sup> *Joiner v. Perkins*, 59 Tex. 300.

<sup>84</sup> *Joiner v. Perkins*, 59 Tex. 300; *Curtis v. Clarke*, 113 Mich. 458, 71 N. W. 845; *Eubank v. Finnell*, 118 Mo. App. 535, 94 S. W. 591.

<sup>85</sup> *Dixon v. Gayfere*, 17 Beav. 421, 21 Beav. 118; *Keith v. Wolf*, 5



bond is received expressly in consideration of the conveyance, and in full satisfaction for it, may appear by the deed of conveyance,<sup>86</sup> or by a separate writing,<sup>87</sup> or from the circumstances of the case.<sup>88</sup> Suing upon the note and recovering judgment thereon, where the lien is not declared upon, will not waive the vendor's lien.<sup>88a</sup>

The intention to waive the lien, when only the personal obligation of the vendee is taken for the purchase-money, may be shown by an express agreement of the parties, or by any expressions inconsistent with an intention to continue it;<sup>89</sup> but the fact that the note contains a waiver of exemp-

Bush (Ky.) 646; *Donovan v. Donovan*, 85 Mich. 63, 48 N. W. 163.

<sup>86</sup> *Clarke v. Royle*, 3 Sim. 499; *Buckland v. Pocknell*, 13 Sim. 406.

<sup>87</sup> *Dixon v. Gayfere*, 17 Beav. 421, 21 Beav. 118.

<sup>88</sup> *Jersey v. Briton Ferry Floating Dock Co.*, L. R. 7 Eq. 409.

<sup>88a</sup> *Marshall v. Marshall*, (Tex.) 42 S. W. 353; *Elswick v. Matney*, 132 Ky. 29, 116 S. W. 718; *Zeigler v. Valley Coal Co.*, 150 Mich. 82, 113 N. W. 775.

<sup>89</sup> *Winter v. Anson*, 1 Sim. & S. 434, 445; *Ex parte Parkes*, 1 G. & J. (Md.) 228; *McCarty v. Williams*, 69 Ala. 174; *Williams v. McCarty*, 74 Ala. 295; *Zoll v. Carnahan*, 83 Mo. 35; *Brisco v. Minah Consol. Min. Co.*, 82 Fed. 952. In Iowa it is provided by statute that no vendor's lien for unpaid purchase-money shall be enforced in any court, after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage, or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit brought by the vendor, his executors or assigns to enforce

such lien. Code 1897, § 2924; *Rotch v. Hussey*, 52 Iowa 694, 3 N. W. 727; *Dean v. Scott*, 67 Iowa 233, 25 N. W. 147. But it is held that a mortgage is not such a conveyance as will deprive a vendor of a lien for purchase-money; but the lien attaches to the vendee's equity of redemption. *Tinsley v. Tinsley*, 52 Iowa 14, 2 N. W. 528. Nor is a contract for the sale of land such a conveyance. *Noyes v. Kramer*, 54 Iowa 22, 6 N. W. 123; *Shropshire v. Lyle*, 31 Fed. 694. A quitclaim deed by the vendee is sufficient to bar a vendor's lien under this statute. *Chrisman v. Hay*, 43 Fed. 552. In Kentucky it is provided that when any real estate shall be conveyed, and the consideration, or any part thereof, remains unpaid, the grantor shall not have a lien for the same against bona fide creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid. Stat. 1909, § 2358. As to what is a sufficient reservation under this provision, see *Keith v. Wolf*, 5 Bush (Ky.) 646; *Ledford v. Smith*, 6

tions of personal property does not raise a presumption that the vendor's lien was waived.<sup>90</sup>

A lien upon land conveyed to a married woman, and partly paid for by her out of her own funds, has been regarded as waived by taking the husband's note for the balance.<sup>91</sup> But if the conveyance be to the husband in trust for the wife, the taking of the husband's note for the purchase-money is no waiver of the lien. In such case the husband is not a stranger to the purchaser.<sup>92</sup> And so if the purchase be made by the husband, but at his request the deed be made to his wife, and he pays part of the purchase-money and gives his note for the balance, the husband is regarded in equity as the real purchaser, and the acceptance of his note raises no inference of an intention to waive the lien.<sup>93</sup>

If a wife conveys land to her husband for a specified sum, taking therefor his note, payable to her at a certain time, she has a vendor's lien on the land for the price, though she did not know whether he would pay the note within the time specified, and expected him to pay it as he could. But by joining with her husband in subsequent mortgages of the land, the wife's lien is extinguished as against attaching creditors of the husband.<sup>94</sup> A contract by which the purchase-

Bush (Ky.) 129, when, by mistake, reservation was not made; *Phillips v. Skinner*, 6 Bush (Ky.) 662. Notice to the purchaser in any other way, that the purchase-money is not paid, will not affect him. *Chapman v. Stockwell*, 18 B. Mon. (Ky.) 650. The amount must be expressly stated. *Taylor v. Ford*, 1 Bush (Ky.) 44; *Maupin v. McCormick*, 2 Bush (Ky.) 206; *Gritton v. McDonald*, 3 Metc. (Ky.) 252; *Cottman v. Martin*, 1 Metc. (Ky.) 563. A covenant to pay all the vendor's debts, the amount of which is not stated, is not a

sufficient reservation. *Long v. Burke*, 2 Bush (Ky.) 90.

<sup>90</sup> *Thompson v. Sheppard*, 85 Ala. 611, 5 So. 334.

<sup>91</sup> *Cowl v. Varnum*, 37 Ill. 181; *Andrus v. Coleman*, 82 Ill. 26, 25 Am. Rep. 289.

<sup>92</sup> *Richardson v. Green*, 46 Ark. 267.

<sup>93</sup> *Hunt v. Marsh*, 80 Mo. 396; *Davenport v. Murray*, 68 Mo. 198; *Pratt v. Eaton*, 65 Mo. 157; *Williams v. Crow*, 84 Mo. 298; *Scott v. Edgar*, 159 Ind. 38, 63 N. E. 452.

<sup>94</sup> *Donovan v. Donovan*, 85 Mich. 63, 48 N. W. 163.

money is to be paid out of the gross receipts of a factory will not defeat a vendor's lien in case the factory is never erected.<sup>94a</sup>

§ 1075. **Lien not waived by giving receipt.**—The lien is not waived by any acknowledgment of the receipt of the consideration, whether that be contained in the body of the deed, or on the back of it, or in a separate instrument.<sup>95</sup> One purchasing from the vendee, finding a recital of payment of the consideration in the deed, may well infer that it has in fact been paid; but if he knows to the contrary, the acknowledgment does not protect him. Evidence that it was not paid may be given, and then notice of this fact to the purchaser may be brought home to him.<sup>96</sup> But the recital of payment is prima facie evidence of it, which the vendor must explain or disprove when he seeks to enforce his lien. So, also, the recital of a particular consideration is prima facie evidence that such was the real consideration, so that a recital of a money consideration casts upon the purchaser the burden of showing that something other than money was agreed to be taken in payment.<sup>97</sup> Parol evidence may be given on the part of the vendee as well as on the part of the vendor of the real transaction. The vendor can not complain that such evidence contradicts the written statement of the deed, in as-much as he himself first sets up an equity against such statement.<sup>98</sup>

<sup>94a</sup> *Burroughs v. Gilliland*, 90 Miss. 127.

<sup>95</sup> *Mackreth v. Symmons*, 15 Ves. 329; *Cuney v. Bell*, 34 Tex. 177; *Gilman v. Brown*, 1 Mason (U. S.) 191, 214, Fed. Cas. No. 5441, affd. 4 Wheat. (U. S.) 255, 4 L. ed. 564; *Scott v. Orbison*, 21 Ark. 202; *Holman v. Patterson*, 29 Ark. 357; *Sheratz v. Nicodemus*, 7 Yerg. (Tenn.) 9; *Tribble v. Oldham*, 5 J. J. Marsh. (Ky.) 137, 144;

*Cecil v. Henry*, (Tex.) 93 S. W. 216; *Bates v. Bigelow*, 86 Ark. 86, 96 S. W. 125; *Cook v. Atkins*, 173 Ala. 363, 56 So. 224.

<sup>96</sup> *Gordon v. Manning*, 44 Miss. 756.

<sup>97</sup> *Kelly v. Karsner*, 81 Ala. 500, 2 So. 164; *Pique v. Arendale*, 71 Ala. 91.

<sup>98</sup> *Winter v. Anson*, 1 Sim. & S. 434, 445.

§ 1076. **Lien, when defeated by vendee's conveyance.**—The lien is defeated by a conveyance by the vendee to one who purchases for value in good faith without notice of the lien.<sup>99</sup> It is a secret, invisible lien, known only to the parties, and to those to whom they may have communicated the fact of its existence. "To the world," says Chief Justice Marshall,<sup>99a</sup> "the vendee appears to hold the estate, divested of any trust whatever; and credit is given to him, in the confidence that the property is his own, in equity as well as law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in

<sup>99</sup> *Cator v. Pembroke*, 1 Bro. C. C. 301; *Thurman v. Stoddard*, 63 Ala. 336; *Bankhead v. Owen*, 60 Ala. 457; *Houston v. Stanton*, 11 Ala. 412; *Hooper v. Strahan*, 71 Ala. 75; *Barclift v. Lillie*, 82 Ala. 319, 2 So. 120; *Adams v. Buchanan*, 49 Mo. 64; *Poe v. Paxton*, 26 W. Va. 607; *Bang v. Brett*, 62 Minn. 4, 63 N. W. 1067; *Moeller v. Holt-haus*, 12 Mo. App. 526; *Dance v. Dance*, 56 Md. 433; *McGonigal v. Plummer*, 30 Md. 422, 428; *Ring-gold v. Bryan*, 3 Md. Ch. 488; *Hawes v. Chaillee*, 129 Ind. 435, 28 N. E. 848; *Lewis v. Henderson*, 22 Ore. 548, 30 Pac. 324; *Moshier v. Meek*, 80 Ill. 79; *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138, \*41 N. Y. (2 Keyes) 64, per Potter, J.; *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46, 5 L. ed. 393, in which the early cases are examined, and the dictum of Sugden, that purchasers are bound although they had no notice, is declared not to be justified or supported. Mr. Justice Potter, in the New York case cited above, says of the doctrine declared by Sugden that it had

never been held by any court of authority within the limits of his research. See, also, *Hertzfeld v. Bailey*, 103 Ala. 473, 15 So. 912; *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234; *Maryland Land, etc., Assn. v. Moore*, 80 Md. 102, 30 Atl. 605; *Malon v. Scholler*, 48 Ind. App. 691, 96 N. E. 499; *Leiberman, Loveman & O'Brien v. Bowden*, 121 Tenn. 496, 119 S. W. 64. The equity of a purchaser or mortgagee who purchases without notice and for a valuable consideration is superior to a vendor's lien. *Welch v. Farmers' Loan & Trust Co.*, 91 C. C. A. 399, 165 Fed. 561. So by statute in Iowa, unless the lien is reserved, or unless such conveyance by the vendee is made after suit brought by the vendor. Code 1897, § 2924; *Fisher v. Shropshire*, 147 U. S. 133, 37 L. ed. 109, 13 Sup. Ct. 201.

<sup>99a</sup> *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46, 5 L. ed. 393. And see *Woody v. Fislar*, 55 Ind. 592; *Moore v. Holcombe*, 3 Leigh (Va.) 597, 24 Am. Dec. 683.

some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery, to the exclusion of bona fide creditors." Moreover, to allow this latent and unwritten lien to prevail against purchasers and mortgagees who in good faith invest their money upon the faith of an unincumbered title of record, would be to discredit and subvert the system of registration, which in this country is universally adopted as the evidence and safeguard of every title. The fact that the sub-purchaser acquired title by a quitclaim deed only, is immaterial.<sup>1</sup>

But a purchaser with notice, or one who has paid nothing, is not regarded as a purchaser in law, and the lien will prevail against him.<sup>2</sup>

The vendor waives his lien by causing the land to be sold on execution to satisfy the lien debt, whether the sale produces a sum sufficient to satisfy the debt or not.<sup>3</sup> But a sale to satisfy a judgment for a part of a purchase-money debt at the suit of an assignee does not defeat the lien of a vendor who is not a party to the suit, unless the purchaser acquired the title through the sale in good faith without notice of the vendor's rights, in absence of any estoppel to defeat his lien.<sup>4</sup>

<sup>1</sup> Willingham v. Hardin, 75 Mo. 429; Moeller v. Holthaus, 12 Mo. App. 526.

<sup>2</sup> Tucker v. Hadley, 52 Miss. 414; Beal v. Harrington, 116 Ill. 113, 4 N. E. 664; Petry v. Ambrosher, 100 Ind. 510; Loomis v. Davenport & St. Paul R. Co., 17 Fed. 301, 3 McCrary (U. S.) 489; Thomas v. Bridges, 73 Mo. 530; Butterfield v. Okie, 36 N. J. Eq. 482; Christopher

v. Christopher, 64 Md. 583, 3 Atl. 296; Strohm v. Good, 113 Ind. 93, 14 N. E. 901; Eisman v. Whalen, 39 Ind. App. 350, 79 N. E. 514.

<sup>3</sup> Nutter v. Fouch, 86 Ind. 451; Dickason v. Fisher, 137 Mo. 342, 37 S. W. 1114; Mori v. Howard, 143 Ky. 480, 136 S. W. 904

<sup>4</sup> Yetter v. Fitts, 113 Ind. 34, 14 N. E. 707.

§ 1077. **Protection of innocent purchaser.**—A purchaser who has paid part of the consideration before receiving notice of the vendor's lien is a purchaser to the extent of the consideration paid, and is protected to that extent; but, as to the unpaid part of the purchase-money, the lien may be enforced, or the unpaid purchase-money must be applied towards the satisfaction of the lien.<sup>5</sup>

§ 1078. **Purchaser's equitable rights.**—Even a purchaser for value acquiring an equitable title under a deed technically insufficient to convey the legal title, because the officer taking the acknowledgment omitted to subscribe the same, has equitable rights superior in merit to the equity of the vendor's lien. The mere fact that the vendor's lien is the elder equity is not sufficient to give it preference.<sup>6</sup> It is only when the equities are in all other respects equal that priority of time gives the better equity. A purchaser's equitable title, though junior in time, is superior in merit. But a mere contract by the vendee for the sale of the land is not a conveyance that will defeat the lien of the vendor for the purchase-money.<sup>7</sup>

The lien will be enforced against a grantee who had notice before his purchase that his grantor had not paid his purchase-money.<sup>8</sup>

§ 1079. **Lien defeated by grantee's mortgage.**—The grantor's lien having no validity as against a purchaser in good faith, it has no validity against one who takes a mortgage as security for a debt contracted at the time, for he is also a purchaser to the extent of his mortgage.<sup>9</sup> Even an equitable

<sup>5</sup> Mitchell v. Dawson, 23 W. Va. 86; Craft v. Russell, 67 Ala. 9; Moore v. Holcombe, 3 Leigh (Va.) 597, 606, 24 Am. Dec. 683; Brawley v. Catron, 8 Leigh (Va.) 522, 526; Combination Land Co. v. Morgan, 95 Cal. 548, 30 Pac. 1102.

<sup>6</sup> Hume v. Dixon, 37 Ohio St. 66.

<sup>7</sup> Noyes v. Kramer, 54 Iowa 22, 6 N. W. 123.

<sup>8</sup> Hawk v. Leverett, 71 Ga. 675.

<sup>9</sup> Short v. Battle, 52 Ala. 456; Growning v. Behn, 10 B. Mon.

mortgage—one, for instance, arising by means of a mere contract for a mortgage, and nothing more, or by a deposit of title-deeds, where, as in England, such a deposit creates an equitable mortgage—may be entitled to priority over the lien, although the lien be prior in time. In contests between persons having only equitable interests, priority of time is the ground of preference last resorted to, or, in other words, only when their equities are in all other respects equal; and the circumstances that the equitable mortgagee has possession of the title-deeds has been held to give him the better equity, and to make the maxim, *Qui prior est tempore, potior est jure*, inapplicable.<sup>10</sup> An assignee of a mortgage, who took it without notice of a prior lien upon the property

(Ky.) 383; *Bryant v. Stephens*, 58 Ala. 636; *Harris v. Harlan*, 14 Ind. 439; *Richards v. McPherson*, 74 Ind. 158; *Bailey v. Tindall*, 59 Tex. 540; *Poe v. Paxton*, 26 W. Va. 607; *Lindbloom v. Kidston*, 2 Alaska 292.

<sup>10</sup> *Rice v. Rice*, 2 Drew. 73, per Vice-Chancellor Kindersley: "The vendors when they sold the estate chose to leave part of the purchase money unpaid, and yet executed and delivered to the purchaser a conveyance, by which they declared, in the most solemn and deliberate manner, both in the body and by a receipt indorsed, that the whole purchase money had been duly paid. They might still have required that the title deeds should remain in their custody, with a memorandum, by way of equitable mortgage as a security for the unpaid purchase money, and if they had done so they would have been secure against any subsequent equitable incumbrance; but that they did

not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity. In truth it can not be said that the purchaser in mortgaging the estate by the deposit of the deeds has done the vendors any wrong, for he has only done that which the vendors authorized and enabled him to do. The defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had in effect by their acts assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute indefeasible title both at law and in equity." And see *Wilson v. Keating*, 4 De G. & J. 588; *Bailey v. Tindall*, 59 Tex. 540.

for unpaid purchase-money, is entitled to priority over such lien, although the original mortgagee had notice of such lien.<sup>11</sup>

A lien which has been voluntarily abandoned can not be again revived.<sup>12</sup>

But the lien will still attach to the equity of redemption of the vendee, and upon a foreclosure of the mortgage the lien may be enforced upon the surplus.<sup>13</sup> If the mortgage be given merely to secure a pre-existing debt, it will not prevail against the lien.<sup>14</sup> The mortgagee is not then a purchaser in good faith for value.

When the consideration of a mortgage is in part a debt already due, and in part a new debt created at the date of the mortgage, the mortgage will be protected against the lien only as to the new debt.<sup>15</sup>

#### § 1080. Priority of lien by mortgage over equitable lien.—

As between this latent lien in equity, and a legal lien by mortgage arising at the same time, the latter will prevail.<sup>16</sup> Such a mortgage may attach to the property the moment the land is conveyed to the mortgagee; as, for instance, when a railroad company has executed and recorded a mortgage of

<sup>11</sup> *Sprague v. Drew*, 3 Stew. N. J. Dig. 434, 6 Atl. 307; *Traphagen v. Hand*, 36 N. J. Eq. 384, affd. 38 N. J. Eq. 613.

<sup>12</sup> *Richards v. McPherson*, 74 Ind. 158; *Mattix v. Weand*, 19 Ind. 151.

<sup>13</sup> *Brown v. Porter*, 2 Mich. N. P. 12. See *Arnold v. Patrick*, 6 Paige (N. Y.) 310; *Tinsley v. Tinsley*, 52 Iowa 14, 2 N. W. 528.

<sup>14</sup> *Bailey v. Tindall*, 59 Tex. 540; *Chance v. McWhorter*, 26 Ga. 315. Otherwise in Tennessee: *Sharp v. Fly*, 9 Bax. (Tenn.) 4.

<sup>15</sup> *Pepper v. George*, 51 Ala. 190.

In this case the court held, partly with reference to the terms of a statute, that a mortgage given in security of a pre-existing debt, although the time of payment is extended and a pending suit is discontinued, does not constitute the mortgagee a purchaser for value, so as to entitle him to protection against an outstanding lien.

<sup>16</sup> *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138, \*41 N. Y. (2 Keyes) 64; *Campbell v. Sidwell*, 61 Ohio St. 179, 55 N. E. 609.



all its real estate, both that which it holds at the time and that which it may acquire thereafter; it is well settled that the mortgage attaches to the after-acquired lands as soon as the conveyance is made to the company. The mortgage lien is preferred to the vendor's lien for the purchase-money in such case. Where the conveyance in such case was made by an agent of the company, who knew of the existence of the mortgage, there was a further reason for rejecting his claim of a lien as against the mortgage.<sup>17</sup>

It is admissible to show by parol evidence an agreement between the contracting parties that, as between a mortgage and a vendor's lien created at the same time upon the same land, the vendor's lien shall have precedence, and shall be first paid out of the land.<sup>18</sup>

The grantor's taking a mortgage upon the same property obviously excludes his holding a lien upon it at the same time,<sup>19</sup> unless the circumstances make the case exceptional, as where the mortgage was taken as the result of proceedings to enforce a vendor's lien after the giving of a subsequent mortgage of which the mortgagee was not aware;<sup>20</sup>

<sup>17</sup> *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138, \*41 N. Y. (2 Keyes) 64.

<sup>18</sup> *Hill v. McLean*, 10 Lea (Tenn.) 107.

<sup>19</sup> *Gaylord v. Knapp*, 15 Hun (N. Y.) 87; *Mattix v. Weand*, 19 Ind. 151; *Camden v. Vail*, 23 Cal. 633; *Little v. Brown*, 2 Leigh (Va.) 353; *Young v. Wood*, 11 B. Mon. (Ky.) 123; *Shelby v. Perrin*, 18 Tex. 515; *Escher v. Simmons*, 54 Iowa 269, 6 N. W. 274; *Stuart v. Harrison*, 52 Iowa 511, 3 N. W. 546; *Sharp v. Collins*, 74 Mo. 266. In *Pease v. Kelly*, 3 Ore. 417, the court said that both liens could not exist at the same time, and that the mortgage lien, being the more definite and the higher se-

curity, repelled the equitable lien. But contra, *Boos v. Ewing*, 17 Ohio 500, 49 Am. Dec. 478; *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115; *Stafford v. Van Rensselaer*, 9 Cow. (N. Y.) 316; *Wasson v. Davis*, 34 Tex. 159; *Irvin v. Garner*, 50 Tex. 48, 7 Reporter 479; *Linville v. Savage*, 58 Mo. 248; *Morris v. Pate*, 31 Mo. 315. But still it is a matter of intention. *Partridge v. Logan*, 3 Mo. App. 509; *Rogers v. Tucker*, 94 Mo. 346, 7 S. W. 414; *Hanna v. Davis*, 112 Mo. 599, 20 S. W. 686; *Robbins v. Masteller*, 147 Ind. 122, 46 N. E. 330; *Fields v. Drennen*, 115 Ala. 558, 22 So. 114.

<sup>20</sup> *Ledos v. Kupfrian*, 28 N. J. Eq. 161.

and if a mortgage be taken upon a part of the estate purchased, the inference is that it was not intended that the rest of it should be affected by the lien.<sup>21</sup> If the vendor takes the purchaser's mortgage for the unpaid purchase-money, and afterwards returns such mortgage in exchange for a mortgage made to such purchaser by a purchaser from him, the vendor's lien does not attach when it appears that the last purchaser had already given a mortgage upon the property when the mortgage to the vendor was executed.<sup>22</sup> But a vendor who has been induced by fraud and deceit to accept a forged mortgage upon the realty to secure his unpaid purchase-money is not regarded as having abandoned his equitable lien.<sup>23</sup>

**§ 1081. Judgment creditor as quasi purchaser for value.**—A judgment creditor is regarded as a quasi purchaser for a valuable consideration, and, having no notice of the lien, his judgment lien is sustained against the lien of the vendor.<sup>24</sup>

<sup>21</sup> *Capper v. Spottiswoode*, Tاملن 21; *Bond v. Kent*, 2 Vern. 281; *Brown v. Gilman*, 4 Wheat. (U. S.) 255, 4 L. ed. 564; *Phillips v. Saunderson*, 1 Sm. & M. Ch. (Miss.) 462; *Fish v. Howland*, 1 Paige (N. Y.) 20, 30; *Hadley v. Pickett*, 25 Ind. 450; *Haskell v. Scott*, 56 Ind. 564; *Dudley v. Dickson*, 14 N. J. Eq. 252. But when the purchase-money does not consist of one entire liability, but of several distinct liabilities, accruing severally, and the corresponding liens are not divisible merely, but are essentially divided and distinct, it has been held that the taking of security for one lien does not waive another lien. *De Forest v. Holum*, 38 Wis. 516.

<sup>22</sup> *Sharp v. Collins*, 74 Mo. 266.

<sup>23</sup> *Fouch v. Wilson*, 60 Ind. 64, 28 Am. Rep. 651.

<sup>24</sup> *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46, 5 L. ed. 393; *Hulett v. Whipple*, 58 Barb. (N. Y.) 224; *Taylor v. Baldwin*, 10 Barb. (N. Y.) 626; *Cook v. Banker*, 50 N. Y. 655; *Robinson v. Williams*, 22 N. Y. 380; *Cook v. Kraft*, 60 Barb. (N. Y.) 409, 41 How. Prac. (N. Y.) 279, 3 Lans. (N. Y.) 512; *Johnson v. Cawthorn*, 1 Dev. & B. Eq. (N. Car.) 32, 27 Am. Dec. 250; *Aldridge v. Dunn*, 7 Blackf. (Ind.) 249, 41 Am. Dec. 224; *Messmore v. Stephens*, 83 Ind. 524. And see *Poe v. Paxton*, 26 W. Va. 607; *Webb v. Robinson*, 14 Ga. 216; *Gann v. Chester*, 5 Yerg. (Tenn.) 205.

It has even been held that the lien does not affect the rights of the vendee's creditors who have attached the land without notice of it.<sup>25</sup>

A judgment creditor who purchases at execution sale, and has the amount of his bid credited on the execution, may be considered a bona fide purchaser.<sup>26</sup> This is an exception to the general rule made on grounds of policy and expediency; for a mortgagee purchasing at a foreclosure sale and crediting the pre-existing debt, for which the mortgage was given, for the amount of his bid, paying no new consideration, takes the title subject to the vendor's lien.<sup>27</sup>

Where the lien is regarded as a parol trust arising by implication of law, although it is within the meaning of a statute declaring a parol trust in land void as against purchasers and creditors without notice, yet, if the creditor receives notice of such lien before he obtains an order for the sale of the land, and afterwards purchases at his own sale, he is not entitled to the protection of the statute, but the vendor's lien prevails against his claim.<sup>28</sup> And so a purchaser having notice of the lien at the time of the sale is not a purchaser without notice, although he in fact had no actual notice when the lien first attached.<sup>29</sup>

But on the other hand, in some states, in accordance with the common-law rule, it is held that a judgment creditor takes only what belonged to his debtor, and takes subject to all the equities which exist in favor of the vendor.<sup>30</sup> The judgment creditor is said to have only an equity, and the

<sup>25</sup> *Allen v. Loring*, 34 Iowa 499;

*Porter v. Dubuque*, 20 Iowa 440;

*Adams v. Buchanan*, 49 Mo. 64.

<sup>26</sup> *Wallace v. Campbell*, 54 Tex.

87, 91; *Ellis v. Singletary*, 45 Tex.

27, 40, per *Roberts*, C. J. See,

however, *Ayers v. Duprey*, 27 Tex.

593, 86 Am. Dec. 657.

<sup>27</sup> *Bailey v. Tindall*, 59 Tex. 540.

<sup>28</sup> *Dickerson v. Carroll*, 76 Ala. 377.

<sup>29</sup> *Orme v. Roberts*, 33 Tex. 768;

*Senter v. Lambeth*, 59 Tex. 259.

<sup>30</sup> *Lissa v. Posey*, 64 Miss. 352,

1 So. 500; *Nugent v. Priebatsch*,

61 Miss. 402; *Walton v. Hargroves*,

42 Miss. 18, 97 Am. Dec. 429; *Tuck-*

*er v. Hadley*, 52 Miss. 414; *Thomp-*

vendor's equity, being the prior and better equity, must prevail.

**§ 1082. Rights of assignee in bankruptcy in property subject to lien.**—The vendee's assignee in bankruptcy takes the property subject to the lien, for it is a settled principle that he takes only the rights and estate of the bankrupt, and subject to all the equities which affected him.<sup>31</sup> An assignee of the vendee, under a general assignment for the benefit of creditors, will also take subject to the vendor's lien.<sup>32</sup> After such assignment in bankruptcy, or for the benefit of creditors, a bill to enforce the lien should be brought against the assignee and not against the bankrupt.

A discharge in bankruptcy of the vendee does not discharge the land.<sup>33</sup>

**§ 1083. Purchaser with notice.**—Any one acquiring an interest in land affected by a vendor's lien, with notice of its existence, takes it subject to the lien.<sup>34</sup> Upon this point Lord

son v. McGill, 1 Freem. Ch. (Miss.) 401; Lewis v. Caperton, 8 Grat. (Va.) 148; Bowman v. Faw, 5 Lea (Tenn.) 472; Messmore v. Stephens, 83 Ind. 524.

<sup>31</sup> Bowles v. Rogers, 6 Ves. 95; Ex parte Peake, 1 Madd. Ch. 191; In re Perdue, 2 N. Bank. R. 183; Corlies v. Howland, 26 N. J. Eq. 311; Hubbard v. Clark, 3 Stew. N. J. Dig. 540, 7 Atl. 26; Phelps v. Curts, 80 Ill. 109; Tichenor v. Allen, 13 Grat. (Va.) 15; Exchange & Deposit Bank v. Stone, 80 Ky. 109, 3 Ky. L. 594.

<sup>32</sup> Fawell v. Heelis, Amb. 724; Shirley v. The Congress Steam Sugar Refinery, 2 Edw. Ch. (N. Y.) 505; Walton v. Hargroves, 42 Miss. 18, 97 Am. Dec. 429; Pearce v. Foreman, 29 Ark. 563; Warren

v. Fenn, 28 Barb. (N. Y.) 333; Green v. Demoss, 10 Humph. (Tenn.) 371; Brown v. Vanlier, 7 Humph. (Tenn.) 239. But in Jones v. Ragland, 4 Lea (Tenn.) 539, it was held that a trust assignment of land for the benefit of a creditor having no notice of a vendor's lien upon the land, duly registered, had priority of the lien. And see Fain v. Inman, 6 Heisk. (Tenn.) 5, 19 Am. Rep. 577.

<sup>33</sup> Graves v. Coutant, 31 N. J. Eq. 763.

<sup>34</sup> Ledos v. Kupfrian, 28 N. J. Eq. 161; Corlies v. Howland, 26 N. J. Eq. 311; Graves v. Coutant, 31 N. J. Eq. 763; Acton v. Waddington, 46 N. J. Eq. 16, 18 Atl. 356, affd. 46 N. J. Eq. 611, 22 Atl. 56; Stephens v. Shannon, 43 Ark.

Eldon said:<sup>35</sup> "There is no doubt that a third person, having full knowledge, that the other got the estate without payment, can not maintain that though a court of equity will not permit him to keep it, he may give it to another person, without payment."

The notice may be actual, as where the purchaser is informed of the fact of the purchase by the parties;<sup>36</sup> or constructive, through the pendency of a suit to enforce the lien;<sup>37</sup> or through recitals in a deed under which the purchaser claims; or through recitals in an order of court authorizing the sale, and directing that a mortgage be taken for the purchase-money,<sup>38</sup> or by reason of the fact that the deed does not contain covenants of warranty.<sup>38a</sup> He is bound by

464; *Boyd v. Jackson*, 82 Ind. 525; *Dodge v. Evans*, 43 Miss. 570; *Merritt v. Wells*, 18 Ind. 171; *Webb v. Robinson*, 14 Ga. 216; *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142; *Shall v. Biscoe*, 18 Ark. 142; *Swan v. Benson*, 31 Ark. 728; *Chapman v. Liggett*, 41 Ark. 292; *Bulger v. Holly*, 47 Ala. 453; *Sampley v. Watson*, 43 Ala. 377; *Gordon v. Bell*, 50 Ala. 213; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343; *Stroud v. Pace*, 35 Ark. 100; *Craft v. Russell*, 67 Ala. 9; *Buford v. McCormick*, 57 Ala. 428; *Gaar v. Millikan*, 68 Ind. 208; *Webster v. McCollough*, 61 Iowa 496, 16 N. W. 578; *Johnson v. McGrew*, 42 Iowa 555; *Jordan v. Wimer*, 45 Iowa 65; *Mitchell v. Dawson*, 23 W. Va. 86; *Croft v. Perkins*, 174 Ill. 627, 51 N. E. 816; *Brisco v. Minah Consol. Min. Co.*, 82 Fed. 952. In California, South Dakota and Idaho the codes declare that the vendor's lien is valid against every

one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value. California: Civ. Code 1906, § 3048; South Dakota: Rev. Code (Civ.) 1903, § 2150; Idaho: Rev. Code 1908, § 3443. In North Dakota, vendors' and purchasers' liens shall be subject to the rights of subsequent creditors without notice, or purchasers or incumbrancers in good faith and for value. Rev. Code 1905, § 6283.

<sup>35</sup> *Mackreth v. Symmons*, 15 Ves. 329; *Carr v. Hobbs*, 11 Md. 285.

<sup>36</sup> *Wilson v. Lyon*, 51 Ill. 166; *Harshbarger v. Foreman*, 81 Ill. 364; *Scott v. Edgar*, 159 Ind. 38, 63 N. E. 452.

<sup>37</sup> *Tharpe v. Dunlap*, 4 Heisk. (Tenn.) 674; *Tiernan v. Thurman*, 14 B. Mon. (Ky.) 277.

<sup>38</sup> *Dickinson v. Worthington*, 10 Fed. 860, 4 Hughes (U. S.) 430.

<sup>38a</sup> *Zeigler v. Valley Coal Co.*, 150 Mich. 82.

any notice which would put a reasonable man upon inquiry.<sup>39</sup> If he has notice that some part of the purchase-money is unpaid, it is incumbent upon him to ascertain how much remains unpaid, and he is chargeable with notice of the lien whatever its extent may be.<sup>40</sup> It is not necessary that he should have notice that the indebtedness for the purchase-money constitutes a lien.<sup>41</sup> Where one of a firm to whom a mortgage is executed has knowledge that the mortgagor has failed to pay at least part of the purchase-money, this is sufficient to put the mortgagees upon inquiry; and where such inquiry, prosecuted with diligence, would have led to the discovery that no part of the purchase-money had been paid, and that the mortgagor's vendor had retained a lien on the land for the full amount of the agreed price, the vendor's lien is superior to the mortgage.<sup>42</sup>

The purchaser must pay a new consideration to entitle him to the position of an innocent purchaser for value, and to defend against the equitable lien of the vendor.<sup>43</sup>

Whether a pre-existing debt is a valuable consideration is a question upon which the authorities are divided; but the same rule applies in this case that applies in case of a mortgage or pledge.<sup>44</sup>

<sup>39</sup> *Briscoe v. Bronaugh*, 1 Tex. 326, 46 Am. Dec. 108; *Parker v. Foy*, 43 Miss. 260, 5 Am. Rep. 484; *Autrey v. Whitmore*, 31 Tex. 623; *Rosette v. Wynn*, 73 Ala. 146.

<sup>40</sup> *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *Manly v. Slason*, 21 Vt. 271, 52 Am. Dec. 60; *Harshbarger v. Foreman*, 81 Ill. 364; *Ledos v. Kupfrian*, 28 N. J. Eq. 161; *Overall v. Taylor*, 99 Ala. 12, 11 So. 738.

<sup>41</sup> *Brinkerhoff v. Vansciven*, 4 N. J. Eq. 251; *Ledos v. Kupfrian*, 28 N. J. Eq. 161.

<sup>42</sup> *Overall v. Taylor*, 99 Ala. 12, 11 So. 738.

<sup>43</sup> *Perkins v. Swank*, 43 Miss. 349; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Chance v. McWhorter*, 26 Ga. 315; *Craft v. Russell*, 67 Ala. 9; *Jarman v. Farley*, 7 Lea (Tenn.) 141. As to what facts are sufficient to charge a purchaser with notice, see *White v. Fisher*, 77 Ind. 65, 40 Am. Rep. 287; *Foulks v. Reed*, 89 Ind. 370.

<sup>44</sup> See *Jones on Collateral Securities*, §§ 107-133; *Butterfield v. Okie*, 36 N. J. Eq. 482. In Indiana a pre-existing debt is a sufficient consideration to support an absolute conveyance to one who purchases in good faith, and enables

If the purchaser has notice of the vendor's lien before he has paid the whole purchase-money, he is protected to the extent of the payment made by him before he had notice of the vendor's lien.<sup>45</sup> If he has made valuable improvements, he is allowed compensation for them; and the land will be charged with the lien for the balance of the purchase-money after deducting the payments made and the value of such improvements.<sup>46</sup>

One who defends upon the ground that he is a bona fide purchaser for value should distinctly aver that he is a purchaser from one in actual or constructive possession who was seized, or claimed to be seized, of the legal title; that he purchased in good faith; that he parted with value, assumed a liability, or incurred an injury for or on account of the conveyance; and that he had no notice of the plaintiff's equity at the time, or before he parted with the consideration. The contents of the deed should be substantially set out, and the actual consideration should be fully stated.<sup>47</sup>

**§ 1084. Rule where deed shows purchase-money not paid.**—When the deed, under which the vendee holds, shows by its recitals that the purchase-money has not been paid, although the deed be not recorded, a purchaser from him is affected with notice of the outstanding vendor's lien; for he can only make title by a deed which leads him to this fact, and he must therefore be presumed to be cognizant of it.<sup>48</sup>

him to hold the property as against the lien of a vendor. *Wert v. Naylor*, 93 Ind. 431. However, such a consideration does not make a mortgagee a bona fide purchaser, so as to cut off a prior vendor's lien. *Boling v. Howell*, 93 Ind. 329.

<sup>45</sup> *Craft v. Russell*, 67 Ala. 9; *Mitchell v. Dawson*, 23 W. Va. 86.

<sup>46</sup> *Ware v. Curry*, 67 Ala. 274. A vendee in possession who knows

of the vendor's lien can not recover for improvements placed on the land. *Banks v. McQuatters*, (Tex. Civ. App.) 57 S. W. 334.

<sup>47</sup> *Hooper v. Strahan*, 71 Ala. 75; *May v. Wilkinson*, 76 Ala. 543; *Fossett v. Turk*, 171 Ala. 565, 54 So. 695; *Ramirez v. Smith*, (Tex. Civ. App.) 56 S. W. 254, *revd.* 94 Tex. 184, 59 S. W. 258; *Buckley v. Runge*, (Tex.) 136 S. W. 533.

<sup>48</sup> *Cordova v. Hood*, 17 Wall.

The fact that the vendee, in his deed conveying his land to another, recites his purchase of the estate from the first vendor, does not affect the purchaser with notice, if the recital does not show that the estate was not paid for.<sup>49</sup> Nor does the fact that the vendor remains in possession of the land as lessee affect the purchaser with notice that the purchase-money remains unpaid.<sup>50</sup>

The fact that a purchaser has the conveyance made to another person, as, for instance, his wife or daughter, but gives his own notes for the purchase-money, does not make any difference with enforcement of the lien.<sup>51</sup> Such third person is a mere volunteer, not a purchaser without notice and for value. He is but a recipient of the title, and there is no reason why the lien should not exist against him.

But a recital not in a deed under which a subsequent purchaser claims title will not ordinarily bind him. Thus, where a purchaser gave five notes for the unpaid purchase-money, and secured three of these by a deed of trust which recited that the vendor's lien for the other two notes should be unimpaired, and the notes secured by the deed of trust were afterwards paid, and the deed of trust entered satisfied of record, it was held that this recital was not notice of the lien to a subsequent mortgagee, who was only bound to look to the vendor's deed of conveyance, and to the lien of the deed

(U. S.) 1, 21 L. ed. 587; *Masich v. Shearer*, 49 Ala. 226; *Shorter v. Frazer*, 64 Ala. 74; *Orriek v. Durham*, 79 Mo. 174; *Tydings v. Pitcher*, 82 Mo. 379; *Major v. Bukley*, 51 Mo. 227; *Stephens v. Shannon*, 43 Ark. 464; *Tiernan v. Thurman*, 14 B. Mon. (Ky.) 277; *Thornton v. Knox*, 6 B. Mon. (Ky.) 74; *Daughaday v. Paine*, 6 Minn. 443 (Gil. 304); *McRimmon v. Martin*, 14 Tex. 318; *McAlpine v. Burnett*, 23 Tex. 649; *Willis v. Gay*, 48 Tex. 463, 26 Am. Rep. 328.

<sup>49</sup> *Cator v. Pembroke*, 1 Bro. C. C. 301; *Eyre v. Sadleir*, 14 Ir. Ch. 119, 15 Ir. Ch. 1.

<sup>50</sup> *White v. Wakefield*, 7 Sim. 401.

<sup>51</sup> *Doyle v. Orr*, 51 Miss. 229; *Davis v. Pearson*, 44 Miss. 508; *Russell v. Watt*, 41 Miss. 602, 609, 93 Am. Dec. 270; *Upshaw v. Hargrove*, 6 Sm. & M. (Miss.) 286; *Marsh v. Turner*, 4 Mo. 253; *Taylor v. Alloway*, 3 Litt. (Ky.) 216.



of trust, for notice of the vendor's rights. The recital in the deed of trust was merely that the instrument should not have a certain effect. It was of effect only as against the deed of trust, and a subsequent purchaser or mortgagee, finding the deed of trust satisfied of record, was not bound to notice it further.<sup>52</sup>

**§ 1085. Necessary allegations in answer as defense against lien.**—A purchaser who defends against the lien, on the ground that he purchased for value without notice, should in his answer briefly state the deed of purchase, the date, the parties, contents, and consideration paid, and that he is seized in fee and possession, with a distinct averment that the consideration was paid in good faith, and was actual, independent of the recital of the deed.<sup>53</sup> He should deny notice previous to and down to the time of paying the money and the delivery of the deed; and if notice be specially charged, he should deny all the circumstances referred to from which notice can be inferred. Whether notice be charged in the bill or not, it should be positively denied in the answer. A purchaser has the burden of proof that his purchase was made in good faith without notice.<sup>53a</sup>

This defense is not available to the purchaser if the purchase-money has not been actually paid before notice was received.<sup>54</sup>

**§ 1086. Lien lost by taking mortgage.**—A vendor's lien is presumptively lost by taking a mortgage upon other property, or by taking other independent security for the purchase-money,<sup>55</sup> such as a bond or note with a surety or in-

<sup>52</sup>Mairs v. Bank of Oxford, 58 Miss. 919.

<sup>53</sup>Pearce v. Foreman, 29 Ark. 563, and cases cited; Wells v. Morrow, 38 Ala. 125, 128, and cases cited; Buford v. McCormick, 57 Ala. 428.

<sup>53a</sup>Bates v. Bigelow, 80 Ark. 86, 96 S. W. 125.

<sup>54</sup>Campbell v. Roach, 45 Ala. 667. And see Weaver v. Barden, 49 N. Y. 286; Dresser v. Mo. & Iowa R. Construction Co., 93 U. S. 92, 23 L. ed. 815.

<sup>55</sup>Nairn v. Prowse, 6 Ves. 752; Rice v. Rice, 36 Fed. 858. Alabama: Walker v. Struve, 70 Ala. 167; Fields v. Drennen, 115

dorser, or the note of a third person, or a collateral deposit

Ala. 558, 22 So. 114. Arkansas: Neal v. Speigle, 33 Ark. 63; Johnson v. Godden, 33 Ark. 600. California: Lewis v. Covillaud, 21 Cal. 178; Wells v. Harter, 56 Cal. 342; Baum v. Grigsby, 21 Cal. 172, 175, 81 Am. Dec. 153; Camden v. Vail, 23 Cal. 633; Kent v. San Francisco Sav. Union, 130 Cal. 401, 62 Pac. 620. But see Kent v. Williams, 114 Cal. 537, 46 Pac. 462. Illinois: Wilson v. Sawyer, 74 Ill. 473; Kirkham v. Boston, 67 Ill. 599; McLaurie v. Thomas, 39 Ill. 291; Richards v. Leaming, 27 Ill. 431, 81 Am. Dec. 239; Warner v. Scott, 63 Ill. 368; Kimble v. Esworthy, 6 Bradw. (Ill.) 517; Ilett v. Collins, 103 Ill. 74; Beal v. Harrington, 116 Ill. 113, 4 N. E. 664; Ryhiner v. Frank, 105 Ill. 326; Chicago and Great Western R. Land Co. v. Peck, 112 Ill. 408; Ross v. Clark, 225 Ill. 326; Blomstrom v. Dux, 175 Ill. 435, 51 N. E. 755; Baker v. Updike, 155 Ill. 54, 39 N. E. 587. Indiana: Crans v. Hamilton County, 87 Ind. 162; Richards v. McPherson, 74 Ind. 158; Martin v. Cauble, 72 Ind. 67; Hawes v. Chaillee, 129 Ind. 435, 28 N. E. 848; Fox v. Frazer, 92 Ind. 265; Masters v. Templeton, 92 Ind. 447; Fouch v. Wilson, 60 Ind. 64, 28 Am. Rep. 651; Dibblee v. Mitchell, 15 Ind. 435, 77 Am. Dec. 99. Iowa: Stuart v. Harrison, 52 Iowa 511, 3 N. W. 546. Kentucky: Duckert v. Gray, 3 J. J. Marsh. (Ky.) 163. Maryland: McGonigal v. Plummer, 30 Md. 422; Carrico v. Farmers' & Merchants' Nat. Bank, 33 Md. 235; Richardson v. Ridgely, 8 Gill & J. (Md.) 87. Michigan: Dummer v. Smedley, 110 Mich. 466, 68 N. W. 260, 38 L. R. A. 490. Mississippi: Fonda v. Jones, 42 Miss. 792, 2 Am. Rep. 669. Missouri: Adams v. Buchanan, 49 Mo. 64; Durette v. Briggs, 47 Mo. 356; Anderson v. Griffith, 66 Mo. 44; Brown v. Barrett, 75 Mo. 275; Boyer v. Austin, 75 Mo. 81; Carr v. Thompson, 67 Mo. 472; Hunt v. Marsh, 80 Mo. 396; Winner v. Lipincott Inv. Co., 125 Mo. 528, 28 S. W. 998; Shelley v. Estes, 83 Mo. App. 310. See also, Shelton v. Cooksey, 138 Mo. App. 389, 122 S. W. 331. New Jersey: Dudley v. Dickson, 14 N. J. Eq. 252; Vandoren v. Todd, 3 N. J. Eq. 397; Brinkerhoff v. Vanscriven, 3 Green's Ch. (N. J.) 251; Mason v. Daily, (N. J. Eq.) 44 Atl. 839. New York: Fish v. Howland, 1 Paige (N. Y.) 20; Vail v. Foster, 4 N. Y. 312; Bennett v. Murphy, 123 App. Div. (N. Y.) 102, 108 N. Y. S. 231. Ohio: Follett v. Reese, 20 Ohio 546, 55 Am. Dec. 472; Mayham v. Coombs, 14 Ohio 428; Shurtz v. Colvin, 55 Ohio St. 274, 45 N. E. 527. Tennessee: Denny v. Steakly, 2 Heisk. (Tenn.) 156; Zwingie v. Wilkinson, 94 Tenn. 246, 28 S. W. 1096. Texas: Parker v. Sewell, 24 Tex. 238; Brown v. Christie, 35 Tex. 689; McDonough v. Cross, 40 Tex. 251. The lien is not waived by taking a personal judgment on the debt. Howard v. Herman, 9 Tex. Civ. App. 79, 29 S. W. 542; Noblett v. Harper, (Tex.) 136 S. W. 519.

of stock or other personal property,<sup>56</sup> unless there be an express agreement that it shall not have this effect.<sup>57</sup> If a mortgage be taken upon another estate of the vendee, the obvious intention of burdening one estate is that the other shall remain free and unincumbered.<sup>58</sup> The same inference would be drawn from the taking of any pledge for the purchase-money, or the note of a third person secured by a vendor's lien on other land;<sup>59</sup> or from taking the personal obligation of some other person alone, or in addition to that of the vendee,<sup>60</sup> even of the husband or wife of the vendor.<sup>61</sup>

<sup>56</sup> *Loomis v. Davenport & St. Paul R. Co.*, 17 Fed. 301, 3 McCrary (U. S.) 489; *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955. Alabama: *Donegan v. Hentz*, 70 Ala. 437; *Kyle v. Bellenger*, 79 Ala. 516; *Carroll v. Shapard*, 78 Ala. 358; *Woodall v. Kelly*, 85 Ala. 368, 5 So. 164, 7 Am. St. 57; *Jackson v. Stanley*, 87 Ala. 270, 6 So. 193; *Kinney v. Ensminger*, 94 Ala. 536, 10 So. 143; *Ramage v. Towles*, 85 Ala. 588, 5 So. 342. Arkansas: *Springfield & M. R. Co. v. Stewart*, 51 Ark. 285, 10 S. W. 767; *Dutton v. Bratt*, (Ark.) 11 S. W. 821. New York: *Hazeltine v. Moore*, 21 Hun (N. Y.) 355. Ohio: *Dietrich v. Folk*, 40 Ohio St. 635.

<sup>57</sup> *Daughaday v. Paine*, 6 Minn. 443 (Gil. 304); *Cresap v. Manor*, 63 Tex. 485; *Boyer v. Austin*, 75 Mo. 81; *Emission v. Whittlesey*, 55 Mo. 254, 258. The presumption of waiver may be rebutted by proof of an old agreement made at the time of the sale that it should not so operate. *Ramage v. Towles*, 85 Ala. 588, 5 So. 342.

<sup>58</sup> Sir William Grant in *Nairn v. Prowse*, 6 Ves. 752; *Walker v. Struve*, 70 Ala. 167; *Masters v. Templeton*, 92 Ind. 447.

<sup>59</sup> *Cresap v. Manor*, 63 Tex. 485.

<sup>60</sup> *Wilson v. Graham*, 5 Munf. (Va.) 297; *Williams v. Roberts*, 5 Ohio 35; *Campbell v. Henry*, 45 Miss. 326; *Boon v. Murphy*, 6 Blackf. (Ind.) 272; *Carrico v. Farmers' & Merchants' Nat. Bank*, 33 Md. 235; *McGonigal v. Plummer*, 30 Md. 422; *Boynton v. Champlin*, 42 Ill. 57; *Vail v. Foster*, 4 N. Y. 312; *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *Schwarz v. Stein*, 29 Md. 112; *Walsh v. McBride*, 72 Md. 45, 19 Atl. 4; *Hummer v. Schott*, 21 Md. 307; *Sanders v. McAfee*, 41 Ga. 684; *Fonda v. Jones*, 42 Miss. 792, 2 Am. Rep. 669; *Durette v. Briggs*, 47 Mo. 356; *Stevens v. Rainwater*, 4 Mo. App. 292; *Sears v. Smith*, 2 Mich. 243; *Yaryan v. Shriner*, 26 Ind. 364; *Johnson v. Sugg*, 21 Miss. 346; *Manly v. Slason*, 21 Vt. 271, 52 Am. Dec. 60; *Cannon v. Bonner*, 38 Tex. 487; *Carnes v. Hubbard*, 10 Miss. 108; *Walker v. Struve*, 70 Ala. 167. Contra, *McClure v. Harris*, 12 B. Mon. (Ky.) 261. And so not waived by taking a guaranteed note. *Burrus v. Rouillac*, 2 Bush (Ky.) 39; *Tiernan v. Thurman*, 14 B. Mon. (Ky.) 277.

<sup>61</sup> See, however, *Davis v. Pear-*

A vendor, who has taken other land conveyed to him with covenants of warranty by the vendee, is deemed to have waived his lien.<sup>62</sup> The delivery of such other deed in escrow is a waiver of the lien also, and it is not revived by the failure of the depository, wrongfully or otherwise, to deliver the deed to the vendor.<sup>63</sup>

When the vendor has retained the legal title until part of the payments have been made, or the deed has remained in escrow by agreement until the first instalment has been met, the delivery of the deed in reliance upon the purchaser's notes is a waiver of the lien.<sup>64</sup> When the vendor has surrendered an express lien, which was in effect a mortgage, and received part payment, and, for a part, negotiable securities, he is regarded as having waived his lien for this part.<sup>65</sup>

Yet, contrary to the generally received rule, some courts go so far in support of this lien as to hold that the presumption of waiver, arising from taking distinct and independent security, may be rebutted by proof that the vendor relied upon the land as well as upon such security;<sup>66</sup> but there is still a presumption of waiver arising from the taking of such security which will prevail in the absence of proof to the contrary.<sup>67</sup>

**§ 1087. Waiver by taking a mortgage.**—The taking of a mortgage as security for a portion of the unpaid purchase-money waives the vendor's lien for the remainder. An express mortgage<sup>68</sup> for a portion of the purchase-money indi-

son, 44 Miss. 508; *Partridge v. Logan*, 3 Mo. App. 509.

<sup>62</sup> *Hare v. Van Deusen*, 32 Barb. (N. Y.) 92. See, however, *Bishop v. Snell*, 37 Ala. 90.

<sup>63</sup> *Coit v. Fougere*, 36 Barb. (N. Y.) 195.

<sup>64</sup> *Brown v. Gilman*, 4 Wheat. (U. S.) 255, 4 L. ed. 564.

<sup>65</sup> *Porter v. Dubuque*, 20 Iowa 440.

<sup>66</sup> *Faver v. Robinson*, 46 Tex. 204; *Ellis v. Singletary*, 45 Tex. 27; *Willis v. Gay*, 48 Tex. 463, 26 Am. Rep. 328; *Seeligson v. Mitcham*, 74 Tex. 571, 12 S. W. 237.

<sup>67</sup> *Irvine v. Muse*, 10 Heisk. (Tenn.) 477.

<sup>68</sup> *Orrick v. Durham*, 79 Mo. 174; *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919, 22 Am. St. 272; *Hunt v. Waterman*, 12 Cal. 301; *Baum v. Grigs-*

cates a waiver of a lien for the residue in accordance with the maxim, *Expressum facit cessare tacitum*. An express contract, that the lien shall be retained to a specified extent, is equivalent to a waiver of the lien to any greater extent.<sup>69</sup> An express statement, however, in the mortgage deed, that the vendor's lien for the remainder of the purchase-money is not thereby waived, would be regarded as sufficient to overcome the presumption of a waiver.<sup>70</sup>

Where the giving of a mortgage for a part of the purchase-money is not regarded as a waiver of a lien in favor of a purchase-money note given for another portion of the purchase-money, the mortgage is regarded as superior to the lien.<sup>71</sup>

Where the vendor has taken the purchaser's note for a part of the purchase-money, in which it is recited that it is for purchase-money, and at the same time takes a mortgage upon the land and a note made by a third person for another part of the purchase-money, parol evidence is admissible to show an agreement between all the contracting parties that the lien should have priority of satisfaction over the mortgage.<sup>72</sup> The taking of a joint note from the purchaser and another person, which includes the price due for other lands, is a waiver of the vendor's lien.<sup>72a</sup>

The retaining by the vendor of the interest in the land, by way of security for the purchase-money, is undoubtedly a waiver of the vendor's lien. The lien is then one by contract, and depends upon the contract.<sup>73</sup> But an agreement be-

by, 21 Cal. 172, 81 Am. Dec. 153; Robbins v. Masteller, 147 Ind. 122, 46 N. E. 330; Mason v. Daily, (N. J. Eq.) 44 Atl. 839; Blomstrom v. Dux, 175 Ill. 435, 51 N. E. 755.

<sup>69</sup> Brown v. Gilman, 4 Wheat. (U. S.) 255, 290, 4 L. ed. 564, per Marshall, C. J.

<sup>70</sup> Briscoe v. Callahan, 77 Mo.

134; Emison v. Whittlesey, 55 Mo. 254.

<sup>71</sup> Robinson v. McWhirter, 52 Tex. 201.

<sup>72</sup> Hill v. McLean, 10 Lea (Tenn.) 107.

<sup>72a</sup> Brown v. Blankenship, 108 Ky. 464, 56 S. W. 817, 22 Ky. L. 143.

<sup>73</sup> Fish v. Howland, 1 Paige (N. Y.) 20.

tween the vendor and the purchaser, being father and daughter, that the former should reside on the land during his lifetime, was held not to amount to a waiver of his lien for the amount of a promissory note given in addition to the agreement.<sup>74</sup>

On a sale of lands, if the purchaser gives his note for the unpaid balance of purchase-money, but the title is taken, at his instance, in the name of a third person, who advanced the money to make the cash payment, and who afterwards executes a conveyance to the purchaser, taking a mortgage to secure the repayment of the money so advanced, the lien of the original vendor is not thereby waived or extinguished, but may be enforced against the land, subject to the mortgage.<sup>75</sup>

**§ 1088. Lien waived although security taken proves worthless.**—Although the security prove to be inadequate,<sup>76</sup> or wholly void,<sup>77</sup> or worthless,<sup>78</sup> there is an implied waiver of the lien. The lien once having been waived by the vendor, a court of equity can not, as a general rule, revive it.<sup>79</sup> The acceptance of a deed of other lands in payment of part of the purchase-price is a waiver of the lien, although the title to such other lands proves to be bad.<sup>80</sup> But here the authorities are not in harmony; for where a mortgage had been taken of the land to secure the purchase-money, but was void for the reason that the husband had not joined in the execution of it, the lien was sustained;<sup>81</sup> and so where the mortgage

<sup>74</sup> Webster v. McCollough, 61 Iowa 496, 16 N. W. 578.

<sup>75</sup> Crampton v. Prince, 83 Ala. 246, 3 So. 519, 3 Am. St. 718.

<sup>76</sup> Hunt v. Waterman, 12 Cal. 301; Partridge v. Logan, 3 Mo. App. 509; McKeown v. Collins, 38 Fla. 276, 21 So. 103.

<sup>77</sup> Camden v. Vail, 23 Cal. 633.

<sup>78</sup> Kendrick v. Eggleston, 56 Iowa 128, 8 N. W. 786, 41 Am. Rep.

90; Akers v. Luse, 56 Iowa 346, 9 N. W. 303.

<sup>79</sup> Mayham v. Coombs, 14 Ohio 428; Burger v. Potter, 32 Ill. 66; Franklin v. Hillsdale Land & Cattle Co., 70 Ill. App. 297; Blomstrom v. Dux, 175 Ill. 435, 51 N. E. 755.

<sup>80</sup> Willard v. Reas, 26 Wis. 540.

<sup>81</sup> Haugh v. Blythe, 20 Ind. 24; Fowler v. Rust, 2 A. K. Marsh.

was void for misdescription or ambiguity,<sup>82</sup> or on account of a defect in its execution;<sup>83</sup> and with better reason, where the vendor had been induced by the fraudulent misrepresentations of the vendee to take the security, it was held he might still rely upon the lien;<sup>84</sup> and it has been held that the vendor does not waive his security by taking, through the fraud of the purchaser,<sup>85</sup> or, without fraud on his part,<sup>86</sup> worthless security for the purchase-money. Suit must be brought promptly upon the discovery of the fraud, especially if the rights of other persons may be affected by the delay.<sup>87</sup>

Where a vendor takes the purchaser's accepted draft for the purchase-money as payment, and not as security, and the draft is not paid by the drawee, the lien is not waived.<sup>88</sup>

Where the vendor takes from the purchaser the note of a third person made payable to the purchaser and indorsed by him without recourse, the note is considered as having been accepted in payment of the purchase-money, and the lien therefore is waived.<sup>89</sup>

(Ky.) 294; *Champlin v. McLeod*, 53 Miss. 484.

<sup>82</sup> *Davis v. Cox*, 6 Ind. 481.

<sup>83</sup> *Chapman v. Chapman*, 55 Ark. 542, 18 S. W. 1037.

<sup>84</sup> *Tobey v. McAllister*, 9 Wis. 463; *Coit v. Fougere*, 36 Barb. (N. Y.) 195; *Gnash v. George*, 58 Iowa 492, 12 N. W. 546; *McDole v. Purdy*, 23 Iowa 277; *Thomas v. Bridges*, 73 Mo. 530; *Brown v. Byam*, 65 Iowa 374, 21 N. W. 684; *Graham v. Moffett*, 119 Mich. 303, 78 N. W. 132, 75 Am. St. 393.

<sup>85</sup> *Himes v. Langley*, 85 Ind. 77; *Fouch v. Wilson*, 60 Ind. 64, 28 Am. Rep. 651; *Felton v. Smith*, 84 Ind. 485; *McDole v. Purdy*, 23 Iowa 277; *Skinner v. Purnell*, 52 Mo. 96; *Crippen v. Heermance*, 9 Paige (N. Y.) 211. And see *Dubois v. Hull*,

43 Barb. (N. Y.) 26; *Burger v. Hughes*, 5 Hun (N. Y.) 180, *affd.* 63 N. Y. 629.

<sup>86</sup> *Duke v. Balme*, 16 Minn. 306 (Gil. 270). See *Hollis v. Hollis*, 4 Baxt. (Tenn.) 524.

<sup>87</sup> *Himes v. Langley*, 85 Ind. 77.

<sup>88</sup> *Jobe v. Chedister*, 5 Lea (Tenn.) 346; *Loomis v. Davenport & St. Paul R. Co.*, 17 Fed. 301, 3 McCrary (U. S.) 489, 494. "The question in every case is whether the vendor intended to waive his right to a lien upon the land, and to rely upon other collateral or independent security. In this case, as already stated, we find that such was not the intention of the complainant." Per McCrary, J.

<sup>89</sup> *Hazelrigg v. Boarman*, 8 Ky. L. (abstract) 607, 2 S. W. 769.

§ 1089. **Immaterial when security is taken.**—Whether the security be taken at the time of the conveyance or subsequently, the effect of taking it is generally held to be the same.<sup>90</sup> But the waiver may in either case be avoided by an express agreement that the lien shall remain, notwithstanding the security.<sup>91</sup> When there is no security, the burden is upon the vendee to show that the lien does not exist; but after the taking of security, aside from the personal obligation of the purchaser, the burden is shifted and is upon the vendor to show that the lien has not been waived.<sup>92</sup>

There is no waiver, however, until the security is actually taken, although there be an agreement to receive it.<sup>93</sup>

§ 1090. **Taking security only presumptive evidence of waiver.**—Taking security for the purchase-money is only presumptive evidence of a waiver of the lien,<sup>94</sup> which presumption may be rebutted by facts and circumstances which in

<sup>90</sup> But contra held when the security was voluntarily given, not in pursuance of the original agreement. *Vandoren v. Todd*, 2 Green Eq. (N. J.) 397.

<sup>91</sup> *Daughaday v. Paine*, 6 Minn. 443 (Gil. 304); *Yaryan v. Shriner*, 26 Ind. 364; *Boon v. Murphy*, 6 Blackf. (Ind.) 272.

<sup>92</sup> *Bradford v. Marvin*, 2 Fla. 463.

<sup>93</sup> *Jones v. Vantress*, 23 Ind. 533; *Dunlap v. Burnett*, 13 Miss. 702, 45 Am. Dec. 269.

<sup>94</sup> *Saunders v. Leslie*, 2 Ba. & B. 509; *Cordova v. Hood*, 17 Wall. (U. S.) 1, 21 L. ed. 587, and cases cited; *Seymour v. Slide & Spur Gold Mines*, 42 Fed. 633, affd. 153 U. S. 509, 38 L. ed. 802, 14 Sup. Ct. 842; *Dibblee v. Mitchell*, 15 Ind. 435, 77 Am. Dec. 99; *Carr v. Thompson*, 67 Mo. 472; *Durette v.*

*Briggs*, 47 Mo. 356, 362; *Stevens v. Rainwater*, 4 Mo. App. 292; *Tedder v. Steele*, 70 Ala. 347; *Mayes v. Hendry*, 33 Ark. 240. *Gibson, C. J.*, speaking of the circumstances which are held to be a waiver of the lien, says they are so purely arbitrary that the mind is often puzzled to find the reason of them. "Thus the assumption, that taking an independent security is inconsistent with an intention to retain the lien, is merely gratuitous; for the parties might, in all reason, just as well be supposed to have intended the security to be cumulative." *Kauf-felt v. Bower*, 7 Serg. & R. (Pa.) 64, 77, 10 Am. Dec. 428. A waiver obtained by fraud is not binding. *Franklin v. Walker*, 171 Ill. 405, 49 N. E. 556; *Jones v. Rush*, 156 Mo. 364, 57 S. W. 118.



their nature take from the act its prima facie import, leaving the implied and primary intention to retain a lien unaffected.<sup>95</sup> Although the security be what is termed by the authorities an independent security,—such as a mortgage on other property, a pledge, or the negotiable note of a third party indorsed by the vendee,—it is only evidence of an intention to waive the lien rights, and not conclusive of such intention.<sup>96</sup> The taking of security is not a waiver of the lien, unless the nature of the security be such that it evinces an intention to waive it;<sup>97</sup> and therefore a mortgage given expressly in aid of the lien has been held not to be a waiver of it.<sup>98</sup>

It is even held that it is competent to prove by parol whether or not the lien is waived.<sup>99</sup>

Upon a sale of land to a married woman, the taking of her note for the purchase-money, signed also by her husband, is not necessarily a waiver of the vendor's lien.<sup>1</sup> In such case the husband is not a security in the sense which makes the taking of security an implication of an intention to waive the lien.

If land be sold in the first instance to the husband, but at his request the deed be made to his wife and son, the fact

<sup>95</sup> *Hunt v. Marsh*, 80 Mo. 396; *Pratt v. Eaton*, 65 Mo. 157; *Tedder v. Steele*, 70 Ala. 347; *Gnash v. George*, 58 Iowa 492, 12 N. W. 546; *Lawson v. Cundiff*, 81 Mo. App. 169.

<sup>96</sup> *Lavender v. Abbott*, 30 Ark. 172; and see 2 Story's Eq. Juris. (13th ed.) § 1226; *De Forest v. Holum*, 38 Wis. 516; *Sanders v. McAfee*, 41 Ga. 684; *Fonda v. Jones*, 42 Miss. 792, 2 Am. Rep. 669; *Lawrence v. Meyer*, 35 Ark. 104; *Thames v. Caldwell*, 60 Ala. 644; *Ellis v. Singletary*, 45 Tex. 27, 37; *Slaughter v. Owens*, 60 Tex. 668;

*Gnash v. George*, 58 Iowa 492, 12 N. W. 546; *Kendrick v. Eggleston*, 56 Iowa 128, 8 N. W. 786, 41 Am. Rep. 90; *Akers v. Luse*, 56 Iowa 346, 9 N. W. 303.

<sup>97</sup> *Corlies v. Howland*, 26 N. J. Eq. 311; *Hallock v. Smith*, 3 Barb. (N. Y.) 267; *Dubois v. Hull*, 43 Barb. (N. Y.) 26. And see *Christian v. Austin*, 36 Tex. 540; *Thomason v. Cooper*, 57 Ala. 560.

<sup>98</sup> *Emison v. Whittlesey*, 55 Mo. 254.

<sup>99</sup> *Jarman v. Farley*, 7 Lea (Tenn.) 141.

<sup>1</sup> *Parker v. McBee*, 61 Miss. 134.

that the husband gives his note for a balance of the purchase-money does not imply a waiver of the vendor's lien.<sup>2</sup>

It is said that when it is doubtful whether the security taken should amount to a waiver, the lien should be preserved.<sup>3</sup>

If the note given for the purchase-money recites the consideration and describes the land, there is an indication of an intention to rest on the security of the lien, though the note be secured by a surety. Such a recital does not create a charge upon the land for the purchase-money, or an equitable mortgage, as it has been supposed to do in some cases; but it serves to overcome and rebut the presumption of waiver arising from the taking of the personal security on the note.<sup>4</sup>

It has also been held that, in the absence of an express waiver of lien, the vendor may enforce his lien against land which his vendee has received in exchange for land on which the lien primarily attached, in case the vendor has accepted, in lieu of the original note, the note of the person who had exchanged lands with the vendee given to secure a balance due the vendee in excess of the value of the land exchanged.<sup>5</sup>

The effect of taking independent security may be controlled by express agreement that the lien shall not be waived thereby; or may be controlled by expressions which negative any intention to abandon it.<sup>6</sup> An express agreement that the lien shall be retained, notwithstanding other security be given for the debt, may be made by a married woman, when the land is conveyed to her, and becomes her separate estate.<sup>7</sup>

<sup>2</sup> *Hunt v. Marsh*, 80 Mo. 396; See to same effect, *Zook v. Davenport v. Murray*, 68 Mo. 198; *Thompson*, 111 Iowa 463, 82 N. W. Martin v. Cauble, 72 Ind. 67; 930.

*Humphrey v. Thorn*, 63 Ind. 296; <sup>5</sup> *Perry v. Woodson*, 61 Tex. 228.  
*Fleece v. O'Rear*, 83 Ind. 200; <sup>6</sup> *Austen v. Halsey*, 6 Ves. 475,  
*Bakes v. Gilbert*, 93 Ind. 70. 483; *Elliot v. Edwards*, 3 Bos. &

<sup>3</sup> *Wilson v. Lyon*, 51 Ill. 166; P. 181; *Frail v. Ellis*, 16 Beav. 350.  
*Harris v. Hanks*, 25 Ark. 510; *Fen-* <sup>7</sup> *Mears v. Kearney*, 1 Abb. N. ter v. McKinstry, 91 Ill. App. 255. Cas. (N. Y.) 303. The note given

<sup>4</sup> *Tedder v. Steele*, 70 Ala. 347. for the land was as follows: "Nine-

§ 1091. **Estoppel of vendor.**—The vendor may be estopped to claim the lien by reason of having induced another to purchase the property as unincumbered, upon the representation that the lien no longer existed or would not be claimed.<sup>8</sup> But his representations will not affect the lien of his vendee who makes the sale.<sup>9</sup>

A vendor loses his lien by assenting to a conveyance by his debtor of all his property, including that upon which the lien exists, in trust for his creditors.<sup>10</sup>

If a vendor makes a voluntary conveyance of his land to his son, and announces to a third person that he has given the land to his son, so that such third person might loan the son money upon a mortgage of the land, and the loan is made upon the faith of such statement, the vendor's lien will be subordinated to the mortgage debt.<sup>11</sup>

A vendor's lien once fully abandoned can not be revived.<sup>12</sup>

§ 1092. **Assignability of vendor's lien.**—Whether the vendor's lien is assignable with the debt which it secures is a

ty days after date, I promise to pay to the order of Patrick Kearney, one hundred and seventy-five dollars, at the Fifth National Bank, New York, and for the payment of which I pledge my sole and separate estate, being 514 West Forty-third Street, New York. (Signed) Catherine Kearney. (Indorsed) Patrick Kearney." The inference from the statement and opinion in the case is, that Patrick was her husband; at any rate he was not the vendor. It is also to be inferred that the premises designated in the note were those for the price of which the note was taken. The case was before the Superior Court of New York.

<sup>8</sup> Henson v. Westcott, 82 Ill. 224; Atkinson v. Lindsey, 39 Ind. 296;

Burns v. Taylor, 23 Ala. 255; Thompson v. Dawson, 3 Head (Tenn.) 384; Reily v. Miami Exporting Co., 5 Ohio 333; Franklin v. McDonald, 163 Ill. 139, 45 N. E. 212, affg. 58 Ill. App. 230; Towery v. Meeks, 17 Ky. L. 248, 30 S. W. 1014; Buckingham v. Thompson, (Tex. Civ. App.) 135 S. W. 652.

<sup>9</sup> Rowland v. Day, 17 Ala. 681; Larscheid v. Kittell, 142 Wis. 172, 125 N. W. 442.

<sup>10</sup> Fox v. Fraser, 92 Ind. 265.

<sup>11</sup> Alexander v. Ellison, 79 Ky. 148, 2 Ky. L. 49.

<sup>12</sup> Mattix v. Weand, 19 Ind. 151; Masters v. Templeton, 92 Ind. 447; Royal Consol. Mining Co. v. Royal Consol. Mines Co., 157 Cal. 737, 110 Pac. 123.

question upon which the authorities are not agreed.<sup>13</sup> Generally in the United States the lien is considered personal to the vendor, and not assignable except under peculiarly equitable circumstances.<sup>14</sup> Generally, too, where the lien is con-

<sup>13</sup> By the English authorities, the lien seems to be assignable, though the cases are not decisive. 2 *Dart's V. & P.* (6th ed.) 828, and cases cited; *Dryden v. Frost*, 3 *Mylne & C.* 670.

<sup>14</sup> Not assignable in the following States: Arkansas: The lien is an individual equity, and does not pass by an assignment of the debt. *Carlton v. Buckner*, 28 Ark. 66; *Hutton v. Moore*, 26 Ark. 382, 396; *Williams v. Christian*, 23 Ark. 255; *Shall v. Biscoe*, 18 Ark. 142, 162; *Jones v. Doss*, 27 Ark. 518; *Rogers v. James*, 33 Ark. 77; *Hecht v. Spears*, 27 Ark. 229, 11 Am. Rep. 784; *Crossland v. Powers*, (Ark.) 13 S. W. 722; *Morris v. Ham*, 47 Ark. 293, 1 S. W. 519. But this rule does not apply when the debt has been assigned merely as collateral. *Carlton v. Buckner*, 28 Ark. 66; *Crawley v. Riggs*, 24 Ark. 563; *Chapman v. Liggett*, 41 Ark. 292. California: *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *Lewis v. Covillaud*, 21 Cal. 178; *Williams v. Young*, 21 Cal. 227; *Ross v. Heintzen*, 36 Cal. 313. In California, North Dakota, South Dakota, and Idaho, it is provided that, where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract, but a transfer of such con-

tract in trust to pay debts, and return the surplus, is not a waiver of the lien. California: *Civ. Code* 1906, § 3047; *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919, 22 Am. St. 272; *Bau n v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153. North Dakota: *Rev. Code* 1905, § 6282. South Dakota: *Rev. Code (Civ.)* 1903, § 2149. Idaho: *Rev. Code* 1908, § 3442; *Bancroft v. Crosby*, 74 Cal. 583, 16 Pac. 504. Georgia: *Webb v. Robinson*, 14 Ga. 216; *Wellborn v. Williams*, 9 Ga. 86, 52 Am. Dec. 427. Illinois: *Keith v. Horner*, 32 Ill. 524; *Carpenter v. Mitchell*, 54 Ill. 126; *Richards v. Leaming*, 27 Ill. 431, 81 Am. Dec. 239; *Moshier v. Meek*, 80 Ill. 79; *Dayhuff v. Dayhuff*, 81 Ill. 499; *Kimble v. Es-worthy*, 6 Bradw. (Ill.) 517; *Stagg v. Small*, 4 Bradw. (Ill.) 192; *Small v. Stagg*, 95 Ill. 39; *Bonnell v. Holt*, 89 Ill. 71; *Elder v. Jones*, 85 Ill. 384; *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18. But where the vendor gives a bond for title he has the same right to assign his interest and lien as he would have if he had executed a deed and taken a mortgage on the land sold. *Lewis v. Shearer*, 189 Ill. 184, 59 N. E. 580. Maryland: *Dixon v. Dixon*, 1 Md. Ch. 220; *Iglehart v. Armiger*, 1 Bland Ch. (Md.) 519. Minnesota: *Hammond v. Peyton*, 34 Minn. 529, 27 N. W. 72; *Law v. Butler*, 44 Minn. 482, 47 N. W. 53. Mississippi: The lien subsists only so long as the ven-

sidered a personal equity, it is not assignable even by express language. It is strictly personal to the vendor, and can be enforced only by him.<sup>15</sup> The prevailing doctrine is, that this

vendor is himself a creditor. It is a personal equity, and does not pass to the assignee of the note or bond. *Pitts v. Parker*, 44 Miss. 247; *Skaggs v. Nelson*, 25 Miss. 88; *Briggs v. Hill*, 6 How. (Miss.) 362, 38 Am. Dec. 441; *Walker v. Williams*, 30 Miss. 165; *Stratton v. Gold*, 40 Miss. 778; *Lindsey v. Bates*, 42 Miss. 397; *Murphree v. Countiss*, 58 Miss. 712. Some earlier cases to the contrary. In the recent case of *Perkins v. Gibson*, 51 Miss. 699, 24 Am. Rep. 644, Mr. Justice Tarbell said: "The study of the case at bar has induced, in the mind of the writer, these individual impressions for the expression of which he is alone responsible. That the reasons assigned against the transfer or assignment, by contract, of the vendor's lien by implication, are wholly unsatisfactory to him, and he has met with no convincing argument why this lien should not be as available in the hands of assignees and third parties, as that sub-vendees, with notice, take the land subject thereto. The rule in Kentucky is sustained by the courts of a minority of the states, it is true, but the present impression of the writer is, that it is founded in the better reason and equity." The case was, however, decided upon other grounds. But this rule in Mississippi is now changed by § 4001 of the Code of 1906, which provides that the assignee of a claim for the pur-

chase-money of land may enforce the vendor's lien as the vendor could. *Louisiana National Bank v. Knapp*, 61 Miss. 485. New York: Cannot be enforced by an assignee. *White v. Williams*, 1 Paige (N. Y.) 502; *Snyder v. Snyder*, 115 N. Y. S. 993. But the vendor may enforce it after an assignment, when he continues to have a pecuniary interest in the debt. *Smith v. Smith*, 9 Abb. Pr. (N. S.) (N. Y.) 420. Ohio: *Brush v. Kinsley*, 14 Ohio 20; *Horton v. Horner*, 14 Ohio 437; *Jackman v. Hallock*, 1 Ohio 318, 13 Am. Dec. 627; *Tiernan v. Beam*, 2 Ohio 383, 15 Am. Dec. 557; *Ogle v. Ogle*, 41 Ohio St. 359. But the lien has been held to pass to a devisee of the notes. *Tiernan v. Beam*, 2 Ohio 383, 15 Am. Dec. 557. Oregon: *First National Bank v. Salem Capital Flour Mills Co.*, 39 Fed. 89. Tennessee: *Tharpe v. Dunlap*, 4 Heisk. (Tenn.) 674, and cases cited; *Green v. Demoss*, 10 Humph. (Tenn.) 371; *Cowan v. Sharp*, 11 Heisk. (Tenn.) 450; *Bowlin v. Pearson*, 4 Baxt. (Tenn.) 341; *Pillow v. Helm*, 7 Baxt. (Tenn.) 545; *McWhirter v. Swaffer*, 6 Baxt. (Tenn.) 342; *Cate v. Cate*, 87 Tenn 41, 9 S. W. 231.

<sup>15</sup> *Keith v. Horner*, 32 Ill. 524; *Richards v. Leaming*, 27 Ill. 431, 81 Am. Dec. 239; *Hecht v. Spears*, 27 Ark. 229, 11 Am. Rep. 784; *In re Brooks*, 2 Nat. Bank Reg. 466. One paying the purchase-price for the vendee cannot be subrogated

lien is implied only in favor of the vendor himself; that it is a personal equity. There is a disposition not to extend the grantor's lien beyond the settled rules of equity in reference to it, but rather than keep it strictly within limits, because it is unnecessary for the protection of the grantor, who can easily protect himself by mortgage. Such restriction is regarded as not only the prevailing, but as the better rule; that best calculated to promote the general interest, and most in accordance with the spirit and policy of our laws.<sup>16</sup> If the note given for the purchase-money be transferred, it does not carry with it to the assignee the vendor's lien, so that he can enforce it in his own name.<sup>17</sup> It can not be assigned even by express contract.<sup>18</sup> It can be enforced only by the vendor himself; and he can not enforce it in his name for the benefit of another to whom he has transferred the evidence of the debt.<sup>19</sup> But if the note comes back to the vendor his lien is said to revive.<sup>20</sup> The lien, being an incident of the debt, can not be established by the vendor after he has absolutely transferred the debt to another.<sup>21</sup> But if the vendor holds title to the land as trustee, he does not waive his lien by indorsing the note in blank and delivering it to the cestui que trust.<sup>22</sup>

It can not be invoked in favor of one who has advanced money to a purchaser with which to pay for the lands;<sup>23</sup> or

to the vendor's lien. *Martin v. Martin*, 164 Ill. 640, 45 N. E. 1007, 56 Am. St. 219, revg. 62 Ill. App. 378.

<sup>16</sup> *Hammond v. Peyton*, 34 Minn. 529, 27 N. W. 72.

<sup>17</sup> *Marquat v. Marquat*, 7 How. Pr. (N. Y.) 417, revd. 12 N. Y. 336; *Stansell v. Roberts*, 13 Ohio 148, 42 Am. Dec. 193; *Skaggs v. Nelson*, 25 Miss. 88; *Richards v. Leaming*, 27 Ill. 431, 81 Am. Dec. 239; *Wing v. Goodman*, 75 Ill. 159.

<sup>18</sup> *Keith v. Horner*, 32 Ill. 524; *McLaurie v. Thomas*, 39 Ill. 291.

<sup>19</sup> *Elder v. Jones*, 85 Ill. 384.

<sup>20</sup> *Cotten v. McGehee*, 54 Miss. 510; *Rogers v. James*, 33 Ark. 77.

<sup>21</sup> *Scott v. Mann*, 36 Tex. 157.

<sup>22</sup> *Parker v. McBee*, 61 Miss. 134.

<sup>23</sup> *Stagg v. Small*, 4 Bradw. (Ill.) 192; *Gilman v. Dingeman*, 49 Iowa 308; *Labouisse v. Orleans Cotton-Rope & Mfg. Co.*, 43 La. Ann. 245, 9 So. 204.

by one of two joint purchasers who has paid the whole consideration.<sup>24</sup>

An assignment of a judgment for the purchase-money does not pass the benefit of the lien.<sup>25</sup>

In a few states, however, the lien is regarded as assignable, and the assignee of the debt may enforce the lien in his own name.<sup>26</sup> But the lien does not pass when the note for

<sup>24</sup> *Brown v. Budd*, 2 Ind. 442; *Wooldridge v. Scott*, 69 Mo. 669.

<sup>25</sup> *Turner v. Horner*, 29 Ark. 440.

<sup>26</sup> Assignable in—Alabama: The transfer of a bond, bill, or note, given for the purchase-money of lands, whether the transfer be by delivery merely, or in writing, expressed to be with or without recourse on the transferer, passes to the transferee: the lien of the vendor on the lands. Civ. Code 1907, § 5160; *Weaver v. Brown*, 87 Ala. 533, 6 So. 354; *Parson v. Martin*, 86 Ala. 352, 5 So. 467. Prior to this statute the transfer of a promissory note, given for the purchase-money of land, by delivery only, did not carry with it the right to enforce the vendor's lien on the land. *Prickett v. Sibert*, 71 Ala. 194. Indiana: *Nichols v. Glover*, 41 Ind. 24; *Kern v. Hazlerigg*, 11 Ind. 443, 71 Am. Dec. 360; *Wiseman v. Hutchinson*, 20 Ind. 40; *Fisher v. Johnson*, 5 Ind. 492; *Bryson v. Collmer*, 33 Ind. App. 494, 71 N. E. 229; *Smith v. Mills*, 145 Ind. 334, 43 N. E. 564, 44 N. E. 362. Kentucky: *Honore v. Bakewell*, 6 B. Mon. (Ky.) 67, 43 Am. Dec. 147; *Ripperdon v. Cozine*, 8 B. Mon. (Ky.) 465; *Eubank v. Poston*, 5 T. B. Mon. (Ky.) 285, 286; *Johnston v. Gwathmay*, 4 Litt.

(Ky.) 317, 318, 14 Am. Dec. 135; *Broadwell v. King*, 3 B. Mon. (Ky.) 449; *Adams v. Feeder*, 19 Ky. L. 581, 41 S. W. 275; *Clifford v. Gruelle*, 17 Ky. L. 842, 32 S. W. 937. Mississippi: Code 1906, § 4001; *Louisiana National Bank v. Knapp*, 61 Miss. 485; *Elmslie v. Thurman*, 87 Miss. 228. Missouri: *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493; *Dickason v. Fisher*, 137 Mo. 342, 37 S. W. 1114; *Williams v. Baker*, 100 Mo. App. 284, 73 S. W. 339. New Jersey: *Acton v. Waddington*, 46 N. J. Eq. 16, 18 Atl. 356, *affd.* 46 N. J. Eq. 611, 22 Atl. 56, *per McGill*, Ch. New Mexico: *Bates v. Childers*, 4 N. Mex. 347, 352, 20 Pac. 164. Texas: *Cannon v. McDaniel*, 46 Tex. 303; *White v. Downs*, 40 Tex. 225; *Cordova v. Hood*, 17 Wall. (U. S.) 1, 21 L. ed. 587; *Watt v. White*, 33 Tex. 421; *Moore v. Raymond*, 15 Tex. 554; *Brooks v. Young*, 60 Tex. 32; *Hamblen v. Folts*, 70 Tex. 132, 7 S. W. 834; *Rutherford v. Mothershed*, 42 Tex. Civ. App. 360, 92 S. W. 1021; *Jackson v. Ivory*, (Tex. Civ. App.) 30 S. W. 716; *Gulf C. & S. F. R. Co. v. Blount*, (Tex. Civ. App.) 136 S. W. 566; *Bowden v. Bridgman*, (Tex. Civ. App.) 141 S. W. 1043. West Virginia: *Board v. Wilson*, 34 W. Va. 609, 12 S. E. 778.

the purchase-price is assigned by one not rightfully holding it.<sup>27</sup> When several notes taken for the purchase-money are assigned at different times, each note is pro tanto an assignment of the lien,<sup>28</sup> and an assignment of part of a note gives a pro tanto interest in the lien.<sup>29</sup> But a transfer of the note by delivery only, without recourse to the vendor, or liability on his part, does not carry with it the right to enforce the lien.<sup>30</sup>

When the transfer of a note or other evidence of debt, given for the purchase-money, is of a nature that involves the vendor in liability to the transferee for the payment of the debt, it is upon the principle of subrogation to the security the lien affords the vendor for the debt that the transferee can claim the lien. When the liability of the vendor does not exist, the medium of subrogation fails.<sup>31</sup>

If the vendor assigns one note and retains another, the note assigned is entitled to priority over that retained, though the latter first becomes due.<sup>32</sup>

An assignment of a lien note as collateral security, in states where the lien is not assignable, does not extinguish the lien, according to some decisions.<sup>33</sup> The vendor may subsequently

<sup>27</sup> *Deibler v. Barwick*, 4 Blackf. (Ind.) 339.

<sup>28</sup> *Davidson v. Allen*, 36 Miss. 419; *Griggsby v. Hair*, 25 Ala. 327; *Robertson v. Guerin*, 50 Tex. 317; *Andrews v. Hobgood*, 1 Lea (Tenn.) 693.

<sup>29</sup> *Thomas v. Wyatt*, 5 B. Mon. (Ky.) 132.

<sup>30</sup> *Alabama: Bankhead v. Owen*, 60 Ala. 457; *Hightower v. Rigsby*, 56 Ala. 126; *Lang v. Wilkinson*, 57 Ala. 259; *Daily v. Reid*, 74 Ala. 415; *Stabler v. Spencer*, 64 Ala. 496. But this rule was changed by statute Civ. Code 1907, § 5160 which provides that the transferee

by writing, or delivery of a bond, note or bill for purchase-money, has a lien on the land, without regard to the liability of the vendor on the bond, note, or bill. And see *Preston v. Ellington*, 74 Ala. 133.

<sup>31</sup> *Wilkinson v. May*, 69 Ala. 33, per *Brickell*, C. J.; *Preston v. Ellington*, 74 Ala. 133, per *Brickell*, C. J.

<sup>32</sup> *Parson v. Martin*, 86 Ala. 352, 5 So. 467; *Martin v. Turner*, (Ky. App.) 115 S. W. 833.

<sup>33</sup> *Arkansas: Blevins v. Rogers*, 32 Ark. 258; *Carlton v. Buckner*, 28 Ark. 66. *California: Bancroft v. Cosby*, 74 Cal. 583, 16 Pac. 504.



take up the note and enforce it. The lien in such case is merely suspended by the assignment, and revives when the vendor repossesses himself of the note. But according to other decisions the transfer of the lien note, though without indorsement or guaranty, wholly defeats the lien, which afterwards can neither be enforced by the assignor nor the assignee.<sup>34</sup> Filing a bill to enforce a lien waives a previous default in instalment payment by the vendee.<sup>34a</sup>

**§ 1093. Subrogation to the lien.**—Where the lien is not assignable, even by express contract, there can of course be no subrogation of another to the position of the vendor, by implication of law; as, for instance, another person paying the debt due the vendor for purchase-money is not subrogated to his lien.<sup>35</sup> But the rule is otherwise where the lien is held to pass by assignment,<sup>36</sup> and a purchaser with notice, who pays off a lien, is substituted to the rights of the owner as against another incumbrancer.<sup>37</sup>

So, also, one who pays the debt for the purchase-money at the instance of the purchaser, and who at the time manifests an intention to keep the lien alive for his protection by retaining the purchase note and deed in his possession with the assent of the debtor, is deemed a purchaser of the lien, and subrogated to the rights of the vendor.<sup>38</sup>

One who furnishes the money for the purchase of real es-

Mississippi: *Stratton v. Gold*, 40 Miss. 778. Tennessee: *Cate v. Cate*, 87 Tenn. 41, 9 S. W. 231.

<sup>34</sup> Georgia: *Hunt v. Harbor*, 80 Ga. 746, 6 S. E. 596. Illinois: *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18; *Lehndorf v. Cope*, 122 Ill. 317, 333, 13 N. E. 505; *Keith v. Horner*, 32 Ill. 524; *Richards v. Leaming*, 27 Ill. 431, 81 Am. Dec. 239. Louisiana: *People's Bank v. Cate*, 40 La. Ann. 138, 3 So. 721.

<sup>34a</sup> *Old Second Nat. Bank v. Al-*

*pena County Sav. Bank*, 115 Mich. 548, 73 N. W. 809.

<sup>35</sup> *Nichol v. Dunn*, 25 Ark. 129; *Haskell v. Scott*, 56 Ind. 564.

<sup>36</sup> *Peet v. Beers*, 4 Ind. 46; *Lowry v. Smith*, 97 Ind. 466; *Lusk v. Hopper*, 3 Bush (Ky.) 179.

<sup>37</sup> *Planters' Bank v. Dodson*, 17 Miss. 527; *Henson v. Reed*, 71 Tex. 726, 10 S. W. 522.

<sup>38</sup> *Rodman v. Sanders*, 44 Ark. 504; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47.

tate, which by his direction is conveyed to a mere volunteer who pays nothing, may be regarded as the equitable vendor, and as having an equitable lien for the purchase-money, if such was the agreement or intention, in place of the legal vendor.<sup>39</sup>

A surety upon a note given by a purchaser of land in payment for it, upon being compelled to pay the note, is subrogated to the vendor's lien, so that his claim is superior to that of the purchaser's widow.<sup>40</sup>

It has even been held that one who loans money to another to pay the purchase-money of a homestead, and takes a note which recites that it is executed for such purchase-money, is subrogated to the rights of the original vendor, when the money is applied in paying off the lien.<sup>41</sup>

But a person loaning money to a purchaser of land, and taking a mortgage to secure himself, is not subrogated to the rights of the vendor so as to enable him to hold the land as against a second purchaser who was in possession under his contract at the time of the execution of the mortgage, provided there be no privity or arrangement between the mortgagee and the vendor that he shall succeed to the vendor's lien.<sup>42</sup>

One who advances money for the purchase of land, with reason to believe the same is sold in fraud of the rights of another, is without equity to claim a lien for his security.<sup>43</sup>

If the land of two persons is subjected to a vendor's lien, and one pays off a judgment for the lien debt, he is entitled to contribution from the other; and he is subrogated to all the rights of the vendor as against such other owner, in or-

<sup>39</sup> *Dwenger v. Branigan*, 95 Ind. 221; *Fleece v. O'Rear*, 83 Ind. 200; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47, 59 Wis. 145, 14 N. W. 32; *Jones v. Parker*, 51 Wis. 218, 8 N. W. 124.

<sup>40</sup> *Ballew v. Roler*, 124 Ind. 557,

24 N. E. 976, 9, L. R. A. 481; *Walsh v. McBride*, 72 Md. 45, 19 Atl. 4, per *McSherry, J.*

<sup>41</sup> *Hicks v. Morris*, 57 Tex. 658.

<sup>42</sup> *Small v. Stagg*, 95 Ill. 39.

<sup>43</sup> *Simon v. Brown*, 38 Mich. 552.

der to enable him to subject the land of such other owner to his proportional part of the judgment.<sup>44</sup> Where the vendee of land gives his note for the purchase-price, and afterwards pays the note from the proceeds of property belonging to his minor children, the children, though not entitled to a resulting trust in the land, become subrogated to the vendor's lien.<sup>45</sup>

**§ 1094. The lien in favor of third persons.**—The lien exists in favor of a third person to whom the vendee, at the vendor's request, has agreed to pay a portion of the purchase-money.<sup>46</sup> It may exist in favor of one whose land has been sold on execution, and at whose request the sheriff has given credit to the purchaser for so much of his bid as was not required to satisfy the judgment. The transaction may in such case be regarded as in substance to that extent a sale by the owner through the sheriff, and the sheriff's deed to that extent his deed.<sup>47</sup>

The lien may be established in favor of one who is beneficially the owner of the property sold, although the title stands in another who makes the conveyance to the purchaser.<sup>48</sup>

<sup>44</sup> Beck v. Tarrant, 61 Tex. 402.

<sup>45</sup> Oury v. Saunders, 77 Tex. 278, 13 S. W. 1030. And see Hurst v. Marshall, 75 Tex. 452, 13 S. W. 33.

<sup>46</sup> Francis v. Wells, 2 Colo. 660; Mitchell v. Butt, 45 Ga. 162; Latham v. Staples, 46 Ala. 462; Campbell v. Roach, 45 Ala. 667; Young v. Hawkins, 74 Ala. 370; Carver v. Eads, 65 Ala. 190; Linn v. Bass, 84 Ala. 281, 4 So. 867; De L'Isle v. Moss, 34 La. Ann. 164; Thompson v. Thompson, 3 Lea (Tenn.) 126; Mize v. Barnes, 78 Ky. 506; Glaze v. Watson, 55 Tex. 563; Whetsel v. Roberts, 31 Ohio St. 503; Pinchain v. Collard, 13 Tex. 333;

Louisiana Nat. Bank v. Knapp, 61 Miss. 485; Joiner v. Perkins, 59 Tex. 300; Tysen v. Wabash R. Co., 15 Fed. 763, 11 Biss. (U. S.) 510, revd. 114 U. S. 587, 29 L. ed. 235, 5 Sup. Ct. 1081; Woodall v. Kelly, 85 Ala. 368, 5 So. 164, 7 Am. St. 57; Kilbourne v. Wiley, 124 Mich. 370, 83 N. W. 99; Malone's Committee v. Leeбус, 29 Ky. L. 800, 96 S. W. 519.

<sup>47</sup> Yarborough v. Wood, 42 Tex. 91, 19 Am. Rep. 44.

<sup>48</sup> Russell v. Watt, 41 Miss. 602, 93 Am. Dec. 270. See, however, Kelly v. Ruble, 11 Ore. 75, 4 Pac. 593. Where land is devised to A

In a case in Mississippi, it appeared that the owner of land was indebted to another, whom he authorized verbally to sell the land. A sale was made, the owner conveying the land to the purchaser, who gave his note for the amount to the creditor with the understanding that it was to be a lien upon the land.<sup>49</sup> Notwithstanding the rule prevalent in this state, that the lien is not assignable by a transfer of the note given for the purchase-money, it was held that the land in this case was bound by the lien in favor of the creditor to whom the note was given; and yet it has been held in this state that a third person, to whom one of the purchase-money notes is given at the request of the vendor, cannot enforce the lien for that note.<sup>50</sup>

The decision was based upon a distinction between a vendor and a grantor; and it was considered that the person to whom the note was given was, under the circumstances, really the vendor.

**§ 1095. Effect of indorsement of note without recourse to carry the lien.**—An indorsement of the note "without recourse" does not carry the lien,<sup>51</sup> because the owner is there-

on condition of his executing purchase-money notes to B it is held that B can enforce vendor's lien against A. *Ballard v. Camplin*, 161 Ind. 16, 67 N. E. 505.

<sup>49</sup> *Perkins v. Gibson*, 51 Miss. 699, 24 Am. Rep. 644. The cases of *Kelly v. Mills*, 41 Miss. 267; *Russell v. Watt*, 41 Miss. 602, 93 Am. Dec. 270, are cited as fully recognizing this distinction. Mr. Justice Tarbell reviews the decisions upon the point whether the lien is affected by the substitution of another person for the vendor in the giving of the notes, approving the decision in *Pinchain v. Collard*, 13 Tex. 333; and he ex-

presses his individual opinion in favor of the broad position that the benefit of the lien should pass by an assignment of the note. See, ante, § 1092.

<sup>50</sup> *Rutland v. Brister*, 53 Miss. 683.

<sup>51</sup> *Schnebly v. Ragan*, 7 Gill & J. (Md.) 120, 28 Am. Dec. 195; *Johnson v. Nunnerly*, 30 Ark. 153; *Williams v. Christian*, 23 Ark. 255; *Smith v. Smith*, 9 Abb. Pr. (N. S.) (N. Y.) 420; *Bankhead v. Owen*, 60 Ala. 457. Contra, *Davidson v. Allen*, 36 Miss. 419; *Neese v. Riley*, 77 Tex. 348, 14 S. W. 65; *Fitch v. Kennard*, (Tex. Civ. App.) 133 S. W. 738.

by released from liability on the note, and no longer has any interest in the land. And yet a qualification has been made of even this proposition, for it is held that when, after such an assignment, the note is taken up by the vendor and reassigned to him, whereby the note and lien are again united in the same party, the lien then attaches.<sup>52</sup>

### § 1096. Exception to the rule of non-assignability of lien.

—As an exception to the rule that the lien is not assignable by a transfer of the note, or other obligation given for the purchase-money, it is held that when the transfer is for the payment of a debt of the vendor's, or is made as collateral security for his debt, the lien passes with the assignment.<sup>53</sup> The reason is said to be, that when the assignment is made for the benefit of a third person, or he is merely a purchaser of the note, there is no peculiar equity in his favor; but when the transfer is for the security or payment of the vendor's own debt, the equity continues; the assignee, in such case, holding the lien as well for the benefit of the assignor as for himself, is subrogated to all his equities.<sup>54</sup>

In like manner it is held that if the vendor indorse the note, and is afterwards obliged to take it up at maturity upon the failure of the vendee to pay, or if the note in any way comes back into the vendor's possession as his own, then both the debt and the lien, which had been separated by the assignment, are again united in the vendor, who may

<sup>52</sup> *Bernays v. Feild*, 29 Ark. 218.

<sup>53</sup> So provided by statute in California, § 3047 of Civ. Code 1906; South Dakota: Rev. Code (Civ.) 1903, § 2149; *Bancroft v. Cosby*, 74 Cal. 583, 16 Pac. 504. In North Dakota when a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller, waives his lien to the ex-

tent of the sum payable under the contract, but a transfer of such contract in trust to pay debts and return the surplus is not a waiver of the lien. Rev. Code 1905, § 6282.

<sup>54</sup> *Carlton v. Buckner*, 28 Ark. 66; *Crawley v. Riggs*, 24 Ark. 563; *Plowman v. Riddle*, 14 Ala. 169, 48 Am. Dec. 92; *Hallock v. Smith*, 3 Barb. (N. Y.) 267, 272; *Levy v. Rudolph*, 22 Ky. L. 258, 56 S. W. 988.

enforce the lien, and, as the owner of the note, the vendor may enforce it as though the assignment had never been made.<sup>56</sup> In such case the bill to enforce the lien should allege the special facts which show that the vendor is remitted to his former right to enforce the lien.<sup>57</sup>

**§ 1097. Effect of indorsement of several notes.**—In case there are several notes for purchase-money, and a part of these are transferred by indorsement, leaving a part in the vendor's hands, the indorsement of each is pro tanto an assignment of the vendor's lien, and entitles the assignee to payment out of the proceeds of the sale of the land, in priority to the notes retained by the vendor, without regard to the time of their maturity; but the vendor is entitled to the surplus remaining after payment of the assigned notes in full; and he may assert his right to it by petition filed in the cause while the fund is in court.<sup>58</sup> The same principle applies in case of the assignment of one or more mortgage notes, leaving other notes secured by the same mortgage in the mortgagee's hands.<sup>59</sup>

If several notes which constitute a vendor's lien upon land are assigned at different times to different persons, priority of assignment gives no priority of right; but the lien secures the several notes pro rata,<sup>60</sup> as in the case of successive assignments of notes secured by a mortgage.<sup>61</sup>

**§ 1098. Lien not lost by changing the evidence of the debt.**—The lien is not lost by a mere change in the form of

<sup>56</sup> Kelly v. Payne, 18 Ala. 371; Preston v. Ellington, 74 Ala. 133. And see Turner v. Horner, 29 Ark. 440; Bernays v. Feild, 29 Ark. 218; White v. Williams, 1 Paige (N. Y.) 502; Hallock v. Smith, 3 Barb. (N. Y.) 267; Lindsey v. Bates, 42 Miss. 397.

<sup>57</sup> Young v. Hawkins, 74 Ala. 370.

<sup>58</sup> Preston v. Ellington, 74 Ala.

133; Martin v. Turner, (Ky. App.) 115 S. W. 833; Nashville Trust Co. v. Smythe, 94 Tenn. 513, 29 S. W. 903, 27 L. R. A. 663, 45 Am. St. 748.

<sup>59</sup> Jones on Mortgages, (6th ed.) § 822.

<sup>60</sup> Wooters v. Hollingsworth, 58 Tex. 371; Salmon v. Downs, 55 Tex. 243.

<sup>61</sup> Jones on Mortgages, (6th ed), § 822.

the debt, as, for instance, by taking of a new note.<sup>62</sup> And it is held by some authorities that the vendee's giving of his note at the vendor's request to a third person, to whom he was indebted, or to whom he gives the amount, does not affect it so long as the original consideration remains;<sup>63</sup> and that it is immaterial to whom the acknowledgment of the debt is made, when this is done at the request of the vendor.<sup>64</sup>

Even the giving of a new note or bond to the vendor by a purchaser from the first vendee, if expressed to be for the purchase-money of the land, is regarded as a mere substitute for the original note or bond, and not an independent security;<sup>65</sup> even though the new note be executed not only by the purchaser, but also by a surety.<sup>66</sup>

But if the original note or bond be cancelled, and a new one given to another person, the lien is lost;<sup>67</sup> and a verbal agreement by all parties that the lien should be retained does not save it. And so, if there be a compromise and set-

<sup>62</sup> *Cordova v. Hood*, 17 Wall. (U. S.) 1, 21 L. ed. 587; *Aldridge v. Dunn*, 7 Blackf. (Ind.) 249, 41 Am. Dec. 224; *Reeder v. Nay*, 95 Ind. 164; *Dibrell v. Smith*, 40 Tex. 447; *Brooks v. Young*, 60 Tex., 32; *Joiner v. Perkins*, 59 Tex. 300; *Hicks v. Morris*, 57 Tex. 658; *Flanagan v. Cushman*, 48 Tex. 241; *Robertson v. Guerin*, 50 Tex. 317; *Johnson v. Townsend*, 77 Tex. 639, 14 S. W. 233; *Walker v. Struve*, 70 Ala. 167; *United States B. & Loan Assn. v. Thompson*, 19 Ky. L. 424, 41 S. W. 5.

<sup>63</sup> *French v. Dickey*, 3 Tenn. Ch. 302; *Neese v. Riley*, 77 Tex. 348, 14 S. W. 65; *Hicks v. Morris*, 57 Tex. 658; *Wynn v. Flannegan*, 25 Tex. 778; *Robertson v. Guerin*, 50

Tex. 317; *Ellis v. Singletary*, 45 Tex. 27; *Acton v. Waddington*, 46 N. J. Eq. 16, 18 Atl. 356, affd. 46 N. J. Eq. 611, 22 Atl. 56.

<sup>64</sup> *Hamilton v. Gilbert*, 2 Heisk. (Tenn.) 680; *Nichols v. Glover*, 41 Ind. 24.

<sup>65</sup> *Boyd v. Jackson*, 82 Ind. 525, 526; *Cummings v. Moore*, 61 Miss. 184; *Pouns v. Gartman*, 29 Miss. 133; *Cox v. Romine*, 9 Grat. (Va.) 27.

<sup>66</sup> *Ellis v. Singletary*, 45 Tex. 27, 37; *Slaughter v. Owens*, 60 Tex. 668.

<sup>67</sup> *Hurlock v. Smith*, 39 Md. 436; *Phelps v. Conover*, 25 Ill. 309, 314. So held, also, in Texas, when additional security was given. *Jackson v. Hill*, 39 Tex. 493.

tlement of the original notes, and a complete novation of the contract, the lien is lost.<sup>68</sup>

The lien is not lost by obtaining a judgment for the purchase-money, or upon a note for the amount of such purchase-money.<sup>69</sup> At most, the obtaining of judgment can only be regarded as a circumstance bearing upon the question whether there was a waiver or not.<sup>70</sup> But the lien is waived by obtaining a judgment for the purchase-money together with a claim for the price of personal property, if the two claims are so mingled together as to render it impossible to determine how much of the judgment represents the price of the land and how much the value of the personal property.<sup>71</sup> The lien may also be waived by taking a new note for a balance due on the original notes, and including also other indebtedness.<sup>72</sup>

Whether a new note or bond is to operate as payment depends wholly upon the intent of the parties; and, when so intended, the lien will fall with the note or bond surrendered.<sup>73</sup>

If the lien debt be once paid, whether by a new obligation or in any other manner, the lien cannot afterwards be revived to the prejudice of third persons by any agreement between the debtor and creditor that the lien shall be considered as still existing.<sup>74</sup>

A sale of the land upon execution, under a judgment for

<sup>68</sup> *Williams v. McCarty*, 74 Ala. 295, 69 Ala. 174; *Sims v. Sampey*, 64 Ala. 230, 68 Ala. 588; *Cummings v. Moore*, 61 Miss. 184.

<sup>69</sup> *Burns v. Griffin*, 24 Grant's Ch. (U. C.) 451; *In re Perdue*, 2 N. Bank R. 183; *Ball v. Hill*, 48 Tex. 634; *Graves v. Coutant*, 31 N. J. Eq. 763; *Waldrom v. Zacharie*, 54 Tex. 503.

<sup>70</sup> *Dubois v. Hull*, 43 Barb. (N. Y.) 26.

<sup>71</sup> *Clark v. Stilson*, 36 Mich. 482.

<sup>72</sup> *Wasson v. Davis*, 34 Tex. 159, 165.

<sup>73</sup> *Murray v. Witte*, 16 S. Car. 504; *Adger v. Pringle*, 11 S. Car. 527.

<sup>74</sup> *Exchange etc., Bank v. Bradley*, 15 Lea (Tenn.) 279.



the debt, is inconsistent with any claim of lien upon the land, and negatives or waives such a claim.<sup>75</sup>

**§ 1099. Enforcement of lien when debt is barred.**—When the debt is barred, the vendor's lien cannot be enforced. But the remedy continues so long as an action can be maintained for the recovery of the purchase-money.<sup>76</sup> It exists solely in the debt, and is a mere remedy or security for this; the lien is barred by the same lapse of time that bars the debt.<sup>77</sup> Moreover this lien "has no existence until it has been declared to exist by a court of equity;"<sup>78</sup> it is not an estate in the land, but is a charge or right which has its inception only when the bill to enforce it is filed.<sup>79</sup> It is in fact only a money demand which may be enforced against the land in the hands of the vendee, or any one else having proper notice of its existence;<sup>80</sup> and if the debt is gone before the lien is established, there can be nothing to establish the lien for. It cannot exist distinct from the debt.<sup>81</sup> The lien may be enforced for the first note when that becomes due.<sup>82</sup> In an action for specific performance it is

<sup>75</sup> *Clark v. Stilson*, 36 Mich. 482; *Youse v. McCreary*, 2 Blackf. (Ind.) 243; *Nutter v. Fouch*, 86 Ind. 451; *Dickason v. Eby*, 73 Mo. 133; *Outton v. Mitchell*, 4 Bibb (Ky.) 239; *Grubb v. Crane*, 5 Ill. 153; *McArthur v. Porter*, 1 Ohio 99.

<sup>76</sup> *Acton v. Waddington*, 46 N. J. Eq. 16, 18 Atl. 356, affd. 46 N. J. Eq. 611, 22 Atl. 56; *Graves v. Coutant*, 31 N. J. Eq. 763.

<sup>77</sup> *Trotter v. Erwin*, 27 Miss. 772; *Ball v. Hill*, 48 Tex. 634; *Pitschki v. Anderson*, 49 Tex. 1; *Borst v. Corey*, 15 N. Y. 505; *White v. Blakemore*, 8 Lea (Tenn.) 49, per Cooper, J.; *Rindge v. Oliphint*, 62 Tex. 682; *Cassell v. Lowry*, 164 Ind. 1, 72 N. E. 640. *Contra*, *Bizzell v. Nix*, 60 Ala. 281,

31 Am. Rep. 38, *Manning, J.*, dissenting; *Flinn v. Barber*, 61 Ala. 530; *Moreton v. Harrison*, 1 Bland (Md.) 491; *Linthicum v. Tapscott*, 28 Ark. 267; *Waddell v. Carlock*, 41 Ark. 523; *Stephens v. Shannon*, 43 Ark. 464; *Ilett v. Collins*, 103 Ill. 74.

<sup>78</sup> *Linthicum v. Tapscott*, 28 Ark. 267; *Fain v. Inman*, 6 Heisk. (Tenn.) 5, 19 Am. Rep. 577; *Jones v. Ragland*, 4 Lea (Tenn.) 539; *Stephens v. Shannon*, 43 Ark. 464.

<sup>79</sup> *Stephens v. Shannon*, 43 Ark. 464; *Waddell v. Carlock*, 41 Ark. 523.

<sup>80</sup> *Messmore v. Stephens*, 83 Ind. 524; *Martin v. Cauble*, 72 Ind. 67; *Nutter v. Fouch*, 86 Ind. 451.

<sup>81</sup> *Borst v. Corey*, 15 N. Y. 505.

<sup>82</sup> *Furr v. Morgan*, 55 Miss. 389.

held in Michigan that a vendor can have a lien declared for unpaid purchase-money.<sup>82a</sup>

If a judgment be obtained on the original note, the lien continues so long as the judgment remains as subsisting and valid claim against the debtor.<sup>83</sup>

But the rule is otherwise in Alabama, Maryland, Virginia and Kentucky, where, though the debt be barred, the lien continues like a mortgage lien, for twenty years.<sup>84</sup> The exceptional decisions in these states seem to proceed upon the idea that the vendor's lien is a trust in the land. The debtor's discharge in bankruptcy does not affect the right to enforce the lien.<sup>85</sup>

Great delay in enforcing the lien, though this be less than twenty years, is a circumstance to be considered in determining whether the purchase-money has in fact been paid.<sup>86</sup>

A vendor is barred by the continuous possession of the vendee for twenty years, or such other length of time as would bar a mortgagee of his right to foreclose a mortgage.<sup>87</sup>

The only remedy for enforcing the lien is a suit in equity,

<sup>82a</sup> *Corning v. Loomis*, 111 Mich. 23, 69 N. W. 85.

<sup>83</sup> *Slaughter v. Owens*, 60 Tex. 668; *Ball v. Hill*, 48 Tex. 634; *Beck v. Tarrant*, 61 Tex. 402.

<sup>84</sup> *Chapman v. Lee*, 64 Ala. 483; *Relfe v. Relfe*, 34 Ala. 500, 73 Am. Dec. 467; *Shorter v. Frazer*, 64 Ala. 74; *Bizzell v. Nix*, 60 Ala. 281, 31 Am. Rep. 38; *Ware v. Curry*, 67 Ala. 274; *Lingan v. Henderson*, 1 Bland (Va.) 236; *Moreton v. Harrison*, 1 Bland (Va.) 491; *Magruder v. Peter*, 11 Gill & J. (Md.) 217; *Baltimore & Ohio R. Co. v. Trimble*, 51 Md. 99; *Tunstall v. Withers*, 86 Va. 892, 11 S. E. 565; *Hanna v. Wilson*, 3 Grat. (Va.) 243, 46 Am. Dec. 190; *Coles v. Withers*, 33 Grat. (Va.) 186. In Kentucky, fifteen years. *Lucy v. Hop-*

*kins*, 11 Ky. L. 907, 13 S. W. 518; *Hamilton v. Wright*, 27 Ky. L. 1144, 87 S. W. 1093. See also, *Wise v. Wolfe*, 120 Ky. 263, 27 Ky. L. 610, 85 S. W. 1191.

<sup>85</sup> *Barnett v. Salyers*, 11 Ky. L. 465, 12 S. W. 303.

<sup>86</sup> *May v. Wilkinson*, 76 Ala. 543; *Hunstall v. Withers*, 86 Va. 892, 11 S. E. 565. In Missouri, the vendor must enforce his lien within ten years after his cause of action accrued. The provisions of the statute of limitations concerning trusts growing out of the realty applies. *Zoll v. Carnahan*, 83 Mo. 35; *Hockaday v. Lawther*, 17 Mo. App. 636.

<sup>87</sup> *Thompson v. Thompson*, 3 Lea (Tenn.) 126.

inasmuch as the lien is altogether a thing of equity, and does not exist in law. If a personal obligation has been taken for the debt, an action at law upon this cannot be brought at the same time with a suit in equity to enforce the lien. If the claim be not satisfied by one remedy, the other may be resorted to.<sup>88</sup>

**§ 1100. Must the remedy at law be exhausted before bill in equity can be filed?**—Whether the remedy at law must first be exhausted, or shown not to exist, before a bill in equity can be filed to enforce the lien, is a question upon which the courts are not agreed. On the one hand it is held that the purchase-money is a debt payable out of the purchaser's personal estate, and the equitable lien exists for only so much of the debt as the personal estate is sufficient to answer. "The vendor," says Sugden,<sup>89</sup> "has not an original charge on the estate, but only an equity to resort to it, in case the personal estate prove deficient." If by a proceeding at law he can recover the debt, equity will not interfere to enforce the lien.<sup>90</sup>

<sup>88</sup> *Barker v. Smark*, 3 Beav. 64.

<sup>89</sup> *Vendors & Purchasers*, 395. To same effect, *Gilman v. Brown*, 1 Mason (U. S.) 191, Fed. Cas. 5441, affd. 4 Wheat. (U. S.) 255, 4 L. ed. 564; *Martin v. Cauble*, 72 Ind. 67.

<sup>90</sup> *Pratt v. Vanwyck*, 6 Gill & J. (Md.) 495; *Richardson v. Stillinger*, 12 Gill & J. (Md.) 477; *Ridgeway v. Toram*, 2 Md. Ch. 303; *Ford v. Smith*, 1 McArthur (D. C.) 592; *Eyler v. Crabbs*, 2 Md. 137, 56 Am. Dec. 711; *Roper v. McCook*, 7 Ala. 318; *Bryant v. Stephens*, 58 Ala. 636; *Botdorf v. Conner*, 1 Blackf. (Ind.) 287; *Russell v. Todd*, 7 Blackf. (Ind.) 239. But under the new practice in Indiana the vendor may seek his legal remedy upon his money demand, and in the

same action ask for the enforcement of his lien. *Nutter v. Fouch*, 86 Ind. 451. When the action is to enforce the lien against the widow and heirs of the vendee, unless the complaint avers the insufficiency of the personalty to pay the debt, the judgment should not direct a sale of the land until the personalty is first exhausted. *Chandler v. Chandler*, 78 Ind. 417. But in such an action the judgment should not direct a sale of the land in the first instance, unless the complaint alleges and the evidence proves that the vendee has no other property subject to execution; but the judgment should be for the amount of the debt established, with a proper entry that it is for the purchase-money, and that the land

A different rule prevails in several states, where the vendee may enforce his lien in the first instance, without having taken any steps to collect the debt at law.<sup>91</sup>

Under the modern practice, especially in those states which have adopted the code practice, the vendor may at one and the same time seek his remedy for the debt, and his equitable remedy for the enforcement of his lien against the land.<sup>92</sup>

The fact that the holder of a note given for the purchase-money has procured its allowance against the estate of the deceased vendee, is no obstacle to the enforcement of a vendor's lien against the land itself in the hands of a devisee.<sup>93</sup>

In some states a different doctrine of the nature of the lien prevails under which the lien is enlarged, and made

is subject to execution to satisfy the same in the event that other property of the vendee, subject to execution, cannot be found. *Nutter v. Fouch*, 86 Ind. 451; *Evans v. Feeny*, 81 Ind. 532. It is not necessary to the validity of the complaint that it should contain an allegation of the want of other property. *Stelzer v. La Rose*, 79 Ind. 435; *Evans v. Feeny*, 81 Ind. 532; *Scott v. Crawford*, 12 Ind. 410; *Bowen v. Fisher*, 14 Ind. 104; *Stevens v. Hurt*, 17 Ind. 141; *Citizens' State Bank v. Adams*, 91 Ind. 280.

In Maryland, it is now provided by statute that the Court of Chancery may decree a sale to enforce a vendor's lien upon any estate in lands, whether legal or equitable, although the complainant may have a perfect remedy at law for the money for which the lien is claimed. *Pub. Gen. Laws* 1904, p. 444, § 208.

<sup>91</sup> *High v. Batte*, 10 Yerg. (Tenn.) 186; *Pratt v. Clark*, 57 Mo. 189; *Richardson v. Baker*, 5 J. J. Marsh. (Ky.) 323; *Stewart v. Caldwell*, 54 Mo. 536; *Bradley v. Bosley*, 1 Barb. Ch. (N. Y.) 125; *Dubois v. Hull*, 43 Barb. (N. Y.) 26; *Owen v. Moore*, 14 Ala. 640; *Campbell v. Roach*, 45 Ala. 667; *Vail v. Drexel*, 9 Bradw. (Ill.) 439; *Mayes v. Hendry*, 33 Ark. 240; *Burgess v. Fairbanks*, 83 Cal. 215, 23 Pac. 292. In Arkansas when a purchaser defaults in payment the vendor may sue at law to recover the debt, or sue for possession and collect the rents and profits or proceed by bill to foreclose the purchaser's equity of redemption. *Higgs v. Smith*, 100 Ark. 543, 140 S. W. 990.

<sup>92</sup> *Nutter v. Fouch*, 86 Ind. 451; *Chapman v. Lee*, 64 Ala. 483.

<sup>93</sup> *Edmonson v. Phillips*, 73 Mo. 57.

more like that which exists under the civil law. It is declared to arise and exist at the time of the sale, and to result from the sale on credit without other security, regardless of the subsequent inability of the purchaser to pay, or of failure to compel him to do so by suit at law.<sup>94</sup>

§ 1101. **Enforcement of lien by parties to bill.**—The vendor's lien upon the death of the vendor follows the debt, and may be enforced by the person entitled to enforce the debt itself.<sup>95</sup> A specific bequest of the claim for the purchase-money carries the lien with it.<sup>96</sup> Ordinarily the right to enforce the lien after the death of the vendor belongs to the personal representative.<sup>97</sup> When lands are sold by an administrator under an order of court, the right to enforce the lien for the purchase-money ordinarily belongs to him;<sup>98</sup> but when the sale is made for the purpose of division among the heirs, who are the beneficiaries, and the existence of debts or other necessity for an administrator is not shown, the heirs may maintain a bill in their own names to enforce the lien.<sup>99</sup>

In a bill by the assignee of a note or bond given for purchase-money, the assignor is not a necessary party, and the assignee need not state when the assignment was made.<sup>1</sup>

If the vendor has transferred a part of the notes taken for purchase-money, the holders should be made parties to the vendor's suit to foreclose the lien, in a state where the assignee can enforce the lien, else he will not be bound by the judgment.<sup>2</sup> To a bill by a transferee of a note for the

<sup>94</sup> *White v. Downs*, 40 Tex. 225.

<sup>95</sup> 2 Story Eq. Jur., (13th ed.) § 1227.

<sup>96</sup> *Tiernan v. Beam*, 2 Ohio 383, 386, 15 Am. Dec. 557; *Lavender v. Abbott*, 30 Ark. 172.

<sup>97</sup> 2 Story Eq. Jur., (13th ed.) § 789; *Dayhuff v. Dayhuff*, 81 Ill. 499; *Hubbard v. Clark*, (N. J.) 7 Atl. 26.

<sup>98</sup> *Knight v. Blanton*, 51 Ala. 333.

<sup>99</sup> *Knight v. Blanton*, 51 Ala. 333.

<sup>1</sup> *Kirk v. Sheets*, 90 Ala. 504, 7 So. 736.

<sup>2</sup> *Glaze v. Watson*, 55 Tex. 563; *Young v. Hawkins*, 74 Ala. 370; *Miller v. Morrison*, 47 W. Va. 664, 35 S. E. 905; *Benson v. Snyder*, 42 W. Va. 223, 24 S. E. 880; *Marshall v. Hall*, 42 W. Va. 641, 26 S. E. 300;

purchase money to enforce the lien, the vendor's wife, who did not join in the deed to release her dower, is not a proper party, when the bill recognizes her inchoate right of dower, and seeks no relief against her. She has in such case no interest in the suit.<sup>3</sup>

The administrator of a deceased vendee, having no interest in the land, is not generally a necessary party to a suit to enforce the lien,<sup>4</sup> though a proper party.<sup>5</sup> His heirs at law or devisees are necessary parties.<sup>6</sup> His widow, having a contingent interest in the surplus, is a proper party.<sup>7</sup> But after a sale of the land by the vendee's administrator in his official capacity to one who had notice of the lien, who is made a party to the bill, it is not necessary to join the heirs.<sup>8</sup>

Subsequent purchasers, mortgagees, and other holders of liens in the property should be made parties defendant to the suit, or they will not be bound.<sup>9</sup>

Smith v. Parsons, 33 W. Va. 644, 11 S. E. 68; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553; Paxton v. Paxton, 38 W. Va. 616, 18 S. E. 765; Depue v. Sargent, 21 W. Va. 326; Green v. Jarvis, (Tenn.) 42 S. W. 165; Foster v. Lyons, 19 Ky. L. 1906, 44 S. W. 625; McClaugherty v. Croft, 43 W. Va. 270, 27 S. E. 246; Garrett v. Parker, (Tex. Civ. App.) 39 S. W. 147.

<sup>3</sup> Sims v. Nat. Commercial Bank, 73 Ala. 248; Mutual Building & Loan Ass'n v. Wyeth, 105 Ala. 635, 17 So. 45.

<sup>4</sup> Edwards v. Edwards, 5 Heisk. (Tenn.) 123; McKay v. Green, 3 Johns. Ch. (N. Y.) 56; Ballard v. Carter, 71 Tex. 161, 9 S. W. 92.

<sup>5</sup> Lord v. Wilcox, 99 Ind. 491; Chapman v. Peebles, 84 Ala. 283, 4 So. 273.

<sup>6</sup> Jackson v. Hill, 39 Tex. 493; Owen v. Bankhead, 76 Ala. 143.

And see Converse v. Sorley, 39 Tex. 515. In some states, however, the administrator is regarded as a necessary party; for there may be a deficiency, in which case the administrator is liable to a judgment; or there may be a surplus, in which case the administrator is entitled to receive it for administration. Moore v. Alexander, 81 Ala. 509, 8 So. 199.

<sup>7</sup> Edwards v. Edwards, 5 Heisk. (Tenn.) 123. When a vendor enforces his lien by suit to which the widow of the vendee is not a party and buys the property at sheriff's sale, after the vendee's death, the widow cannot claim any interest therein. Schaefer v. Purviance, 160 Ind. 63, 66 N. E. 154.

<sup>8</sup> Thornton v. Neal, 49 Ala. 590.

<sup>9</sup> Carter v. Attoaway, 46 Tex. 108; Turner v. Phelps, 46 Tex. 251; Davis v. Rankin, 50 Tex. 279; Rob-

The husband of a vendee, to whom the land has been transferred, creating in her a statutory separate estate under the laws of Alabama, is a proper party defendant to a bill to enforce the lien, on account of the interest which he, as husband and trustee, has in the rents and income of the land.<sup>10</sup>

If the vendor's lien is upon an undivided interest of a tenant in common in land, a person holding a mortgage on the interest of the other tenant in common is neither a necessary nor a proper party to a bill to enforce the lien.<sup>11</sup>

A mere tenant or agent in possession of the land, but having no interest in it, is not a proper defendant.<sup>12</sup>

The original vendee, who has parted with all his interest in the land, is not an indispensable party.<sup>13</sup>

A person claiming a title paramount to the lien cannot be made a party to the bill for the purpose of litigating his title in the foreclosure suit. The rule is analogous to that which prevails in relation to adverse claimants in suits to foreclose mortgages.<sup>14</sup> But this rule is confined to such adverse claims of title as were derived from the vendor or vendee anterior to the purchase, or from a stranger either prior or subsequent thereto. Therefore a purchaser at a tax-sale, made after the right to a vendor's lien accrued, may be properly joined as a party defendant.<sup>15</sup>

*inson v. Black*, 56 Tex. 215; *Foster v. Powers*, 64 Tex. 247; *Andrews v. Key*, 77 Tex. 35, 13 S. W. 640; *Pierce v. Moreman*, 84 Tex. 596, 20 S. W. 821. Otherwise in West Virginia: *Moreland v. Metz*, 24 W. Va. 119, 49 Am. Rep. 246; *Gordon v. Johnson*, 186 Ill. 18, 57 N. E. 790, revg. 79 Ill. App. 423; *Whitaker v. Big Sandy Lumber Co.*, 46 S. W. 263, revd. 29 Tex. 216, 47 S. W. 519; *Scharff v. Whitaker*, 92 Tex. 216, 47 S. W. 519; *Reynolds v. Lawrence*, 147 Ala. 216, 40 So. 576, 119 Am. St. 78.

<sup>10</sup> *Sims v. Nat. Commercial Bank*, 73 Ala. 248.

<sup>11</sup> *Dugge v. Stumpe*, 73 Mo. 513.

<sup>12</sup> *Milner v. Ramsey*, 48 Ala. 287; *Reed v. Gregory*, 46 Miss. 740.

<sup>13</sup> *Batre x. Auze*, 5 Ala. 173; *Wilkinson v. May*, 69 Ala. 33.

<sup>14</sup> *Randle v. Boyd*, 73 Ala. 282, 283; *Fisher v. Abney*, 69 Tex. 416, 9 S. W. 321; *Jones on Mortgages*, (6th ed.) § 1440

<sup>15</sup> *Randle v. Boyd*, 73 Ala. 282, 283; *Earle v. Marx*, 80 Tex. 39, 15 S. W. 595. See *Jones on Mortgages*, (6th ed.) §§ 1440, 1445.

§ 1101a. **Vesting of lien on death of vendor in executor.**—Upon the death of a vendor who has taken a note for the purchase-money, the title to it vests in his executor or administrator, who may indorse and deliver it to whom he may please, or he may bring suit upon it anywhere in the world without taking out letters of administration in the jurisdiction wherein the debtor resides. Though the vendor resided at the time of his death in a different state from that in which the land is situated, his executor appointed in the state of his residence may sue to assert a vendor's lien in the state where the land is situated, without procuring letters testamentary there. Whether he indorses it, or does not, its proceeds or the note itself is home assets, subject exclusively to home distribution under the law of the domicile.<sup>16</sup>

§ 1102. **The bill.**—A bill to enforce a vendor's lien should be brought in the county where the land is situated, though the defendant is not a resident of that county,<sup>17</sup> and should contain a sufficient description of the land upon which it is sought to enforce it, to enable the court to render an effectual decree of sale.<sup>18</sup> It should allege a debt due for the purchase-money, in whole or in part, of the real estate described, and that such debt remains due and unpaid.<sup>19</sup> It

<sup>16</sup> *Giddings v. Green*, 48 Fed. 489.

<sup>17</sup> *Joiner v. Perkins*, 59 Tex. 300; *Mackey v. Craig*, 144 Ind. 203, 43 N. E. 6.

<sup>18</sup> *Long v. Pace*, 42 Ala. 495; *Williams v. Roe*, 59 Ala. 629; *Alford v. Wilson*, 62 Tex. 484; *Daugherty v. Eastburn*, 74 Tex. 68, 11 S. W. 1053; *Daniel v. Watson*, 72 Tex. 642, 10 S. W. 737; *Thompson v. Sheppard*, 85 Ala. 611, 5 So. 334; *Brown v. McKee*, 80 Tex. 594, 16 S. W. 435; *Watters v. Parker* (Tex.), 19 S. W. 1022. As to effect of including land excepted from the conveyance, see *Nass v. Chad-*

*wick*, 70 Tex. 157, 7 S. W. 828. A description which with reasonable certainty furnishes the means of identification is sufficient. *Neely v. Goodwin*, 91 Ala. 604, 8 So. 344; *Grimes v. Grimes*, 141 Ind. 480, 40 N. E. 912.

<sup>19</sup> *Lord v. Wilcox*, 99 Ind. 491; *Kelly v. Karsner*, 81 Ala. 500, 2 So. 164. Though the bill alleges that the purchase-money was never paid, if the deed is annexed or made part of the bill, and the deed recites the payment of the purchase-money, the recitals in the deed are sufficient evidence of



should allege a conveyance of the land.<sup>20</sup> It should allege the contract of sale under which the conveyance was made with reasonable certainty, the consideration to be paid, and the time when payment was to be made; and these should be clearly proved.<sup>21</sup> The bill cannot be maintained where the allegation is that a balance of the purchase-price was to be paid in "five or six years," and the evidence tends to show that it was to be paid in six or seven years, and the terms of the contract were shown only by casual admissions of the purchaser, and were unreasonable in themselves.<sup>22</sup>

§ 1102a. **Defenses.**—The vendee cannot allege defects in the title as a defense to the bill unless he has been evicted. He must look to his covenants.<sup>23</sup> In case, however, the sale was induced by fraud, and the vendor is insolvent, the vendee may by cross-bill set up the fraud;<sup>24</sup> and in case there was a covenant of seizin by one who had no title, a right of action arises as soon as the covenant was made,

payment, in the absence of proof to the contrary. *Agnew v. McGill*, 96 Ala. 496, 11 So. 537.

<sup>20</sup> *Welch v. Hicks*, 27 Ark. 292. An allegation that the conveyance was at the request of the purchaser made to a third person, and that the latter knew all the facts, is sufficient to warrant the enforcement of the vendor's lien against him.

<sup>21</sup> *Mowrey v. Vandling*, 9 Mich. 39; *Dunton v. Outhouse*, 64 Mich. 419, 31 N. W. 411; *Bullock v. Graham*, 87 Ky. 120, 7 S. W. 889.

<sup>22</sup> *Waterfield v. Wilber*, 64 Mich. 642, 31 N. W. 553.

<sup>23</sup> *Leird v. Abernathy*, 10 Heisk. (Tenn.) 626; *Cohen v. Woollard*, 2 Tenn. Ch. 686; *Burks v. Burks*, 12

Ky. L. 552, 14 S. W. 686, 953; *Cooper v. Singleton*, 19 Tex. 260, 70 Am. Dec. 333; *Carson v. Kelley*, 57 Tex. 379; *Fagan v. McWhirter*, 71 Tex. 567, 9 S. W. 677; *Earle v. Marx*, 80 Tex. 39, 15 S. W. 595. In Texas it is held that it is a defense to the suit that the vendor has no valid title to the land. *Houston v. Dickson*, 66 Tex. 79, 1 S. W. 375; *Palmer v. Chandler*, 47 Tex. 332; *Haralson v. Langford*, 66 Tex. 111, 18 S. W. 339; *Adams v. Jordan* (Tex. Civ. App.), 136 S. W. 499; *Williams v. Sax* (Tenn. Ch. App.), 43 S. W. 868.

<sup>24</sup> *Lewis v. Cranmer*, 36 N. J. Eq. 124. Or he may set it up by answer. *Fleming v. Kerns*, 37 W. Va. 494, 16 S. E. 600.

and no eviction is necessary to enable the vendee to avail himself of this defence.<sup>25</sup>

A bill to enforce a lien against a purchaser holding the vendor's deed with warranty is devoid of equity when its averments show that the purchaser has suffered damages by reason of an eviction under an outstanding paramount title, in an amount exceeding the amount of the unpaid purchase-money.<sup>26</sup>

When some of the notes secured by it are not due, a sale can be decreed only of so much of the land as will suffice to pay the debt then accrued and the costs of suit, leaving the other notes to stand as a lien upon the remainder of the land.<sup>27</sup> It is erroneous to decree a sale subject to the lien of the remaining notes.

A deficiency in quantity furnishes no ground of defense. But in some states, if the purchase was induced by a misrepresentation as to quantity or as to the boundary, the purchaser may rescind the contract, or at his option have an abatement in the purchase-price; and this defense is equally available to the purchaser whether the seller knew or did not know the representation he made was false. But when a purchaser defends on the ground of misrepresentations by the vendor, the burden of proof is on defendant, and the misrepresentations are not established where there are only two witnesses, and their testimony is diametrically opposed.<sup>28</sup>

The defendant may set off any legal demands existing in his favor against the complainant at the time the suit is

<sup>25</sup> *Leird v. Abernathy*, 10 Heisk. (Tenn.) 626; *Blewitt v. Greene*, 57 Tex. Civ. App. 588, 122 S. W. 914.

<sup>26</sup> *Kingsbury v. Milner*, 69 Ala. 502.

<sup>27</sup> *Emison v. Risque*, 9 Bush (Ky.) 24; *Burton v. McKinney*, 6 Bush (Ky.) 428. And see *Codwise*

*v. Taylor*, 4 Sneed. (Ky.) 346; *Green v. Jarvis* (Tenn.), 42 S. W. 165. See post, §§ 1500-1505.

<sup>28</sup> *Joseph v. Seward*, 91 Ala. 597, 8 So. 682; *Fleming v. Kerns*, 37 W. Va. 494, 16 S. E. 600; *Wilson v. Moore*, (Tex.) 85 S. W. 25; *Harris v. Berry*, (Tex. Civ. App.) 123 S. W. 1148.

begun on which he might maintain an action in his own name.<sup>29</sup>

§ 1102b. **The decree.**—Equity will enforce a lien for purchase-money, but it will not vacate a transfer because the purchase-money has not been paid. The action to enforce the lien is in affirmance of the transfer, and the decree in such an action orders the property to be sold, or so much of it as may be necessary to discharge the lien.<sup>30</sup>

A vendor having liens upon separate parcels of land, sold to the same vendee at different times, cannot have a decree for the aggregate amount of the liens, and for the sale of all the land to satisfy it; but the decree must be for the sale of each tract for the amount due upon it specifically. The lien is distinct for each parcel.<sup>31</sup>

The decree may, as in case of a decree of sale in a suit to foreclose a mortgage, allow a time for redemption before the sale; and if by statute a time for redemption after sale is allowed in case of a sale under foreclosure of a vendor's lien, the decree should not direct a delivery of the deed till such time has passed.<sup>32</sup>

<sup>29</sup> Weaver v. Brown, 87 Ala. 533, 6 So. 354.

<sup>30</sup> Perkins v. U. S. Electric Light Co. 16 Fed. 513, per Wallace, J.; Portsmouth Sav. Bank v. Yeiser, 81 Nebr. 343, 116 N. W. 38.

<sup>31</sup> Edwards v. Edwards, 5 Heisk. (Tenn.) 123.

<sup>32</sup> Webber v. Mackey, 4 Bradw. (Ill.) 458; Wade v. Greenwood, 2 Rob. (Va.) 474, 40 Am. Dec. 759. In Tennessee it is provided by statute that the vendor of land, as each payment of the purchase-money becomes due, may bring his suit to enforce his lien as vendor, and may have so much of the land sold as may be necessary to pay

the money then due, and that the suit shall be retained in court, and, as each of the payments becomes due, the court shall direct a sufficient quantity of the land to be sold to satisfy the same. If the land can not be divided without great injury to the parties, or if the vendee so direct, the court shall order it all to be sold at one time, making the payments to fall due at such times as the purchaser has agreed to pay the vendor; and the money, as collected, shall be applied to the payment of the instalments due the vendor. Whether the land is all sold, or is sold in parcels, the defendant shall

After a foreclosure sale to enforce a vendor's lien, the purchaser may have a writ of assistance to enable him to obtain possession, just as a purchaser under a sale to foreclose a mortgage may have such a writ.<sup>33</sup>

**§ 1103. Judgment for balance of debt.**—A judgment decreeing a sale of land to satisfy the lien may provide that an execution shall issue for the balance of the debt not satisfied by the sale, if such a practice prevails in other similar cases, such, for instance, as in case of a sale under a mortgage.<sup>34</sup> But a personal judgment will not be entered against the vendee's assignee, unless he has entered into a valid and binding agreement to pay the debt.<sup>35</sup> The allegations of the bill should be framed to show a personal liability, and should demand a personal judgment.<sup>36</sup>

Even if the plaintiff proves not to be entitled to a judgment in rem, he is usually entitled to a judgment in personam, if the allegations and the evidence are sufficient to authorize such a judgment.<sup>37</sup> In some states a judgment for any deficiency there may be after a sale cannot be awarded in the first instance, but the court must ascertain the deficiency after the sale, and then order execution therefor.<sup>38</sup>

The jurisdiction of a court of equity having once attached under a bill properly filed to enforce a vendor's lien, the court will make its jurisdiction effectual for the purposes of complete relief by removing any impediment to the enforcement of the lien, such as a cloud on the title.<sup>39</sup>

have the right of redemption, as in other cases. Code 1896, §§ 5326-5329. See Supp. to Code, §§ 5326-5329, for decisions under same.

<sup>33</sup> Wiley v. Carlisle, 93 Ala. 237, 9 So. 288.

<sup>34</sup> Alford v. Wilson, 62 Tex. 484; Fisher v. Brown, 24 W. Va. 713.

<sup>35</sup> Fisher v. Brown, 24 W. Va.

713; Bates v. Childers, 4 N. Mex. 347, 20 Pac. 164.

<sup>36</sup> Bullock v. Graham, 87 Ky. 120, 9 Ky. L. 1004, 7 S. W. 889.

<sup>37</sup> Bullock v. Graham, 87 Ky. 120, 9 Ky. L. 1004, 7 S. W. 889.

<sup>38</sup> Baker v. Young, 90 Ala. 426, 8 So. 59; Tompkins v. Cooper, 97 Ga. 631, 25 S. E. 247.

<sup>39</sup> Johnston v. Smith, 70 Ala. 108.

§ 1103a. **Recovery of attorney's fee in equity to enforce lien.**—Attorney's fees can be recovered in a suit in equity to enforce a vendor's lien, in case there was a stipulation for the payment of such fees in the notes or other obligations taken for the purchase-money.<sup>40</sup>

The rule is the same as that which applies to like stipulations in mortgages.<sup>41</sup>

§ 1104. **Marshalling assets.**—When land subject to a vendor's lien is subsequently mortgaged to one who, in good faith and without notice of the lien, pays a valuable consideration for his title, he acquires a priority over the vendor, and is entitled to have his claim satisfied in preference to the claim of the vendor for the unpaid purchase-money. But if the mortgagee has also security for his claim upon other real or personal property, he may be compelled in equity to exhaust his remedy upon such security before resorting to the lands affected by the vendor's lien; and if any part of the personal security be wasted or misapplied through his fault or negligence, he must bear the loss.<sup>42</sup>

As a general rule, upon the decease of the vendee, his heir or devisee is entitled to have the unpaid purchase-money paid out of the personal property.<sup>43</sup>

But the court will not add to the sum due on the lien damages suffered because of fraudulent representations. *Ross v. Clark*, 126 Ill. App. 460, 80 N. E. 275.

<sup>40</sup> *Johnson v. Durner*, 88 Ala. 580, 7 So. 245, per Clopton, J., saying: "In such case, the attorney's fees constitute a part of the debt which the vendor is entitled to recover of the vendee. In equity, the promise to pay attorney's fees, in the event of a suit to enforce the payment of the purchase-money, is a part of the consideration agreed to be paid for

the lands, the payment of which equity and good conscience require, and without the payment of which the vendor does not receive the full consideration money agreed to be paid." See also, *Bozman v. Masterson*, (Tex. Civ. App.) 45 S. W. 758.

<sup>41</sup> See *Jones on Mortgages*, § 1606.

<sup>42</sup> *Gordon v. Bell*, 50 Ala. 213. As to sale of land subject to lien in parcels, see *Diamond Flint Glass Co. v. Boyd*, 30 Ind. App. 485, 66 N. E. 479.

<sup>43</sup> *Wright v. Holbrook*, 32 N. Y.

A vendor having a lien may, by suit, set aside a tax title voidable by vendee.<sup>43a</sup>

587; Lamport v. Beeman, 34 Barb. (N. Y.) 513; Sutherland v. Harrison, 86 Ill. 363.  
kirk, 3 Johns. Ch. (N. Y.) 312; <sup>43a</sup> Brown v. Lyon, 81 Miss. 438,  
Warner v. Van Alstyne, 3 Paige 33 So. 284.

## CHAPTER XXIV.

### THE VENDOR'S IMPLIED LIEN FOR PURCHASE-MONEY.

Sec.	Sec.
1105. Money paid prematurely as charge on the estate.	1106. Lien for purchase money paid where purchaser declines to complete contract.

§ 1105. Money paid prematurely as charge on the estate. —Money paid by a vendee of land prematurely, or before receiving a conveyance, is a charge upon the estate in the hands of the vendor, or in the hands of his grantee with notice.<sup>1</sup> And so, if a purchaser makes a deposit on account of the purchase-money, at the time of executing an agreement of purchase, which is not complete because the vendor is unable to give a good title, the purchaser has a lien upon the land for the money so paid.<sup>2</sup> "There can be no doubt, I apprehend," says Lord Cranworth,<sup>3</sup> "that when a

<sup>1</sup> 2 Story Eq. Jurisprudence (13th ed.), § 1217; Lane v. Ludlow, 6 Paige (Ch.) (N. Y.) 316, n; Chase v. Peck, 21 N. Y. 581, 585; Wickman v. Robinson, 14 Wis. 493, 80 Am. Dec. 789; Small v. Small, 16 S. Car. 64; Cooper v. Merritt, 30 Ark. 686; Stewart v. Wood, 63 Mo. 252; Brown v. East, 5 T. B. Mon. (Ky.) 407; Shirley v. Shirley, 7 Blackf. (Ind.) 452; Galbraith v. Reeves, 82 Tex. 357, 18 S. W. 696; Bullitt v. Eastern Kentucky Land Co., 99 Ky. 324, 18 Ky. L. 230, 36 S. W. 16.

<sup>2</sup> Burns v. Griffin, 24 Grant Ch. 451; Dinn v. Grant, 5 De G. & S. 451; Turner v. Marriott, L. R. 3 Eq. 744.

<sup>3</sup> Rose v. Watson, 10 H. L. Cas. 672. And see, also, Wythes v. Lee, 3 Drew. 396; Cator v. Pembroke, 1 Bro. C. C. 301; Burgess v. Wheate, 1 W. Bl. 123, 150; Payne v. Atterbury, Harr. Ch. 414; Funk v. McKeoun, 4 J. J. Marsh. (Ky.) 162; Bibb v. Prather, 1 Bibb. (Ky.) 313. In California, Idaho and North and South Dakota it is provided that one who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back in case of a failure of consideration. Califor-

purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money, the vendor had executed a mortgage to him of the estate to that extent. It seems to me that that is founded upon such solid and substantial justice, that if it is true that there is no decision affirming that principle, I rejoice that now, in your Lordships' House, we are able to lay down a rule that may conclusively guide such questions for the future. I think, however, that there are some authorities which have been pointed out which have established that rule, in principle, if not in terms. But I think it is unimportant to go into that, because it is now established, and will from henceforth be established as a very sound principle, founded on solid justice."

§ 1106. **Lien for purchase money paid where purchaser declines to complete contract.**—When a purchaser properly declines to complete a contract of sale, it seems there should be a lien for the purchase-money paid upon it wherever a vendor's implied lien exists.<sup>4</sup> The lien covers interest on the purchase money paid.<sup>5</sup> If the purchaser has assigned his contract, his assignee has a lien for what has been paid.<sup>6</sup> If there has been a sale and conveyance of the land in the first place, there is no reason why the lien should not arise

nia: Civ. Code 1906, § 3050. Idaho: Rev. Codes 1908, § 3445. North Dakota: Rev. Code 1905, § 6285. South Dakota: Rev. Code (Civ.) 1903, § 2152.

<sup>4</sup>See ante, § 1091.

<sup>5</sup>Rose v. Watson, 10 H. L. Cas. 672; Wythes v. Lee, 3 Drew. 396.

<sup>6</sup>Aberaman Iron Works v. Wickens, L. R. 4 Ch. 101.



upon a resale and reconveyance of the property.<sup>7</sup> The lien will then arise from the conveyance in the same manner as it arose upon the first conveyance.

If a purchaser under a contract by a married woman make payments upon the land, and she refuses to convey because her contract to convey is not binding upon her, the purchaser has a charge upon the land enforceable in equity.<sup>8</sup> If she has assigned the vendee's notes for deferred payments, the assignee has an equitable lien upon the land for their entire amount, and not merely for the consideration paid by him for them, since his recourse against the vendee is lost by her wrongful act.<sup>9</sup>

If the vendor is not the absolute owner of the estate, the purchaser's lien exists only to the extent of the vendor's interest. Thus, if the vendor is a mortgagee selling under a power of sale, the purchaser's lien for the deposit or part payment made is limited to the interest of the mortgagee in the estate, and does not exist against the mortgagor.<sup>10</sup>

<sup>7</sup> *Scott v. Griggs*, 49 Ala. 185; *Napier v. Jones*, 47 Ala. 90. See *Willis v. Searcy*, 49 Ala. 222.

<sup>8</sup> *Felkner v. Tighe*, 39 Ark. 357; *Newman v. Moore* (Ky.), 17 S. W. 740.

<sup>9</sup> *Newman v. Moore* (Ky.), 17 S. W. 740.

<sup>10</sup> *Wythes v. Lee*, 3 Drew. 396;

*Fisher's Mortg.* (5th ed.) § 509. When the purchaser of land against which there is a mechanic's lien agrees to pay the lien, the lien may be enforced against the lands without first exhausting the lienholder's remedy against the vendor. *Cullers v. First Nat. Bank*, (Tex.) 29 S. W. 72.

## CHAPTER XXV.

### THE VENDOR'S LIEN BY CONTRACT OR RESERVATION.

Sec.		Sec.	
1107.	Lien by contract not a vendor's lien.	1119.	Assignment of purchase-money note or bond.
1108.	Legal effect of title bond.	1120.	Order of payment of several notes.
1109.	Security not impaired by holder of contract.	1121.	Notice to purchaser when deed does not refer to a note.
1110.	Reservation of lien in deed as creating an equitable mortgage.	1122.	Subrogation to the lien.
1111.	Lien reserved a lien by contract.	1123.	Statute of limitations.
1112.	Reservation of lien in deed as creating mortgage.	1124.	No obligation to exhaust personalty before resorting to real estate.
1113.	Purchaser not liable for purchase-money in accepting a mortgage deed.	1125.	Proceedings to enforce such lien.
1114.	Title imperfect until the debt is paid.	1126.	Remedies of vendor.
1115.	Obligation of a married woman.	1127.	Tender of performance.
1116.	Waiver of the lien.	1127a.	Temporary eviction of vendee.
1117.	Order of liability of parcels sold.	1128.	Lien of vendor exhausted by foreclosure sale.
1118.	Account of vendor in possession.	1129.	Effect of sale of land to pass growing crops.
		1130.	Restraint of purchaser from impairing vendor's lien.

§ 1107. **Lien by contract not a vendor's lien.**—The interest of a vendor who has given an ordinary contract or bond for the sale of land, but retains the title to the land in himself, is often spoken of in the cases as a vendor's lien;<sup>1</sup> but

<sup>1</sup> See, of recent cases, *Stevens v. Kans.* 245; *Neel v. Clay*, 48 Ala. Chadwick, 10 Kans. 406, 15 Am. 252; *Hill v. Grigsby*, 32 Cal. 55. Rep. 348; *Smith v. Rowland*, 13

it is conceived that this is a misuse of terms, which should be avoided as leading to confusion. There is a fundamental distinction between a vendor's security in such case and the lien implied by law, and properly known as a vendor's lien.<sup>2</sup> When the legal title remains in the vendor, the vendee has merely an equity of redemption in the land, and no act of his can possibly affect the vendor's title; while, in case of a mere lien in the vendor, the fee is in the purchaser, who may at any time discharge the lien by conveying the land to a bona fide purchaser for value.<sup>3</sup> In the one case the vendor has a lien without any title, and in the other he has the title without any occasion for a lien. His title, by the terms of the contract, is his security; and he can not in any way be divested of his title, unless the vendee fulfills his contract, and by that means becomes entitled to a conveyance. As already noticed, the relation of vendor and vendee in such case bears a strong similitude to that of mortgagee and mortgagor. The vendor, having the title, has a substantial security; having no title, he has by implication a lien in name, but it exists only in name until a court of equity has given it force by a decree.<sup>4</sup> A lien by contract

<sup>2</sup> Lowery v. Peterson, 75 Ala. 109; Bankhead v. Owen, 60 Ala. 457; Baker v. Compton, 52 Tex. 252.

<sup>3</sup> Church v. Smith, 39 Wis. 492, 496, per Lyon, J.; Sparks v. Hess, 15 Cal. 186, 194, per Ch. J. Field; Driver v. Hudspeth, 16 Ala. 348; Sykes v. Betts, 87 Ala. 537, 6 So. 428; Wells v. Smith, 44 Miss. 296; Pitts v. Parker, 44 Miss. 247; Hutton v. Moore, 26 Ark. 382; Hines v. Perkins, 2 Heisk. (Tenn.) 395; White v. Blakemore, 8 Lea (Tenn.) 49; Hale v. Baker, 60 Tex. 217; Ransom v. Brown, 63 Tex. 188; Reese v. Burts, 39 Ga. 565; Shelton v. Jones, 4 Wash. 692, 30

Pac. 1061; Hitt v. Pickett, 9 Ky. 644, 12 Ky. L. 51, 11 S. W. 9; Neil v. Rosenthal, 120 App. Div. (N. Y.) 810, 105 N. Y. S. 681. A purchaser from a vendee is bound to investigate the vendor's title even though the deed to such vendee has not been recorded. Runge v. Gilbrough, (Tex. Civ. App.) 87 S. W. 832, affd. 99 Tex. 539, 91 S. W. 566, 122 Am. St. 659.

<sup>4</sup> "It is, in short, a right, which has no existence, until it is established by the decree of a court in the particular case." Per Story, J., in Gilman v. Brown, 1 Mason (U. S.) 191, Fed. Cas. No. 5441, affd. 4 Wheat. (U. S.) 255, 4 L. ed.

"has none of the odious characteristics of the vendor's equitable lien."<sup>5</sup>

When the vendor retains the legal title, the interest of the purchaser is insecure, unless the contract of purchase be recorded; for the land is subject to sale by the vendor, and subject to levy upon execution by his creditors.<sup>6</sup>

It is just as proper to call a mortgage given for purchase money a vendor's lien as to call by that name the lien of one who has given a contract to sell, but retains the legal title, or who has reserved a lien in his deed of conveyance.

It is often said that a vendor's lien may arise as well before the conveyance as after it.<sup>7</sup> But the same courts which give this name to the lien retained by a vendor, who holds the legal title as security for the performance of the contract of sale, generally proceed to point out the differences between this lien and that which is implied upon a conveyance; and inasmuch as the only likeness between the two liens is in their both securing the purchase money, it is proposed, in treating of the subject, to confine the term "vendor's lien" to that lien which is in equity implied to belong to a vendor for the unpaid purchase price of land sold and conveyed by him.

Under a contract for the sale of land which says nothing about a reservation in the deed of the vendor's lien, or about any security being given for the deferred payments of pur-

564. "His lien is an individual equity of no force until decided by a court of equity." *Hutton v. Moore*, 26 Ark. 382, 396, quoted in *Campbell v. Rankin*, 28 Ark. 401, 406.

<sup>5</sup> Per Chief Justice Watkins, in *Moore v. Anders*, 14 Ark. 628, 634, 60 Am. Dec. 551.

<sup>6</sup> *Bell v. McDuffie*, 71 Ga. 264; *Diffie v. Thompson* (Tex.) 88 S. W. 381, revd. on rehearing, 90 S. W.

193; *Evans v. Ashe*, 50 Tex. Civ. App. 54, 108 S. W. 398, 1190; *Lacey v. Smith*, (Tex. Civ. App.) 111 S. W. 965.

<sup>7</sup> *English v. Russell*, 1 Hempst. (U. S.) 35, Fed. Cas. No. 4491; *Yancey v. Mauck*, 15 Grat. (Va.) 300; *Hill v. Grigsby*, 32 Cal. 55; *Amory v. Reilly*, 9 Ind. 490; *Servis v. Beatty*, 32 Miss. 52, distinguished in *Wright v. Troutman*, 81 Ill. 374.

chase money, the vendor has the right to insert in his deed a clause reserving such a lien.<sup>8</sup>

§ 1108. **Legal effect of title bond.**—The legal effect of a title bond, or agreement for a deed, is sometimes said to be like a deed by the vendor and a mortgage back by the vendee.<sup>9</sup> There can be no sensible distinction between the case of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure payment.<sup>10</sup> The vendor holds the legal title, and all persons must necessarily take notice of it; and although the vendee enter into possession, his deed will of course convey only his equitable title.<sup>11</sup> Like a mortgagor in possession, he has an equity of redemption; while the vendor holds the title by reservation rather than by grant, as in the case of an ordinary mortgage. The equitable estate of the vendee may be alienated or devised as real estate, and upon his death it will descend to his heirs; while on the other hand, although the vendor holds the legal title, upon his death the securities he has taken for the purchase money go to his personal representative.<sup>12</sup>

<sup>8</sup> Findley v. Armstrong, 23 W. Va. 113; Warren v. Branch, 15 W. Va. 21, 38; Hatcher v. Hatcher, 1 Rand. (Va.) 53.

<sup>9</sup> Wells v. Francis, 7 Colo. 396, 4 Pac. 49; Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. 771; Willman v. Friedman, 3 Idaho 734, 35 Pac. 37.

<sup>10</sup> Bankhead v. Owen, 60 Ala. 457; Lowery v. Peterson, 75 Ala. 109.

<sup>11</sup> New York & Cleveland Gas Coal Co. v. Plumer, 96 Pa. St. 99.

<sup>12</sup> Smith v. Moore, 26 Ill. 392; Smith v. Price, 42 Ill. 399; Button v. Schroyer, 5 Wis. 598; Lewis v. Hawkins, 23 Wall. (U. S.) 119, 23 L. ed. 113; Martin v. O'Bannon, 35 Ark. 62; Holman v. Patterson, 29

Ark. 357; Lewis v. Boskins, 27 Ark. 61; Scroggins v. Hoadley, 56 Ga. 165; Lingan v. Henderson, 1 Bland Ch. (Md.) 236; Relfe v. Relfe, 34 Ala. 500, 504, 73 Am. Dec. 467; Masterson v. Pullen, 62 Ala. 145; Cleveland v. Martin, 2 Head (Tenn.) 128; Irvine v. Muse, 10 Heisk. (Tenn.) 477; Sehorn v. McWhirter, 8 Baxt. (Tenn.) 201, 6 Baxt. (Tenn.) 311; White v. Blakemore, 8 Lea (Tenn.) 49; Richards v. Fisher, 8 W. Va. 55; Merritt v. Judd, 14 Cal. 59; Purdy v. Bullard, 41 Cal. 444; Dukes v. Turner, 44 Iowa 575; Greene v. Cook, 29 Ill. 186; McConnell v. Beattie, 34 Ark. 113; Schearff v. Dodge, 33 Ark. 340, 345; Walkenhorst v. Lewis, 24 Kans. 420. In

Although the vendor's remedy upon the note or contract or bond taken for the purchase money be barred by the statute of limitations, or by the discharge in bankruptcy of the vendee, the lien upon the land is not affected. As in respect to mortgages, the vendor's lien will in such case be presumed to have been satisfied after the lapse of twenty years, and the continued possession of the vendee;<sup>13</sup> and on the other hand, if the vendor remain in possession, so long as he recognizes the vendee as the equitable owner the statute does not begin to run; and after it does begin to run, the vendee may at any time within the same period redeem the title.<sup>14</sup>

When after such a contract the vendor pays delinquent taxes upon the land,<sup>15</sup> or, at the request of the vendee, pays for improvements upon the property, which by the terms of the contract the vendee was himself to make before receiving a conveyance, the amount so paid becomes a further lien upon the property, which the vendor may enforce by a sale of the vendee's interest under the contract.<sup>16</sup>

If the vendor who retains the title also retains possession of the land as security for the purchase money, he is not liable to the vendee for the rent of the premises.<sup>17</sup>

Nebraska where a vendor has no implied lien for purchase-money, in all cases where he has contracted to convey, but has made no conveyance, he has an equitable lien, as between him and the vendee, and those claiming under such vendee with notice. *Birdsall v. Cropsey*, 29 Nebr. 672, 44 N. W. 857, 29 Nebr. 679, 45 N. W. 921; *Rhea v. Reynolds*, 12 Nebr. 128, 10 N. W. 549; *Dorsey v. Hall*, 7 Nebr. 460; *Whitehorn v. Cranz*, 20 Nebr. 392, 30 N. W. 406. If a vendee makes payment of any part of the consideration after receiving no-

tice of an adverse equity, to that extent he is not a bona fide purchaser. *Savage v. Hazard*, 11 Nebr. 323, 9 N. W. 83; *Earle v. Burch*, 21 Nebr. 702, 33 N. W. 254; *Birdsall v. Cropsey*, 29 Nebr. 672, 44 N. W. 857, modified 29 Nebr. 679, 45 N. W. 921.

<sup>13</sup> *Lewis v. Hawkins*, 23 Wall. (U. S.) 119, 23 L. ed. 113.

<sup>14</sup> *Harris v. King*, 16 Ark. 122.

<sup>15</sup> *Lillie v. Case*, 54 Iowa 177, 6 N. W. 254.

<sup>16</sup> *Grove v. Miles*, 71 Ill. 376, 58 Ill. 338.

<sup>17</sup> *Worrel v. Smith*, 6 Colo. 141.

§ 1109. **Security not impaired by holder of contract.**—The holder of the contract cannot impair the security. The legal title of the vendor in such case is not affected by any liens created by the person who holds the contract of purchase, as, for instance, a mechanic's lien for labor and materials furnished him;<sup>18</sup> or a conveyance or mortgage by him;<sup>19</sup> or a judgment or attachment against him.<sup>20</sup> Such claims necessarily arise after the lien created by the contract, and must be subject to that lien. The vendee cannot possibly do anything to impair that lien, any more than a mortgagor can, after the execution of his mortgage, do anything with his title to impair that security. But if the vendor, after a lien has attached to the interest of the vendee for materials used in the construction of a house upon the premises, takes a reconveyance of the premises, and as a part of the consideration of the reconveyance assumes the lien debt, the lien may be enforced against the whole land.<sup>21</sup>

No homestead right in the property can be acquired by the purchaser as against the lien.<sup>22</sup>

If the vendee sells the property to another, his lien upon the land for the purchase money is subordinate to the lien of the original vendor; and a surety upon the purchase notes given by the first vendee has an equity to have the land sold, for the payment of these notes, superior to any equity which any claimant under such vendee can have on the land.<sup>23</sup>

After a title bond or a contract of sale has been given for

<sup>18</sup> Seitz v. Union Pac. R. Co., 16 Kans. 133; Cochran v. Wimberly, 44 Miss. 503; Thorpe v. Durbon, 45 Iowa 192.

<sup>19</sup> Sitz v. Deihl, 55 Mo. 17; Beattie v. Dickinson, 39 Ark. 205; Harvill v. Lowe, 47 Ga. 214; Carter v. Sims, 2 Heisk. (Tenn.) 166; Rogers v. Blum, 56 Tex. 1; Williams v. Cunningham, 52 Ark. 439, 12 S. W.

1072; Wood v. O'Hanlon, 50 Tex. Civ. App. 642, 111 S. W. 178.

<sup>20</sup> Hadley v. Nash, 69 N. Car. 162; Roberts v. Francis, 2 Heisk. (Tenn.) 127; Tuck v. Calvert, 33 Md. 209.

<sup>21</sup> Adams v. Russell, 85 Ill. 284.

<sup>22</sup> Berry v. Boggess, 62 Tex. 239.

<sup>23</sup> Beattie v. Dickinson, 39 Ark. 205.

the conveyance of lands upon the payment of the purchase money, the lands are not subject to sale under execution at law at the suit of one obtaining judgment afterwards against the vendor; the lien of the vendee prevails against the lien of the judgment creditor, which can operate only upon the interest which the vendor had at the time of its rendition.<sup>24</sup>

**§ 1110. Reservation of lien in deed as creating an equitable mortgage.**—An express reservation in a deed of a lien upon the land conveyed creates an equitable mortgage, and when the deed is recorded every one is bound to take notice of the incumbrance.<sup>25</sup> Thus, where land was sold, and for the purchase money several promissory notes of the purchaser were taken, and these were described in the deed of conveyance, and expressly made a lien upon the land conveyed, a purchaser on execution obtained only an equity of redemption subject to such lien.<sup>26</sup>

To create such a lien there must be something more than a mere recitation that the purchase money, to a certain amount, remains unpaid; this amount must be expressly charged upon the land conveyed.<sup>27</sup> A note or bond given for the pur-

<sup>24</sup> *Shinn v. Taylor*, 28 Ark. 523; *Money v. Dorsey*, 7 Smedes & M. (Miss.) 15, 22; *Taylor v. Eckford*, 11 Smedes & M. (Miss.) 21.

<sup>25</sup> *Ufford v. Wells*, 52 Tex. 612; *Webster v. Mann*, 56 Tex. 119, 42 Am. Rep. 688; *Baker v. Compton*, 52 Tex. 252; *Coles v. Withers*, 33 Grat. (Va.) 186; *Eichelberger v. Gitt*, 104 Pa. St. 64; *Exchange and Deposit Bank v. Bradley*, 15 Lea (Tenn.) 279. See *Hill v. Cole*, 84 Ga. 245, 10 S. E. 739; *Honaker v. Jones*, 102 Tex. 132, 113 S. W. 748; *Atlanta Land & Loan Co. v. Haile*, 106 Ga. 498, 32 S. E. 606; *Smith v. Pate*, (Tex.) 43 S.

W. 312, revd. 91 Tex. 596, 45 S. W. 6; *Gordon v. Johnson*, 186 Ill. 18, 57 N. E. 790.

<sup>26</sup> *Davis v. Hamilton*, 50 Miss. 213; *Stratton v. Gold*, 40 Miss. 778, 781; *Caldwell v. Fraim*, 32 Tex. 310; *Stephens v. Motl*, 81 Tex. 115, 16 S. W. 731. Quoted with approval in *Hall v. Mobile & Montgomery R. Co.*, 58 Ala. 10, 22.

<sup>27</sup> *Heist v. Baker*, 49 Pa. St. 9. There is a broad distinction between the rights of a vendor under an absolute deed with warranty which recites the existence of unpaid purchase-money notes, but retains no express lien in



chase money of land conveyed does not create a lien upon it.<sup>28</sup> It does not, though it recites upon its face that it is given for purchase money of the land, stick to the land. But a reservation of a purchase money lien in a note given for the land renders the sale executory in the same manner as if the reservation were contained in the deed itself.<sup>29</sup> But a grant of land, "to have and to hold the same under and subject, nevertheless, to the payment" of a certain sum at the decease of the grantee, constitutes a charge upon the land, in whosoever hands it may be.<sup>30</sup> A deed of land "charged with the payment" of certain specified sums creates a lien in the nature of a mortgage, and not in the nature of a vendor's lien.<sup>31</sup> A lien is effectually reserved in a deed which describes the notes for the purchase money, and the habendum is "to have and to hold on the payment of the notes hereinabove stated."<sup>32</sup> No particular words are essential for creating a lien by express reservation. All that is necessary is, that the words used should distinctly convey

terms for their payment, and his rights under a deed which declares that a lien is reserved for unpaid purchase-money. Under the former, the vendor has parted with title, and has only an implied vendor's lien for purchase-money; under the latter, the superior title remains with the vendor, and the deed is the evidence of an executory contract. *Baker v. Compton*, 52 Tex. 252, per Gould, J; *Harris v. Shields*, 111 Va. 643, 69 S. E. 933; *Proetzel v. Rabel*, 21 Tex. Civ. App. 559, 54 S. W. 373.

<sup>28</sup> *Smith v. High*, 85 N. Car. 93; *Hoskins v. Wall*, 77 N. Car. 249; *Ransom v. Brown*, 63 Tex. 188; *Baker v. Compton*, 52 Tex. 252. See, however, *Briggs v. Planters' Bank*, *Freeman's Ch.* (Miss.) 574; *Brom v. Herring*, 45 Tex. Civ.

App. 653, 101 S. W. 1023.

<sup>29</sup> *Lundy v. Pierson*, 67 Tex. 233, 2 S. W. 737; *McKelvain v. Allen*, 58 Tex. 383, 387; *Buckley v. Runge* (Tex. Civ. App.), 136 S. W. 533; *Miller v. Linguist*, (Tex. Civ. App.) 141 S. W. 170; *New England Loan & Trust Co. v. Willis*, 19 Tex. Civ. App. 128, 47 S. W. 389. A deed retaining a lien and notes executed at the same time as evidence of the debt reserved must be construed as parts of the same contract. *Beckham v. Scott*, (Tex. Civ. App.) 142 S. W. 80.

<sup>30</sup> *Heist v. Baker*, 49 Pa. St. 9; *Eichelberger v. Gitt*, 104 Pa. St. 64.

<sup>31</sup> *Stanhope v. Dodge*, 52 Md. 483.

<sup>32</sup> *Blaisdell v. Smith*, 3 Bradw. (Ill.) 150.

the idea that the vendor retains a lien on the land. A stipulation that the "land shall be bound for the notes" given for the purchase money creates an effectual lien.<sup>33</sup>

A purchaser who buys land sold under a decree of court, which on its face reserves a lien for the purchase money, buys subject to the lien reserved.<sup>34</sup>

A stipulation in a deed, that the title shall not vest in the grantee until the purchase money is paid, amounts in equity to a mortgage.<sup>35</sup> So does a deed providing that it shall be absolute on the payment of certain notes, but in default of payment shall be void.<sup>36</sup>

A lien may be reserved for the security of a note for the purchase money made payable to a third person.<sup>37</sup>

When a deed is executed in compliance with an ordinary agreement for the sale of land, part of the consideration for which is to be paid at the time and part at a future day, and nothing is said about a lien or other security for the future payments, the vendor has a right to insert in his deed a clause reserving a vendor's lien for the unpaid purchase money.<sup>38</sup>

If upon an absolute sale the possession be expressly reserved to the grantor for one year, the right of possession will vest in the grantee at the end of the year, in the absence of any provision to the contrary, although a part of the purchase price remains unpaid.<sup>39</sup>

A reservation may be made of the crops to be raised on the granted land, to secure interest on the purchase money, and such reservation creates a valid lien which may be foreclosed.<sup>40</sup>

<sup>33</sup> *Moore v. Lackey*, 53 Miss. 85; *Miller v. Linguist*, (Tex. Civ. App.) 141 S. W. 170; *Lipscomb v. Fuqua*, 55 Tex. Civ. App. 535, 121 S. W. 193.

<sup>34</sup> *Ross v. Swan*, 7 Lea (Tenn.) 493.

<sup>35</sup> *Pugh v. Holt*, 27 Miss. 461;

*Lavigne v. Naramore*, 52 Vt. 267.

<sup>36</sup> *Carr v. Holbrook*, 1 Mo. 240.

<sup>37</sup> *Mize v. Barnes*, 78 Ky. 506.

<sup>38</sup> *Findley v. Armstrong*, 23 W. Va. 113.

<sup>39</sup> *Evans v. Enloe*, 64 Wis. 671, 26 N. W. 170.

<sup>40</sup> *Darling v. Robbins*, 60 Vt. 347,

§ 1111. **Lien reserved, a lien by contract.**—A lien for the purchase money expressly reserved by a vendor in his deed of conveyance is a lien created by contract, and not by implication of law. It is a contract that the land shall be burdened with the lien until the note is paid. It is really a mortgage. The lien, then, becomes a matter of record when the deed is recorded.<sup>41</sup> It is not waived by the taking of other security, as is the case with an ordinary vendor's lien.<sup>42</sup> It is governed by the same rules which govern a mortgage. It passes by an assignment of the note secured by it.<sup>43</sup> It is foreclosed as a mortgage; and there is the same right of redemption for a limited period after a foreclosure sale.<sup>44</sup>

"The reservation of the vendor's lien in the deed of conveyance," says Mr. Justice Bradley, of the Supreme Court of the United States,<sup>45</sup> "is equal to a mortgage taken for

15 Atl. 177; *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429. The interest on interest, and attorney's fees may be included in the reservation. *Masterson v. Burnett*, (Tex. Civ. App.) 37 S. W. 987.

<sup>41</sup> *Ober v. Gallagher*, 93 U. S. 199, 23 L. ed. 829; *Armentrout v. Gibbons*, 30 Grat. (Va.) 632; *White v. Downs*, 40 Tex. 225, 231, per Gray, J. "The vendor's lien, however, properly understood, is not in all respects the same as the express lien often reserved in deeds of conveyance for payment of purchase money, nor as strict mortgages or deeds of trust for it, nor yet as the security held by a vendor who has only given a bond for the title. These are often confounded with the vendor's lien, because security of the purchase money is common to all of them. But the vendor's lien arises wholly from inference or implication, which is invisible, and cannot be

recorded; the others are from express contract, visible to all, and may be recorded. All of the same consequences do not therefore, necessarily result, as to assignees or holders of the debt secured by the vendor's lien, nor as to purchasers of the land liable to it, as between the original parties and privies, as do often occur in the cases of express lien by contract." See also, *Moore v. Lackey*, 53 Miss. 85.

<sup>42</sup> *Carpenter v. Mitchell*, 54 Ill. 126; *Wilcox v. First Nat. Bank*, 93 Tex. 322, 55 S. W. 317.

<sup>43</sup> *Carpenter v. Mitchell*, 54 Ill. 126; *Markoe v. Andras*, 67 Ill. 34.

<sup>44</sup> *Markoe v. Andras*, 67 Ill. 34. Quoted with approval in *Hall v. Mobile & Montgomery R. Co.*, 58 Ala. 10, 22; and in *Dingley v. Bank of Ventura*, 57 Cal. 467; *Pullen v. Ward*, 60 Ark. 90, 28 S. W. 1084.

<sup>45</sup> *King v. Young Men's Assn.*, 1 Woods (U. S.) 386, Fed. Cas. No. 7811.

the purchase money, contemporaneously with the deed, and nothing more. "The purchaser has the equity of redemption precisely as if he had received a deed and given a mortgage for the purchase money." The legal title passes to the purchaser subject to the lien, and the land is subject to attachment and execution as his property, just as an equity of redemption is subject.<sup>46</sup>

The lien differs also from a vendor's lien in that it may secure the performance of any covenant or undertaking agreed upon, instead of a fixed sum payable in money; as, for instance, it may secure an agreement to pay in specific articles.<sup>47</sup>

Upon the sale of leasehold property with certain personal property thereon for a gross sum for both, the reservation of a lien in the instrument of transfer is effectual, and will be enforced by a sale of both the real and personal property.<sup>48</sup>

If upon purchase of land part payment be made in the notes of third persons, and the conveyance expressly stipulates that the vendor in no way waives his lien by reason of taking the personal securities, the reservation creates a contract lien in the nature of an equitable mortgage, which may be enforced upon nonpayment of the note.<sup>49</sup>

**§ 1112. Reservation of lien in deed as creating mortgage.**—Such a reservation may appropriately be said to amount substantially to a mortgage, where by this term is meant simply a lien. Thus, in a case in the Circuit Court of the United States for Tennessee, the court, having said that the vendee stands (substantially) in the same position as if he had executed a mortgage to the vendor for the purchase money, explained that, of course, while the court assimilated the lien to that of a mortgage, it did not mean the old com-

<sup>46</sup> *Chitwood v. Trimble*, 2 Baxt. (Tenn.) 78; *Gordon v. Rixey*, 76 Va. 694.

<sup>47</sup> *Chitwood v. Trimble*, 2 Baxt. 93 Am. Dec. 267.

<sup>48</sup> *Ruhl v. Ruhl*, 24 W. Va. 279, 287. See ante, § 1071.

<sup>49</sup> *Harvey v. Kelly*, 41 Miss. 490,

<sup>49</sup> *Kyle v. Bellenger*, 79 Ala. 516.

mon-law mortgage, in its technical sense, but the modern signification of that term, as one applied to any lien created by express contract of the parties as a security for a debt. Such a reservation creates an express lien by contract or agreement of the parties; and that is all that is meant by a mortgage in half or more of the states.<sup>50</sup>

**§ 1113. Purchaser not liable for purchase money in accepting a mortgage deed.**—Ordinarily a purchaser under such a deed would not be personally liable for the purchase money, unless he had by note or some other writing bound himself for its payment. The general rule is that no personal obligation is implied from the giving of a mortgage deed, unless there is an express stipulation or covenant in the deed to that effect, or there be some separate promise in writing to pay the money.<sup>51</sup> In Tennessee, however, it is held that, in an action against the grantee to recover the purchase money, the fact that he has accepted a deed in which a lien is reserved is conclusive proof of a promise on his part to pay the money.<sup>52</sup>

**§ 1114. Title imperfect until the debt is paid.**—The vendee's title is imperfect until the debt is paid. When land has been conveyed by a deed reserving a lien upon it for the purchase money, the lien is an incumbrance upon it, and an execution sale of it as the property of the vendee should be

<sup>50</sup> *Kirk v. Williams*, 24 Fed. 437. And see *Dingley v. Bank of Ventura*, 57 Cal. 467.

<sup>51</sup> *Jones on Mortgages* (3d ed.), §§ 677, 678; *Dolinski v. First Nat. Bank*, (Tex. Civ. App.) 122 S. W. 276; *First State Bank of Teague v. Cox*, (Tex. Civ. App.) 139 S. W. 1. Where a vendor takes purchase-money notes and reserves a

lien in his deed and the vendee conveys to another who expressly agrees to pay such notes and the holder of the lien releases such second vendee the first vendee is also released. *Mays v. Sanders*, 36 S. W. 108, modified 90 Tex. 132, 37 S. W. 595.

<sup>52</sup> *Kirk v. Williams*, 24 Fed. 437.

made as of incumbered property.<sup>53</sup> It has precedence over a prior judgment against the vendee.<sup>54</sup>

The vendee's title is imperfect until this debt is paid, though the debt for the purchase money be barred by the statute of limitations.<sup>55</sup> Though the vendor cannot enforce his lien by suit to recover the money and foreclose the lien, he can assert his superior title to the land as owner. He cannot be evicted after he has regained possession.<sup>56</sup> Every one purchasing his title must have notice of the lien reserved. He has notice only of the debt and simple interests, unless more be reserved.<sup>57</sup> This lien is in fact an equitable mortgage. In the case of an implied lien, the courts have generally been unwilling to extend it beyond the security of the vendor, because it might tend to embarrass the vendee's right of disposing of the property by giving countenance to secret liens upon it; but this reason does not apply when the lien is reserved by express contract in the deed.<sup>58</sup>

The effect of a lien expressly reserved cannot be controlled by evidence of a verbal agreement that there should be no lien.<sup>59</sup>

In Pennsylvania, however, the law upon this subject is exceptional; for it is held that a charge upon land created by the parties to a conveyance is divested by a subsequent sheriff's sale, unless the charge be in the nature of a testamentary provision for the grantor's wife or children, or is incapable of valuation, or is expressly created to run with

<sup>53</sup> *Thompson v. Heffner*, 11 Bush (Ky.) 353; *Robinson v. Appleton*, 124 Ill. 276, 15 N. E. 761.

<sup>54</sup> *Parsons v. Hoyt*, 24 Iowa 154.

<sup>55</sup> *Hale v. Baker*, 60 Tex. 217.

<sup>56</sup> *Hale v. Baker*, 60 Tex. 217.

<sup>57</sup> *Stricklin v. Cooper*, 55 Miss. 624.

<sup>58</sup> *Stratton v. Gold*, 40 Miss. 778; *Peters v. Clements*, 46 Tex. 114; *Masterson v. Cohen*, 46 Tex. 520.

When a lien is reserved in the deed, failure to record the deed or the destruction of the deed will not affect the vendor's lien. *Texarkana Nat. Bank v. Daniel*, (Tex. Civ. App.) 31 S. W. 704. See also, *De Steaguer v. Pittman*, 54 Tex. Civ. App. 316, 117 S. W. 481.

<sup>59</sup> *Hutchinson v. Patrick*, 22 Tex. 318.

the land.<sup>60</sup> It is declared that the doctrine of equitable liens was never admitted into the jurisprudence of this state. Moreover, the policy of the law is, that judicial sales shall pass property clear of all liens, and the courts have yielded with reluctance to making the exceptions above named. Accordingly, it is held that a recital in a deed that the purchase money remains unpaid, and is to be paid annually, does not create a lien which a subsequent judicial sale will not divest.<sup>61</sup> Neither does a recital that the deed is made subject to a mortgage held by a person named for a specified sum create such a lien, when there was in fact no mortgage, but a judgment which subsequently expired. It was urged that the deed created a charge upon the land, and that, as this charge appeared upon the face of the title, a subsequent mortgagee had notice of it, and took subject to it. But it was held, inasmuch as this recital did not amount to a condition, and inasmuch as the charge was not within either of the exceptions named, it was divested and destroyed by a sheriff's sale under a subsequent mortgage. The remedy after such sale, if there be any, is upon the fund created by the sale.<sup>62</sup>

**§ 1115. Obligation of a married woman.**—A married woman is bound by a contract to purchase,<sup>63</sup> or a contract in the nature of a mortgage for purchase money of land conveyed to her, and created by the vendor's reserving in the deed to her a lien upon the land for the security of her note given for such purchase money.<sup>64</sup> Her mortgage for pur-

<sup>60</sup> Strauss' Appeal, 49 Pa. St. 353; *Hiester v. Green*, 48 Pa. St. 96, 86 Am. Dec. 569; *Bear v. Whisler*, 7 Watts (Pa.) 144; *Stewartson v. Watts*, 8 Watts (Pa.) 392.

<sup>61</sup> *Hiester v. Green*, 48 Pa. St. 96, 86 Am. Dec. 569.

<sup>62</sup> *Pierce v. Gardner*, 83 Pa. St. 211.

<sup>63</sup> In North Carolina, when en-

tered into according to requirements of statute. *Johnston v. Cochrane*, 84 N. Car. 446.

<sup>64</sup> See *Carpenter v. Mitchell*, 54 Ill. 126; *Weinberg v. Rempe*, 15 W. Va. 829, 831; *Radford v. Carwile*, 13 W. Va. 572; *Jackson v. Rutledge*, 3 Lea (Tenn.) 626, 31 Am. Rep. 655; *Bedford v. Burton*, 106 U. S. 338, 27 L. ed. 112, 1 Sup. Ct.

chase money, although invalid by reason of her husband not joining in its execution, has been regarded as a declaration preserving a vendor's lien, or as a declaration of a trust in favor of the vendor.<sup>65</sup> Even where the note of a married woman imposes no personal obligation upon her, she can be put to her election, under a sale to her by title bond, either to pay her note for the purchase money, or to surrender the land and all claim to it.<sup>66</sup>

§ 1116. **Waiver of the lien.**—A lien reserved by contract, or existing in the vendor by reason of his not having parted with the legal title, having given only a bond or contract of sale, is of course not lost nor waived as an implied lien is waived by accepting other securities.<sup>67</sup> Neither does a change of notes, nor the substitution of the notes of another person,<sup>68</sup> as for instance those of a subsequent purchaser, nor the reducing

98; *Chilton v. Braiden*, 2 Black. (U. S.) 458, 17 L. ed. 304.

<sup>65</sup> *Morrison v. Brown*, 83 Ill. 562.

<sup>66</sup> *Hendrick v. Foote*, 57 Miss. 117; *Johnson v. Jones*, 51 Miss. 860; *Willingham v. Leake*, 7 Baxt. (Tenn.) 453.

<sup>67</sup> *Whitehurst v. Yandall*, 7 Baxt. (Tenn.) 228; *Schorn v. McWhirter*, 6 Baxt. (Tenn.) 313; *Fogg v. Rogers*, 2 Coldw. (Tenn.) 290; *Hines v. Perkins*, 2 Heisk. (Tenn.) 395; *McCaslin v. State*, 44 Ind. 151; *Huffman v. Cauble*, 86 Ind. 591; *Bradley v. Curtis*, 79 Ky. 327, 2 Ky. L. 329; *Lusk v. Hopper*, 3 Bush (Ky.) 179, 185; *Bozeman v. Ivey*, 49 Ala. 75; *Strickland v. Summerville*, 55 Mo. 164; *Adams v. Cowherd*, 30 Mo. 458; *Lewis v. Pursey*, 8 Bush (Ky.) 615; *Hurley*

*v. Hollyday*, 35 Md. 469; *Schwarz v. Stein*, 29 Md. 112, 119; *Magruder v. Peter*, 11 Gill & J. (Md.) 217; *Hatcher v. Hatcher*, 1 Rand. (Va.) 53; *Knisely v. Williams*, 3 Grat. (Va.) 265, 46 Am. Dec. 193; *Dnnlap v. Shanklin*, 10 W. Va. 662; *Price v. Lauve*, 49 Tex. 74; *Spears v. Taylor*, 149 Ala. 180, 42 So. 1016. To the contrary, not good law: *Hawkins v. Thurman*, 1 Idaho 598.

<sup>68</sup> *Hill v. Downs*, 9 Ky. L. 767, 6 S. W. 650; *Hitt v. Pickett*, 91 Ky. 644, 12 Ky. L. 51, 11 S. W. 9. Where a vendor takes the note of a third person for a part of the purchase price of her land and renews the note and collects the interest thereon for many years, he may thereby waive his vendor's lien. *Spence v. Palmer*, 115 Mo. App. 76, 90 S. W. 749.



the notes to judgment, affect the lien;<sup>69</sup> nor does the taking of new notes by an assignee in his own name, and extending the time of payment;<sup>70</sup> nor does an extension of the time of payment by the original vendor release the lien as against a subsequent purchaser, though the extension be without his consent.<sup>71</sup> It is not waived by taking under duress depreciated currency in payment of the debt.<sup>72</sup> It is not waived by a judgment and sale upon execution of the interest of the vendee in the land.<sup>73</sup> The burden of proof is upon the vendee to show a waiver.<sup>74</sup>

The vendor who has an express lien may by his acts or declarations waive it, as for instance by inducing another to buy the property as unincumbered; or by permitting and encouraging the administrator of the vendee to sell the property to satisfy the lien, and bidding at the sale. Such bidding

<sup>69</sup> *Bozeman v. Ivey*, 49 Ala. 75; *Bradford v. Harper*, 25 Ala. 337; *Chitwood v. Trimble*, 2 Baxt. (Tenn.) 78; *Coles v. Withers*, 33 Grat. (Va.) 186; *Woodward v. Echols*, 58 Ala. 665. Where the grantee assigns notes to the grantor for the land purchased, the lien reserved in the deed only secures the liability of the grantee as assignor of the notes and his release from such liability will release the lien. *Pritchett v. Hape*, 21 Ky. L. 408, 51 S. W. 608.

<sup>70</sup> *Conner v. Banks*, 18 Ala. 42, 52 Am. Dec. 209.

<sup>71</sup> *Dalton v. Rainey*, 75 Tex. 516, 13 S. W. 34.

<sup>72</sup> *Ludington v. Gabbert*, 5 W. Va. 330. The vendor was compelled in this case to receive Confederate treasury notes during the Rebellion. Where an express waiver is pleaded to a suit to foreclose a reserved lien, a reply denying an agreed waiver and alleg-

ing the taking of security on land purporting to be owned by the defendant as additional security and averring fraudulent representations to induce the taking of such security, raises the issue of waiver or non-waiver and is good. *Wittliff v. Biscoe*, (Tex. Civ. App.) 128 S. W. 1153. See also *Jones v. Byrne*, 149 Fed. 457.

<sup>73</sup> *Lewis v. Chapman*, 59 Mo. 371; *Dickason v. Eby*, 73 Mo. 133, per Norton, J.; *Carter County Court v. Butler*, 81 Ky. 597, 5 Ky. L. 661.

<sup>74</sup> *Sehorn v. McWhirter*, 8 Baxt. (Tenn.) 201, 6 Baxt. (Tenn.) 311; *Whitehurst v. Yandall*, 7 Baxt. (Tenn.) 228; *Spears v. Taylor*, 149 Ala. 180, 42 So. 1016; *Springman v. Hawkins*, 52 Tex. Civ. App. 249, 113 S. W. 966; *Stickle v. High Standard Steel Co.*, 78 N. J. Eq. 549, 80 Atl. 500, 78 N. J. Eq. 578, 80 Atl. 503; *Tillar v. Clayton*, 75 Ark. 446, 88 S. W. 972.

at the sale could properly be interpreted by the purchaser as a waiver of the lien, and as an acknowledgment that he was looking solely to the proceeds of the sale, and not to the land itself, for the satisfaction of his claim.<sup>75</sup>

The taking of other security is not a waiver of vendor's lien reserved, as is the case with an implied lien, unless it be shown by direct evidence, or by the circumstances of the case, that the vendor relied wholly on such other security.<sup>76</sup>

The vendor remaining clothed with the legal title, it is presumed that he retained it as an absolute security for the purchase money, and a waiver or abandonment of the lien can hardly be shown.<sup>77</sup> A bond with personal security, taken for the purchase money, does not imply a waiver of the lien under a contract for sale which makes no provision about the reservation of a lien. It may be shown, however, by direct evidence, or by the circumstances of the case, that the vendor relied only on the bond and security, and in that case he would be required to execute a deed without reserving a vendor's lien.<sup>78</sup> A lien reserved in the deed of sale is not lost by the recovery of a judgment for the debt, and the issuing of an execution thereon. But a sale under the execution releases the lien.<sup>79</sup> This lien is equivalent to a mortgage, and, as is the case with a mortgage, a judgment does not affect the lien. It is discharged only by payment, or an express re-

<sup>75</sup> *Butler v. Williams*, 5 Heisk. (Tenn.) 241; *Drumm Com. Co. v. Core*, 47 Tex. Civ. App. 216, 105 S. W. 843. A vendor who has reserved a lien may release a part of the land from the lien by his express act, but where he does so he has a lien on the remaining land for the whole debt. *Smith v. Owen*, 49 Tex. Civ. App. 51, 107 S. W. 929.

<sup>76</sup> *Warren v. Branch*, 15 W. Va. 21, 22; *Daniels v. Moses*, 12 S. Car.

130; *Frazier v. Hendren*, 80 Va. 265; *Byrns v. Woodward*, 10 Lea (Tenn.) 444; *Hodges v. Roberts*, 74 Tex. 517, 12 S. W. 222.

<sup>77</sup> *Sehorn v. McWhirter*, 8 Baxt. (Tenn.) 201; *Rogers v. Blum*, 56 Tex. 1; *Robinson v. Appleton*, 124 Ill. 276, 15 N. E. 761.

<sup>78</sup> *Warren v. Branch*, 15 W. Va. 21.

<sup>79</sup> *Woods v. Ellis*, 85 Va. 471, 7 S. E. 852.

lease.<sup>80</sup> A sale by the vendee to one who purchases with notice does not affect the vendor's rights.<sup>81</sup> If the lien is reserved in the deed, or the vendor retains the title, the purchaser necessarily has notice.<sup>82</sup>

If a note be taken for the amount of the lien, and remedy upon the note be lost by negligence, the reserved lien may still be enforced as securing the debt represented by the note.<sup>83</sup>

A lien reserved is not waived by subsequently taking a mortgage of the same property; and though the property without the knowledge of the grantor has in the meantime been mortgaged to another person, without anything having been done by the grantor to induce the taking of such mortgage, the grantor may have the property sold to enforce his lien; or, if he has foreclosed his mortgage, he may have the property resold under his lien for the benefit of the purchaser under the foreclosure sale.<sup>84</sup>

**§ 1117. Order of liability of parcels sold.**—Purchasers of land, subject to a lien by contract for the payment of purchase money, have the same equities as between themselves as purchasers subject to a formal mortgage. The rule of contribution in the adverse order of sale applies where the same rule applies in the case of mortgages. Simultaneous purchasers should contribute pro rata.<sup>85</sup> And, as in the case of

<sup>80</sup> Exchange & Deposit Bank v. Bradley, 15 Lea (Tenn.) 279; Byrns v. Woodward, 10 Lea (Tenn.) 444; Stephens v. Greene County Iron Co., 11 Heisk. (Tenn.) 71; Mulherrin v. Hill, 5 Heisk. (Tenn.) 58; Hines v. Perkins, 2 Heisk. (Tenn.) 395.

<sup>81</sup> Stone Land etc. Co. v. Boon, 73 Tex. 548, 11 S. W. 544.

<sup>82</sup> Hitt v. Pickett, 91 Ky. 644, 12 Ky. L. 51, 11 S. W. 9.

<sup>83</sup> Hodges v. Roberts, 74 Tex.

517, 12 S. W. 222.

<sup>84</sup> Bradford v. Howe, 11 Ky. L. 10, 11 S. W. 466. Failure of a vendor to reserve his lien in a mortgage taken by him will not waive the lien. The lien is merely merged in the mortgage. Bradbury v. Donnell, 136 Mo. App. 676, 119 S. W. 21.

<sup>85</sup> Wilkes v. Smith, 4 Heisk. (Tenn.) 86; Dukes v. Turner, 44 Iowa 575.

mortgages, the vendor, in making sale of the land to enforce his lien, should first sell the lot last sold by the vendee, and so on in the inverse order until satisfaction is obtained.<sup>86</sup> If the vendee sells a portion of the land to various subpurchasers, and retains a portion himself, this should be first subjected to the lien; and if the vendor releases this portion, and it is of sufficient value to pay the whole amount of the lien, he cannot subject any part of the land conveyed to subpurchasers to the lien. The value of the part released is to be estimated as of the date of the release, without regard to the increase of the value of this portion after the purchase, or after the decree of sale to enforce the lien.<sup>87</sup>

§ 1118. **Account of vendor in possession.**—When a vendor, after giving a bond or contract of sale, remains in possession, and there is delay in making the conveyance beyond the time set for it, the vendee should be credited with a share of the rents and profits received from the use and enjoyment of the property, proportioned to the amount he may have paid on his purchase.<sup>88</sup>

§ 1119. **Assignment of purchase-money note or bond.**—An assignee of a note or bond given for purchase money by one who has taken a contract of sale, or who has taken a conveyance in which a lien upon the land is expressly reserved, like the assignee of a note secured by mortgage, is entitled to the benefit of the security, and may enforce specific performance of the contract of sale, or may enforce the

<sup>86</sup> Alabama v. Stanton, 5 Lea (Tenn.) 423; Whitten v. Saunders, 75 Va. 563; John M. Bonner Memorial Home v. Collin County Nat. Bank, 57 Tex. Civ. App. 313, 122 S. W. 430; Watson v. Vansickle, (Tex. Civ. App.) 114 S. W. 1160.

<sup>87</sup> Boyce v. Stanton, 15 Lea (Tenn.) 346; Watson v. Vansickle, (Tex. Civ. App.) 114 S. W. 1160, modified Vansickle v. Watson, 103 Tex. 37, 123 S. W. 112.

<sup>88</sup> Grove v. Miles, 71 Ill. 376.

lien reserved.<sup>89</sup> The lien is regarded as incident to the

<sup>89</sup> *Ober v. Gallagher*, 93 U. S. 199, 23 L. ed. 829. Illinois: *Wright v. Troutman*, 81 Ill. 374; *Steinkemeyer v. Gillespie*, 82 Ill. 253; *Carpenter v. Mitchell*, 54 Ill. 126; *Blaisdell v. Smith*, 3 Bradw. (Ill.) 150; *Markoe v. Andras*, 67 Ill. 34; *Gordon v. Johnson*, 186 Ill. 18, 57 N. E. 790, revg. 79 Ill. App. 423. Kansas: *Walkenhorst v. Lewis*, 24 Kans. 420; *Stevens v. Chadwick*, 10 Kans. 406, 15 Am. Rep. 348. Virginia: *McClintic v. Wise*, 25 Grat. (Va.) 448, 18 Am. Rep. 694. Mississippi: *Hobson v. Edwards*, 57 Miss. 128; *Hendrick v. Foote*, 57 Miss. 117; *Stratton v. Gold*, 40 Miss. 778; *Kimbrough v. Curtis*, 50 Miss. 117; *Dollahite v. Orne*, 2 Sm. & M. (Miss.) 590; *Tanner v. Hicks*, 4 Sm. & M. (Miss.) 294, 299; *Moore v. Lackey*, 53 Miss. 85; *Terry v. George*, 37 Miss. 539; *Robinson v. Harbour*, 42 Miss. 795, 97 Am. Dec. 501, 2 Am. Rep. 671; *Elmslie v. Thurman*, 87 Miss. 537, 40 So. 67. Nebraska: *Carter v. Leonard*, 65 Nebr. 670, 91 N. W. 574. Alabama: *Roper v. Day*, 48 Ala. 509; *Lowery v. Peterson*, 75 Ala. 109; *Wells v. Morrow*, 38 Ala. 125; *Kelly v. Payne*, 18 Ala. 371; *Roper v. McCook*, 7 Ala. 318; *Hall v. Click*, 5 Ala. 363, 39 Am. Dec. 327; *Wolffe v. Nall*, 62 Ala. 24; *Hall v. Mobile & Mont. R. Co.*, 58 Ala. 10. Kentucky: *Bradley v. Curtis*, 79 Ky. 327, 2 Ky. L. 329; *Duncan v. Louisville*, 13 Bush (Ky.) 378, 26 Am. Rep. 201; *Forwood v. Dehoney*, 5 Bush (Ky.) 174; *Lusk v. Hopper*, 3 Bush (Ky.) 179. South Carolina: *Walker v. Kee*, 16 S. Car. 76. Arkansas: *Campbell v. Rankin*, 28 Ark. 401; *Talieferro v. Barnett*, 37 Ark. 511; *McConnell v. Beattie*, 34 Ark. 113, overruling *Sheppard v. Thomas*, 26 Ark. 617, 626; *Moore v. Anders*, 14 Ark. 628, 634, 60 Am. Dec. 551; *Shall v. Biscoe*, 18 Ark. 142; *Rogers v. James*, 33 Ark. 77; *Martin v. O'Bannon*, 35 Ark. 62. Tennessee: *Tharpe v. Dunlap*, 4 Heisk. (Tenn.) 674; *Osborne v. Royer*, 1 Lea (Tenn.) 217; *Cleveland v. Martin*, 2 Head (Tenn.) 128. Iowa: *Rakestraw v. Hamilton*, 14 Iowa 147; *Blair v. Marsh*, 8 Iowa 144; *Bills v. Mason*, 42 Iowa 329; *Reynolds v. Morse*, 52 Iowa 155, 2 N. W. 1070. Missouri: *Adams v. Cowherd*, 30 Mo. 458. Indiana: *Felton v. Smith*, 84 Ind. 485. North Carolina: *Hadley v. Nash*, 69 N. Car. 162. Washington: *Shelton v. Jones*, 4 Wash. 692, 30 Pac. 1061. Oregon: *Burkhart v. Howard*, 14 Ore. 39, 12 Pac. 79. Texas: *McCamly v. Waterhouse*, 80 Tex. 340, 16 S. W. 19. The cases seem to be uniform upon this point, with the exception of those in Ohio. By statute in Arkansas, Dig. of Stats. 1904, § 510, the lien, when reserved in the deed, is made assignable by a transfer of the note or other obligation for the debt, provided the lien is expressed upon the face of the deed of conveyance. See *Campbell v. Rankin*, 28 Ark. 401, 407; *Richardson v. Hamlett*, 33 Ark. 237; *Stephens v. Anthony*, 37 Ark. 571; *Talieferro v. Barnett*, 37 Ark. 511. In California and Idaho it is pro-

debt.<sup>90</sup> If a vendor who retains the legal title for his security assigns the notes taken for the purchase money, he then holds the legal title as trustee for the holder of the notes, and he cannot properly do anything to defeat the rights of such holder. If, regardless of the trust, he conveys the land to a stranger, who purchases in good faith, the vendor then becomes a trustee of the purchase money which he has realized, for the benefit of the holder of the notes he assigned.<sup>91</sup> The assignment of a note which upon its face shows that it was given in consideration of the purchase money of land, or expressly reserves a lien upon it, passes the lien to the assignee, who may enforce it.<sup>92</sup> Though there has been a partial

vided that where a buyer of real property gives to the seller a written contract for the payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract; but a transfer of such contract in trust to pay debts, and return the surplus, is not a waiver of the lien. California: Civ. Code 1906, § 3047; Idaho: Rev. Codes 1908, § 3442.

<sup>90</sup> *Chitwood v. Trimble*, 2 Baxt. (Tenn.) 78; *Lowery v. Peterson*, 75 Ala. 109; *State Bank of Iowa Falls v. Brown*, 142 Iowa 190, 119 N. W. 81, 134 Am. St. 412. His lien is prior to a subsequent attachment levied on a judgment against his assignor. *Hamilton-Brown Shoe Co. v. Lewis*, 7 Tex. Civ. App. 509, 28 S. W. 101.

In Georgia it was held under a former statute, that if a note for the purchase-money be transferred without indorsement or guaranty, the purchaser's equity became complete as against the vendor,

and the land was subject to levy and sales as his property. *Neal v. Murphey*, 60 Ga. 388; *McGregor v. Matthis*, 32 Ga. 417; *Carhart v. Reviere*, 78 Gal. 173, 1 S. E. 222; *Hunt v. Harbor*, 80 Ga. 746, 6 S. E. 596.

<sup>91</sup> *Cummings v. Oglesby*, 50 Miss. 153; *Pitts v. Parker*, 44 Miss. 247, 252; *Parker v. Kelly*, 10 S. & M. (Miss.) 184, 191; *Skaggs v. Nelson*, 25 Miss. 88; *Conner v. Banks*, 18 Ala. 42, 52 Am. Dec. 209; *Attebury v. Burnett*, 52 Tex. Civ. App. 617, 114 S. W. 159. The assignee of notes secured by a reserved lien, may under a plea of not guilty prove that the notes have not been paid and thereby defeat a suit by the original vendee for possession. *Polk v. Kyser*, 21 Tex. Civ. App. 676, 53 S. W. 87.

<sup>92</sup> *Bailey v. Smock*, 61 Mo. 213; *Murray v. Able*, 19 Tex. 213, 70 Am. Dec. 330; *Osborne v. Royer*, 1 Lea (Tenn.) 217; *Aycock Bros. Lumber Co. v. First Nat. Bank*, 54 Fla. 604, 45 So. 501.

failure of the consideration for the assignment, the assignor cannot subsequently seek to enforce the lien before such assignment has been declared void.<sup>93</sup>

One who takes title from the vendor, with knowledge of an outstanding note for the purchase money previously assigned by the vendor, takes subject to the lien of such note,<sup>94</sup> unless the note was transferred after maturity, or in such manner that it is subject in the hands of the holder to all equities the maker may have against it.<sup>95</sup> As against his assignee, the vendor cannot be heard to dispute his own title to the land, or to aver that he has not an estate coextensive with that he has contracted to convey.<sup>96</sup>

**§ 1120. Order of payment of several notes.**—In case there are several notes or bonds secured in this way, the same equitable rule is applied as to the order of payment of such notes or bonds that is applied when they are secured by a formal mortgage or trust deed; that which was first assigned carries so much of the lien as is necessary to pay it, unless there be an express agreement otherwise,<sup>97</sup> or some equity in favor of the vendor.<sup>98</sup> Such assignee, moreover, is en-

<sup>93</sup> *Green v. Betts*, 1 Fed. 289, 1 McCrary (U. S.) 72.

<sup>94</sup> *Young v. Atkins*, 4 Heisk. (Tenn.) 529; *Houghton v. Rogan*, 17 Tex. Civ. App. 285, 42 S. W. 1018.

<sup>95</sup> *Shinn v. Fredericks*, 56 Ill. 439.

<sup>96</sup> *Lowery v. Peterson*, 75 Ala. 109.

<sup>97</sup> *McClintic v. Wise*, 25 Grat. (Va.) 448, 18 Am. Rep. 694; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531, 1 L. R. A. 639; *Menken v. Taylor*, 4 Lea (Tenn.) 445. Otherwise in Texas, unless it appears that it was the intention that the assignee should be first paid. *Sal-*

*mon v. Downs*, 55 Tex. 243. A later decision in this state places the rule more nearly in accord with the general rule. *Whitehead v. Fisher*, 64 Tex. 638; *Walcott v. Carpenter* (Tex. Civ. App.), 132 S. W. 981; *Douglass v. Blount*, 22 Tex. Civ. App. 493, 55 S. W. 526. See also, *Preston v. Ellington*, 74 Ala. 133; *Barkdill v. Herwig*, 30 La. Ann. 618. As to the rule in Mississippi, see *Aaron v. Warner*, 62 Miss. 370; *Christian v. Clark*, 10 Lea (Tenn.) 630; *Forwood v. Dehoney*, 5 Bush (Ky.) 174.

<sup>98</sup> *Grubbs v. Wysors*, 32 Grat. (Va.) 127.

titled to all the remedies of the vendor to enforce the lien; and the latter cannot, by any act of his, deprive the assignee of these remedies.<sup>99</sup>

§ 1121. **Notice to purchaser when deed does not refer to a note.**—If the deed which retains a lien for purchase money does not refer to any note or bond for such purchase money, a subsequent purchaser is not bound to make inquiry for it, and is not affected by any equity in favor of the assignee of the note or bond. A vendor who had taken a negotiable note for the purchase money of land conveyed by a deed which reserved a lien for the purchase money, but did not refer to the note, afterwards indorsed the note to one person, and contracted to sell the land to another, who paid the purchase money, and thereupon took from the first vendee a conveyance of the property. The second vendee was ignorant of the existence of the outstanding note, and of any claim by the holder of it to the purchase money. It was held that the second vendee took the property unaffected by any lien in favor of the holder of the note.<sup>1</sup> The assignee of the note in such case does not stand upon the same ground with the assignee of a mortgage note, where the latter is described in the mortgage. The giving of a note for the purchase money secured by a vendor's lien is not so universal a practice as to make it incumbent upon a subpurchaser, in the absence of any reference to the note in the deed, to make inquiry for such a note. And so where a note given in consideration of a contract for the conveyance of land was transferred to a third person, and the contract was afterwards cancelled by the parties to it, and the land conveyed to others, it was held that the holder of the note had no lien upon the property.<sup>2</sup>

<sup>99</sup> *McClintic v. Wise*, 25 Grat. 448, 18 Am. Rep. 694.

<sup>1</sup> *National Valley Bank v. Harman*, 75 Va. 604.

<sup>2</sup> *McMillen v. Rose*, 54 Iowa 522, 6 N. W. 728; *Proctor v. Hart*, 72 Miss. 288, 16 So. 595.



§ 1122. **Subrogation to the lien.** A surety upon a note given to the vendor for the purchase money, upon paying the note is subrogated to the vendor's lien for the purchase money, if no equity in favor of the vendor would thereby be displaced. But a surety upon the first of three notes given for the purchase money, upon paying such note is not entitled to be subrogated to the vendor's lien in respect to that note, when the result of such subrogation would be to displace the vendor to his prejudice in respect to his lien for the security of the other notes for the purchase money, as would be the case if the land were an inadequate security for the payment of all the notes.<sup>3</sup> A surety can have no subrogation until he has paid the entire debt.<sup>4</sup> One who has advanced money to the purchaser to enable him to pay a note or bond for the purchase money may be subrogated to the vendor's lien.<sup>5</sup>

§ 1123. **Statute of limitations.**—A lien founded upon contract may be enforced although the debt be barred by the statute of limitations.<sup>6</sup> The relation of a purchaser by title bond to his vendor is similar to that of mortgagor to mortgagee, and his possession is in like manner consistent with his obligation to pay the money secured, and does not become adverse except under circumstances which would make a mortgagor's possession adverse.<sup>7</sup>

<sup>3</sup> Grubbs v. Wysors, 32 Grat. (Va.) 127.

<sup>4</sup> McConnell v. Beattie, 34 Ark. 113; Menken v. Taylor, 4 Lea (Tenn.) 445.

<sup>5</sup> Price v. Davis, 88 Va. 939, 14 S. E. 704; Brown v. Rash, 40 Tex. Civ. App. 203, 89 S. W. 438.

<sup>6</sup> Driver v. Hudspeth, 16 Ala. 348; Bizzell v. Nix, 60 Ala. 281, 31 Am. Rep. 38; Coldcleugh v. Johnson, 34 Ark. 312; White v. Blake-more, 8 Lea (Tenn.) 49; Waddell

v. Carlock, 41 Ark. 523; McPherson v. Johnson, 69 Tex. 484, 6 S. W. 798; Paxton v. Rich, 85 Va. 378, 7 S. E. 531; Dittman v. Iselt (Tex. Civ. App.), 52 S. W. 96; Barber v. Hoffman (Tex. Civ. App.), 37 S. W. 769; White v. Cole, 9 Tex. Civ. App. 277, 29 S. W. 1148; Smith v. Owen, 43 Tex. Civ. App. 411, 97 S. W. 521; 1 L. R. A. 639.

<sup>7</sup> Butler v. Douglass, 3 Fed. 612, 1 McCrary (U. S.) 630; Lewis v. Hawkins, 23 Wall. (U. S.) 119, 23

A vendor's lien under an agreement or bond to convey, where the purchaser enters into possession without receiving a conveyance, is not barred by the statute of limitations until the lapse of twenty years without the payment of interest, or other recognition of the indebtedness on the part of the purchaser. Yet payment may be established by circumstances such as would satisfy a jury that the continued existence of the debt was highly improbable.<sup>8</sup>

**§ 1124. No obligation to exhaust personalty before resorting to real estate.**—The obligation first to exhaust the personal remedy, which is a rule of equity adopted by some courts as to liens arising by implication of law, has no application when the lien is created by express contract.<sup>9</sup>

**§ 1125. Proceedings to enforce such lien.**—To enforce a lien for the purchase money reserved by the vendor in his deed, the same proceedings are had as in case of a formal mortgage. The same persons must be made parties.<sup>10</sup> If the vendee has sold any part or the whole of his interest, his grantee must be made a party;<sup>11</sup> and so must any one who has acquired a lien upon the property through him.<sup>12</sup> "The

L. ed. 113; *Gudger v. Barnes*, 4 Heisk. (Tenn.) 570, overruling *Ray v. Goodman*, 1 Sneed (Tenn.) 586; *Daniels v. Moses*, 12 S. Car. 130; *Adair v. Adair*, 78 Mo. 630; *Lewis v. McDowell*, 88 N. Car. 261.

<sup>8</sup> *Phillips v. Adam*, 78 Ala. 225; *May v. Wilkinson*, 76 Ala. 543; *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. 771.

<sup>9</sup> *Smith v. Rowland*, 13 Kans. 245; *Sparks v. Hess*, 15 Cal. 186, 193; *McCaslin v. State*, 44 Ind. 151; *Huffman v. Cauble*, 86 Ind. 591. See, however, *Bryant v. Stephens*, 58 Ala. 636.

<sup>10</sup> *Wells v. Francis*, 7 Colo. 396,

4 Pac. 49. Where the purchaser of land, upon which a lien was reserved, conveys the same to his wife for life and on her remarriage to any children that might yet be born, the children are not proper or necessary parties to a foreclosure of such lien. *Shannon v. Ruttery*, (Tex. Civ. App.) 140 S. W. 858.

<sup>11</sup> *Ballard v. Carter*, 71 Tex. 161, 9 S. W. 92.

<sup>12</sup> *King v. Young Men's Assn.*, 1 Woods (U. S.) 386, Fed. Cas. No. 7811. *Gaston v. White*, 46 Mo. 486. See post, § 1541. In Iowa it is provided by statute that the

rights of the vendee," says Mr. Justice Bradley,<sup>13</sup> "being the same as those of a mortgagor, they must be extinguished in the same way. They are vested and well defined in the law. They constitute an estate called, it is true, by the name of an equity of redemption; but still an estate which may be conveyed, incumbered, and laid under other liens. And the heirs and assigns of the vendee and subsequent holders of liens on the property against him cannot be disregarded or ignored by the original vendor or his assigns, when they desire to extinguish this estate."

As, in the case of a suit to foreclose a mortgage, a person claiming adversely to the mortgage title should not be made a party, so to a bill to enforce a vendor's lien under a title bond a person claiming adversely to the title should not be made a party, because the rights of such a claimant cannot be litigated and settled in such proceeding.<sup>14</sup>

vendor of real estate who has given a bond or other writing to convey it, and part or all of the purchase-money remains unpaid after the day fixed for payment, whether the time is or is not of the essence of the contract, may file his petition asking the court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property. The vendee in such cases, for the purpose of the foreclosure, is treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner. Code 1897, §§ 4297, 4298; *Dukes v. Turner*, 44 Iowa 575. In Tennessee it is provided by statute that liens on realty retained in favor of vendors on the face of the deed, also mortgages, deeds of trust, and assignments of realty executed to secure debts, shall be barred and

the liens discharged, unless suit to enforce the same be brought within ten years from the maturity of the debt, provided that this statute shall not run against existing liens only from the date of the passage of this act. Acts 1885 Ch. 9; Code 1896, § 4465. For cases cited, see *Shannon's Supp.*, §§ 5326-5329.

<sup>13</sup> *King v. Young Men's Assn.*, 1 Woods (U. S.) 386, Fed. Cas. No. 7811.

<sup>14</sup> *Wells v. Francis*, 7 Colo. 396, 4 Pac. 49; *Moreland v. Metz*, 24 W. Va. 119, 49 Am. Rep. 246; *Cunningham v. Hedrick*, 23 W. Va. 579; *Neely v. Ruleys*, 26 W. Va. 686, 688; *Arnold v. Coburn*, 32 W. Va. 272, 9 S. E. 21. In West Virginia it is held that it is not necessary, before entering a decree of sale under a lien, to ascertain the existence and amount of other

§ 1126. **Remedies of vendor.**—Moreover, the vendor, like a mortgagee, has several remedies, and may pursue all of them concurrently; he may bring an action at law to recover the debt, an action of trespass or ejectment for the possession of the land, and a suit in equity to enforce the lien.<sup>15</sup> The vendor seeking to enforce the lien should set forth the terms of the agreement, and, if the title is still in him, he should aver his ability and willingness to convey the land according to the terms of sale, if the payment of the purchase money and the execution of the conveyance are intended by the contract to be concurrent and contemporaneous acts, or the contract makes the purchase money due and payable only on the tender of a deed of conveyance.<sup>16</sup> But if the purchase money be made payable on a day certain, the payment of this is not dependent upon the making of title;

liens upon the property and their priorities, though subsequent to the vendor's lien, or to make the lienors parties.

<sup>15</sup> *Micou v. Ashurst*, 55 Ala. 607; *Palmer v. Harris*, 100 Ill. 276; *McConnell v. Beattie*, 34 Ark. 113. Where a vendor holds a reserved lien and brings an action to foreclose the same and the foreclosure is void for informalities, he does not lose the lien reserved. *Evans v. Bentley*, 9 Tex. Civ. App. 112, 29 S. W. 497, 36 S. W. 1070. Where purchasers of land agree to execute security to the vendor and thereby induce him to release his reserved lien and such vendees refuse to carry out their agreement, the vendor may still enforce his lien. *Dishman v. Frost*, (Tex. Civ. App.) 140 S. W. 358. He may sue to recover the land, though the note is barred by the statute of limitations. *Johnson v. Lock-*

*hart*, 16 Tex. Civ. App. 32, 40 S. W. 640. The assignee of notes where a lien is reserved in the deed may in case of default in payment enforce the lien and recover the land even though the notes are barred. *White v. Cole*, 87 Tex. 500, 29 S. W. 759. See also, *Pittman v. Robbins*, (Tex. Civ. App.) 59 S. W. 600. The vendor on the purchaser's default may elect to rescind the contract and recover the real estate or recover judgment for the debt and foreclose his lien. *Atteberry v. Burnett*, 52 Tex. Civ. App. 617, 114 S. W. 159. See also, *Fowler v. Coates*, 128 App. Div. (N. Y.) 381, 112 N. Y. S. 849. He may foreclose his lien on any notes that are due. *Pamplin v. Rowe*, 100 Ark. 144, 139 S. W. 1105.

<sup>16</sup> *McKleroy v. Tulane*, 34 Ala. 78.

and in such case it is not necessary for the vendor, in a bill to enforce the lien, to aver an offer on his part to convey, or to aver his readiness to make title.<sup>17</sup> The vendee who has secured possession under his contract, and insists upon maintaining possession, is not permitted to deny his liability on the note, bond, or contract for the purchase money. If he resists payment of the purchase money, he must offer to restore the possession of the land to the vendor.<sup>18</sup> An averment also of the amount of purchase money remaining unpaid is necessary to sustain a judgment for a sale of the land to satisfy the amount due upon the contract.<sup>19</sup> In some states a strict foreclosure of such a lien is allowed.<sup>20</sup> But a strict foreclosure is not generally allowed where such a decree is not made in the foreclosure of mortgages.<sup>21</sup> A decree foreclosing this right of the vendee to purchase should give him a definite time within which to perform his contract.<sup>22</sup> Where a lien is reserved for the security of a bond for purchase money, the lien may be enforced in equity though the bond be lost.<sup>23</sup> A purchaser under a contract of purchase cannot maintain a suit for specific performance after he has assigned to another

<sup>17</sup> *Burkett v. Munford*, 70 Ala. 423; *Munford v. Pearce*, 70 Ala. 452; *May v. Lewis*, 22 Ala. 646; *Reeve v. Downs*, 22 Kans. 330.

<sup>18</sup> *Harvey v. Morris*, 63 Mo. 475; *Reeve v. Downs*, 22 Kans. 330; *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 96; *Brock v. Hidy*, 13 Ohio St. 306.

<sup>19</sup> *Calvin v. Duncan*, 12 Bush. (Ky.) 101. See *Johnston v. Cochran*, 84 N. Car. 446. Where a vendor sues for the land itself he need not refund that part of the purchase-money paid by the vendee. *Branch v. Taylor*, 40 Tex. Civ. App. 248, 89 S. W. 813. In

every case the vendor may sue to recover the land, where the contract is executory if his right has not been waived. *Crain v. National Life Ins. Co. of U. S.*, 55 Tex. Civ. App. 406, 120 S. W. 1098.

<sup>20</sup> *Vail v. Drexel*, 9 Bradw. (Ill.) 439. See *Jones on Mortgages*, § 1541.

<sup>21</sup> *Fitzhugh v. Maxwell*, 34 Mich. 138.

<sup>22</sup> *Keller v. Lewis*, 53 Cal. 113; *Vail v. Drexel*, 9 Bradw. (Ill.) 439.

<sup>23</sup> *Robinson v. Dix*, 18 W. Va. 528.

er his right to receive the conveyance, for he has then no cause of action unless it be as trustee for his assignee.<sup>24</sup>

§ 1127. **Tender of performance.**—It is no defense to an equitable action to enforce a lien, under a contract for unpaid purchase money, that the vendor did not tender a deed before bringing suit.<sup>25</sup> After the time for the performance of the contract has passed, without any offer by either party to perform on that day, there can be no action at law upon it by either, but either may claim a specific performance in equity, making an offer of performance in the bill.<sup>26</sup> If no tender was made before bringing suit, the complainant must aver a readiness and willingness to execute a deed that will vest the title in the purchaser. In Indiana it is held that the tender must be kept good by bringing the deed into court,<sup>27</sup> but generally an offer to deliver the deed is sufficient. If an action to foreclose the lien be brought, not by the vendor, but by his personal representatives, they should show that they are able and willing to give a deed, or else make the heir or devisee who holds the legal title in trust for the purchaser a party to the suit, so that he will be bound by it.<sup>28</sup>

§ 1127a. **Temporary eviction of vendee.**—If the vendee has been evicted and kept for a time only out of the possess-

<sup>24</sup> *Green v. Betts*, 1 Fed. 289, 1 McCrary (U. S.) 72.

<sup>25</sup> *Freeson v. Bissell*, 63 N. Y. 168. See, however, *McCaslin v. State*, 44 Ind. 151; *McKenzie v. Baldrige*, 49 Ala. 564; *Turner v. Lassiter*, 27 Ark. 662; *Wakefield v. Johnson*, 26 Ark. 506; *Paschal v. Brandon*, 79 N. Car. 504; *Evans v. Feeny*, 81 Ind. 532; *Munford v. Pearce*, 70 Ala. 452.

<sup>26</sup> *Bruce v. Tilson*, 25 N. Y. 194; *Stevenson v. Maxwell*, 2 N. Y. 408. And see *McWilliams v. Brookens*, 39 Wis. 334; *Watson v. Bell*, 45 Ala. 452; *Newton v. Hull*,

90 Cal. 487, 27 Pac. 429.

<sup>27</sup> *Goodwine v. Morey*, 111 Ind. 68, 12 N. E. 82; *Melton v. Coffelt*, 59 Ind. 310; *Smith v. Turner*, 50 Ind. 367; *Sowle v. Holdridge*, 63 Ind. 213; *Overly v. Tipton*, 68 Ind. 410.

<sup>28</sup> *Thomson v. Smith*, 63 N. Y. 301. In an action to foreclose a vendor's lien reserved in a sale contract plaintiff must aver his willingness to perform by making a deed as provided in the contract. *Powell v. Hunter*, 204 Mo. 393, 102 S. W. 1020; *Tillar v. Clayton*, 76 Ark. 405, 88 S. W. 972.

ion of the land, and then resumed its occupancy and enjoyment, when the defect in his vendor's title has been cured, in a suit by the vendor to enforce his lien the vendee is entitled to recoup the value of the estate for the period of dispossession.<sup>29</sup> But the vendee cannot claim, as special damages on account of his temporary eviction, that he had closed out a lucrative business, changed his residence, disposed of property at a sacrifice, and made expenditures looking to the occupation of the land during the season, which resulted in loss, for such damages are speculative and remote.<sup>30</sup>

### § 1128. Lien of vendor exhausted by foreclosure sale.—

If a vendor, who has entered into a contract to convey upon the payment of the purchase money, elects to foreclose his contract of sale, he cannot, after the land has been sold and bid in by him for a part only of the judgment, and then redeemed by the purchaser, still claim to have a vendor's lien upon the land for the balance of the purchase money.<sup>31</sup>

The decree must conform to the pleadings. If the bill asks for a sale of the land under the lien, or for a rescission of the contract of sale, a decree can not be entered for the satisfaction of the purchaser's note for the unpaid purchase money, that the vendor retain the moneys received by him, and that the purchaser retain possession of the land, and that the title be vested in him. The decree should either enforce the vendor's lien or rescind the contract.<sup>32</sup>

<sup>29</sup> See *Christy v. Ogle*, 33 Ill. 295; *Moreland v. Metz*, 24 W. Va. 119, 49 Am. Rep. 246. The vendor can not enforce his vendor's lien where his title fails and the vendee is compelled to purchase title from another. *Williams v. Finley*, 99 Tex. 468, 90 S. W. 1087. A purchaser can not prevent a foreclosure of a vendor's lien because of defects in title of a part of the land where

no eviction is shown and where he does not offer to pay the notes justly due. *Frantz v. Masterson*, (Tex. Civ. App.) 133 S. W. 740.

<sup>30</sup> *Gunter v. Beard*, 93 Ala. 227, 9 So. 389.

<sup>31</sup> *Todd v. Davey*, 60 Iowa 532, 15 N. W. 421; *Wall v. Club Land & Cattle Co.*, (Tex. Civ. App.) 88 S. W. 534.

<sup>32</sup> *Baldwin v. Whaley*, 78 Mo. 186.

A vendor who has taken notes for the purchase money can not enforce his lien by a sale of the land until all the notes are due, in the absence of a stipulation or statute to that effect.<sup>33</sup> The rule is the same as that which governs the foreclosure of a mortgage under like circumstances. But a personal judgment against defendant may be had on the notes due at the commencement of the action.

**§ 1129. Effect of sale of land to pass growing crops.—**A sale of the land under order of court to satisfy the lien passes the growing crops, unless they are reserved in the order of sale.<sup>34</sup> But the vendor's lien is subordinate to any lawful lien existing upon the crops at the time it is sought to charge them with the vendor's lien.<sup>35</sup> Before the vendor, however, can resort to the rents and profits of the land sold in payment of the debt for purchase money, he must allege in his bill or prove that the land itself is insufficient to pay the debt, the land being the primary fund for its satisfaction, and the rents and profits only an incidental fund.<sup>36</sup>

A clause in a deed which provides that the grantee may cut and sell the timber on the land, a lien for the purchase money being reserved, is interpreted as being made for the purpose of enabling the purchaser to pay the purchase money.

<sup>33</sup> *Brame v. Swain*, 111 N. Car. 540, 15 S. E. 938. See *Jones on Mortgages*, § 1459. Under Kentucky Civ. Code 1895, § 694, the whole of a tract of land can not be sold to satisfy notes for the purchase-money, unless all of them are due at the date of the judgment for the sale, though all the notes are held by the same person, but only so much of the land may be sold as is sufficient to satisfy the notes that are due; and if the property can not be advantageously divided, none of it can

be sold until all the notes fall due. *Gentry v. Walker*, 93 Ky. 405, 14 Ky. L. 351, 20 S. W. 291; *Leopold v. Furber*, 84 Ky. 214, 8 Ky. L. 198, 1 S. W. 404, following *Faught v. Henry*, 13 Bush (Ky.) 471.

<sup>34</sup> *Yates v. Smith*, 11 Bradw. (Ill.) 459; *Smith v. Hague*, 25 Kans. 246; *Johnston v. Smith*, 70 Ala. 108; *Jones on Mortgages*, §§ 658, 676, 699, 780.

<sup>35</sup> *Wooten v. Bellinger*, 17 Fla. 289.

<sup>36</sup> *Moore v. Knight*, 6 Lea (Tenn.) 427.



If, therefore, the purchaser makes a mortgage of the land to one who advanced him money to make the purchase, and the mortgagee files a bill to foreclose, alleging the superiority of the vendor's lien, and that the timber had been so wasted that the land would not more than satisfy it, a decree directing a sale of the land to pay the vendor's lien, and of the timber to pay the mortgage debt, is erroneous, for there was no intention to sever the title of the timber from that of the land. The mortgage created a lien on the land subordinate to the lien for purchase money, but it created no lien on the timber separate from the land.<sup>37</sup>

**§ 1130. Restraint of purchaser from impairing vendor's lien.**—A purchaser in possession under a contract of sale may be restrained from impairing the vendor's lien by the removal of buildings or otherwise. If the vendee sell the buildings to one who buys with knowledge of a fraudulent intent to impair the vendor's lien, no title passes as against the vendor, who may, under a judgment obtained against the vendee for purchase money, levy on and sell the house in the hands of the purchaser. But inasmuch as the vendee in possession is the equitable owner, he may properly remove buildings and fences, if this does not impair the vendor's security; thus, he may remove them for the purpose of erecting better ones in the place of those removed. The vendor in such case would have no right to interfere. He could not maintain replevin for the house removed, or for the timbers composing the house.<sup>38</sup> Where a vendor reserves a lien for purchase money and puts the vendee into possession and the vendee becomes insolvent and by bad husbandry impairs the vendor's security these facts are sufficient to authorize the court to appoint a receiver.<sup>39</sup>

<sup>37</sup> *Sikes v. Page*, 12 Ky. 780, 15 S. Co. v. *Morgan*, 19 Ky. L. 1761, 44 W. 248. S. W. 389, 628, 45 S. W. 65. See

<sup>38</sup> *Weed v. Hall*, 101 Pa. St. 592. also, *Van Dyke v. Cole*, 81 Vt. 379,

<sup>39</sup> *Columbia Finance & Trust* 70 Atl. 593, 1103.

## CHAPTER XXVI.

### IMPROVEMENT LIENS OF OCCUPANTS.

Sec.		Sec.	
1131.	Rule at common law.	1140.	In general.
1132.	Rule of civil law adopted.	1141.	Statutes providing compensation by set-off.
1133.	Rule adopted by courts of law.	1142.	Statutes providing full equitable compensation.
1134.	Value of improvements set off.	1143.	Statutes giving the occupant a lien on the land for his improvements.
1135.	Relief to one in possession under defective title.	1144.	Owner's land not taken without consent.
1136.	Party in possession allowed lien for improvements.	1145.	Constitutionality of the statutes.
1137.	Allowance in equity for lasting improvements.	1146.	Good faith of occupant a condition of recovery.
1138.	Lien of vendee for permanent improvements made.		
1139.	Lien by acquiescence of owner.		

§ 1131. **Rule at common law.**—At common law, the owner of the land, upon recovering in an action at law, was not bound to pay for any improvements made by the occupant. All improvements were considered as annexed to the freehold, and as passing with it. Although the occupant had made improvements under the belief that he had acquired the freehold, he was presumed to have made them at his own risk; and when it turned out that he was mistaken as to his own title, he was treated as an intruder and as a wrong-doer. The owner was certainly under no legal obligations to pay for improvements upon his land, which he had neither sanctioned nor desired, as a condition upon which he

should be allowed to recover possession.<sup>1</sup> But the occupant under color of title, it was conceded, had a strong equity in favor of being allowed compensation for lasting improvements which had increased the value of the land. "This equity arises from the mistake of the occupants, and neglect of the owner, whereby the labor of the former has inured to the benefit of the latter. There are difficulties, however, in sustaining this equitable claim consistently with the inviolability of private property. The improvements may be extensive, and beyond the ability of the owner to pay, without a disposition of the land; besides he may have a strong attachment for the property, and it might have answered all his purposes without the improvements. To overcome these embarrassments, the learned French civilian, Pothier, (see his *Traite du droit de Propriete*, No. 347,) proposed that the owner should be allowed to take possession upon the condition that the payment of the value of the improvements should remain a charge upon the land, to be made by instalments, under the regulation of the court. It appears to be a rule of the civil law, that, in a suit for the rents and profits, against the bona fide occupant, the value of his lasting improvements may be deducted from the amount of the plaintiff's claim for damages."<sup>2</sup>

§ 1132. **Rule of civil law adopted.**—The courts of equity adopted the rule of the civil law, and whenever the owner of land was compelled to obtain an account of rents and profits against the occupant, the courts required him in the first place to do equity by paying for improvements made by the occupant in good faith, and under color and claim of title.<sup>3</sup>

<sup>1</sup> McCoy v. Grandy, 3 Ohio St. 463, 466; Parsons v. Moses, 16 Iowa 440, 444; Lunquest v. Ten Eyck, 40 Iowa 213.

Bright v. Boyd, 1 Story (U. S.) 478, Fed. Cas. No. 1875; Putnam v. Ritchie, 6 Paige (N. Y.) 390, 404.

<sup>2</sup> McCoy v. Grandy, 3 Ohio St. 463, 466, per Barkley, J. See, also,

<sup>3</sup> Bright v. Boyd, 1 Story (U. S.) 478, Fed. Cas. No. 1875; Putnam v.

§ 1133. **Rule adopted by courts of law.**—Courts of law afterwards adopted the civil-law rule from the courts of equity, and applied it when the owner had recovered in ejectment, and sought to obtain the mesne profits in an action of trespass. This was regarded as an equitable action, and the plaintiff was allowed to recover only the rents and profits, after deducting the value of the improvements.<sup>4</sup> "The action for mesne profits is a liberal and equitable action," said Kent,<sup>5</sup> "and will allow of every kind of equitable defense." But courts of law made no other provision for reimbursing an innocent purchaser for improvements made by him as against the owner of the legal title.<sup>6</sup> In courts of law the value of improvements can be allowed only by way of set-off against the owner's demand for rents and profits and damages, and the compensation for improvements made is limited to the amount which the plaintiff is entitled to recover.<sup>7</sup>

§ 1134. **Value of improvements set off.**—To entitle a defendant in ejectment to set off the value of permanent improvements he has made upon the premises, he must allege and prove that such improvements were made by him, or by those under whom he claims;<sup>8</sup> that they were made while he or they were holding under color of title adversely to the claim of the plaintiff;<sup>9</sup> that they were made in good faith;<sup>10</sup>

Ritchie, 6 Paige (N. Y.) 390; Green v. Biddle, 8 Wheat. (U. S.) 1, 77, 5 L. ed. 547.

<sup>4</sup> *Dormer v. Fortescue*, 3 Atk. 124; *Green v. Biddle*, 8 Wheat. (U. S.) 1, 75, 5 L. ed. 547; *Hylton v. Brown*, 2 Wash. (U. S.) 165; *Fed. Case No. 6983*, *Stark v. Starr*, 1 Sawyer (U. S.) 15, *Fed. Cas. No. 13307*; *Jackson v. Loomis*, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347.

<sup>5</sup> *Murray v. Gouverneur*, 2 Johns. Cas. (N. Y.) 438, 441, 1 Am. Dec. 177.

<sup>6</sup> *Griswold v. Bragg*, 18 Blatchf. (U. S.) 202, per Shipman, J.

<sup>7</sup> *Green v. Biddle*, 8 Wheat. (U. S.) 1, 5 L. ed. 547; *Putnam v. Ritchie*, 6 Paige (N. Y.) 390; *Yount v. Howell*, 14 Cal. 465; *Wernke v. Hazen*, 32 Ind. 431.

<sup>8</sup> *Fitch v. Cornell*, 1 Sawyer (U. S.) 156, 176, *Fed. Cas. No. 4834*.

<sup>9</sup> *Fitch v. Cornell*, 1 Sawyer (U. S.) 156, *Fed. Cas. No. 4834*; *Stark v. Starr*, 1 Sawyer (U. S.) 15, *Fed. Cas. No. 13307*.

<sup>10</sup> *Woodhull v. Rosenthal*, 61 N.

and that they are of value, and of permanent value, to the property.<sup>11</sup>

§ 1135. Relief to one in possession under defective title.—Whether a court of equity will grant affirmative relief to one in possession of land under a defective title, who has made permanent improvements in good faith, believing himself to be legally entitled to the property, and allow him to recover from the true owner the value of such improvements without the aid of some other equity, and merely upon proof that he has made such improvements in the belief that he had the legal title, seems to be quite generally doubted by the authorities.<sup>12</sup> It is true that Judge Story, in a case which did not necessarily involve this precise point, remarked that there did not seem to be any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value.<sup>13</sup> The decision, however, was placed upon the ground that, inasmuch as the true owner sought relief in equity by asking for an account of rents and profits received by the defendant while in possession, he should do equity by allowing for improvements

Y. 382, 396; *Fitch v. Cornell*, 1 Sawyer (U. S.) 156, Fed. Cas. No. 13307; *White v. Moses*, 21 Cal. 34; *Dothage v. Stuart*, 35 Mo. 251; *Thompson v. Gilman*, 17 Vt. 109; *Whitney v. Richardson*, 31 Vt. 300. And see *Field v. Columbet*, 4 Sawyer (U. S.) 523, Fed. Cas. No. 4764.

<sup>11</sup> *Bell v. Barnet*, 2 J. J. Marsh. (Ky.) 516, 7 J. J. Marsh. (Ky.) 379; *Fitch v. Cornell*, 1 Sawyer (U. S.) 156, Fed. Cas. No. 4834; *Stark v. Starr*, 1 Sawyer (U. S.) 15, Fed. Cas. No. 13307; *Gill v. Patten*, 1 Cranch (U. S.) 465, Fed. Cas. No. 5428; *Woodhull v. Rosenthal*, 61 N. Y. 382.

<sup>12</sup> *Putnam v. Ritchie*, 6 Paige

(N. Y.) 390; *Taylor v. Foster*, 22 Ohio St. 255, 257, per Day, J.; *Diederich v. Rose*, 228 Ill. 610, 81 N. E. 1140.

<sup>13</sup> *Bright v. Boyd*, 1 Story (U. S.) 478, 494, Fed. Cas. No. 1875. With reference to this subject, Judge Story said: "It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a bona fide purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case

made by the defendant. When, upon the report of the master, the same case came before the learned judge, he placed his decision upon the broad ground of the purchaser's equity. He said:<sup>14</sup> "My judgment is, that the plaintiff is entitled to the full value of all the improvements and meliorations, which he has made upon the estate, to the extent of the additional value, which they have conferred upon the land. It appears by the Master's report, that the present value of the land with the improvements and meliorations is \$1,000; and that the present value of the land without these improvements and meliorations is but \$25.00; so that in fact, the value of the land is increased thereby \$975. This latter sum, in my judgment, the plaintiff is entitled to, as a lien and charge on the land in its present condition. I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of Equity, that, so far as an innocent purchaser for a valuable consid-

of a vacant lot in a city, where a bona fide purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just, that in such a case, the true owner should recover and possess the whole, without any compensation whatever to the bona fide purchaser? To me it seems manifestly unjust and inequitable, thus to appropriate to one man the property and money of another, who is in no default. The argument, I am aware, is, that the moment the house is built, it belongs to the owner of the land by mere operation of law; and that he certainly may possess and enjoy his own. But this is merely stating

the technical rule of law, by which the true owner seeks to hold, what, in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But, then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief?"

<sup>14</sup> *Bright v. Boyd*, 2 Story (U. S.) 605, Fed. Cas. No. 1876. The opinion of Judge Story, that a court of equity should grant affirmative relief at the suit of a bona fide possessor, has apparently been adopted in Maryland, *Union Hall Assn. v. Morrison*, 39 Md. 281; in Missouri, *Valle v. Fleming*, 29 Mo. 152; and in Oregon, *Hatcher v. Briggs*, 6 Ore. 31.

eration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent values of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation."

**§ 1136. Party in possession allowed lien for improvements.**—But generally it is only when the true owner seeks relief in equity against a purchaser lawfully in possession that the latter is allowed an equitable lien for improvements which he has made under the erroneous belief that he was the rightful owner. The courts in such cases say to the plaintiff that he shall do equity to the defendant by allowing for such improvements before he shall be granted relief.<sup>15</sup> Thus, if the true owner, after a recovery of the property at law, seeks, as plaintiff, an account in equity against such possessor for the rents and profits, courts of equity will allow the latter to deduct the value of all improvements made by him of permanent benefit to the estate.<sup>16</sup> Courts of equity will not go further and grant active relief in favor of such purchaser, and sustain a bill brought by him to recover the value of his permanent improvements, after the true owner has recovered the premises at law.

<sup>15</sup> *Robinson v. Ridley*, 6 Madd. 2; *Attorney-Gen. v. Baliol College*, 9 Mod. 407, 411; *Canal Bank v. Hudson*, 111 U. S. 66, 83, 28 L. ed. 354, 4 Sup. Ct. 303, per Blatchford, J.; *Bright v. Boyd*, 1 Story (U. S.) 478, Fed. Cas. No. 1875; 2 Story (U. S.) 605, Fed. Cas. No. 1876; *Williams v. Gibbes*, 20 How.

(U. S.) 535, 15 L. ed. 1013; *Davis v. Smith*, 5 Ga. 274, 289, 48 Am. Dec. 279; *Bazemore v. Davis*, 55 Ga. 504, 520; *Smith v. Drake*, 23 N. J. Eq. 302. See *Jones on Mortgages*, § 1128.

<sup>16</sup> *Bright v. Boyd*, 1 Story (U. S.) 478, Fed. Cas. No. 1875.

§ 1137. Allowance in equity for lasting improvements.— Upon the same principle, where improvements have been made by a lessee under a lease which passes a legal estate, though unauthorized, equity will not set it aside without allowing for lasting improvements. Thus, where a lease was made by trustees under a will and by authority of a decree of court, and the trustees exceeded their authority in agreeing upon some of the terms of the lease, it was held that, inasmuch as the lessees had a good legal estate, the lease would not be wholly set aside without making allowance for the improvements made by the lessee.<sup>17</sup> Lord Chancellor Hardwicke said: "The lessees have a good legal estate. The consideration might have been different if they had had only a defective one at law, so that the trustees could recover at law, and turn the lessees into equity to establish the lease, by having the defect supplied; and there perhaps the court would not do it; but the lessees having a good title at law, they have no need to be suitors to this Court, but instead of them the trustees must be obliged to come into this court to be relieved against this lease; but that must be upon equitable terms." The equitable terms were, that the trustees should allow the tenant for lasting improvements made by him.

§ 1138. Lien of vendee for permanent improvements made.—And so where a purchaser in possession under a contract of purchase made improvements in accordance with the contract, which required a certain expenditure as a necessary condition to entitle him to a deed, and the vendor failed to convey by reason of a defective title in himself, it was held that the vendee had an equitable lien on the premises for the money expended in such improvements.<sup>18</sup> Such a lien

<sup>17</sup> Attorney-General v. Baliol (N. Y.) 488. In Wisconsin where College, 9 Mod. 407. one purchased land by an unen-

<sup>18</sup> Gibert v. Peteler, 38 N. Y. forcible oral contract, took pos-  
165, 97 Am. Dec. 785, affg. 38 Barb. session and made valuable im-



may be enforced by a sale of the premises by order of court.<sup>19</sup>

But one who has entered into a contract of purchase whereby he has agreed to expend a certain sum of money on the land, and, after spending a part of it, declines to perform the contract further, has no lien on the land for the money which he has expended.<sup>20</sup>

**§ 1139. Lien by acquiescence of owner.**—It is everywhere conceded that, if the true owner stands by and suffers the person lawfully in possession to make improvements without giving him notice of his title, his acquiescence in the improvements will give rise to a lien upon the estate.<sup>21</sup> Some judges have been of the opinion that the lien for improvements is strictly confined to cases of acquiescence by the real owner. Thus Chancellor Walworth said that he had not been able to find any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter after he had knowledge of his legal rights.<sup>22</sup>

Where a father allowed his sons to erect buildings on his land at a great expense, they were allowed a lien on the premises, under the circumstances of the case. The father had not engaged to make over the land to them, although

provements, he was held in equity to be entitled to a lien for their value. *Schneider v. Reed*, 123 Wis. 488, 101 N. W. 682. See, also, *Marmon v. White*, 151 Ind. 445, 51 N. E. 930.

<sup>19</sup> *King v. Thompson*, 9 Pet. (U. S.) 204, 9 L. ed. 102.

<sup>20</sup> *Wallis v. Smith*, 21 Ch. Div. 243, per Fay, J.

<sup>21</sup> *Pilling v. Armitage*, 12 Ves. 78, 84, per Sir Wm. Grant. And see *Miner v. Beckman*, 50 N. Y.

337, 14 Abb. Prac. (N. Y.) (N. S.) 1.

<sup>22</sup> *Putnam v. Ritchie*, 6 Paige (N. Y.) 390, 405; *Overton v. Meggs*, (Tex. Civ. App.) 105 S. W. 208. Where it was held in case the owner of land had done nothing to induce one to settle upon and improve the land and knew nothing of such settlement and improvements, neither he nor his grantee could be held liable for the value of such improvements.

he contemplated and intended to do so at some future time. The father was regarded as having in some manner induced the sons to greatly improve his property.<sup>23</sup>

§ 1140. **In general.**—The relief which the courts at first afforded to occupants, who had in good faith made valuable and lasting improvements upon the land of others, is now given by legislation. These statutes are in some states called Betterment Acts, and in others Occupying Claimant Acts. These statutes may be divided into three groups, according to the nature and method of the remedy which they afford. In several states the indemnity afforded the occupant follows in theory that afforded by courts of law, inasmuch as the only compensation provided is merely by way of set-off to the owner's demand for rents and profits; and the extent of the indemnification is the amount of the rents and profits the plaintiff may recover. The statutes in these states may be regarded as imposing a lien upon the land limited in amount to the liability of the occupant for the use and occupation of the premises.

In a larger number of states the theory of the statutes enacted practically follows the opinion of Judge Story, that an equitable lien is placed upon the land for the value of the improvements which the bona fide occupant has innocently made. Accordingly, full compensation is allowed the occupant by provisions which differ much in different states, but which generally provide that the plaintiff in a real action shall not have judgment until he has made full compensation to the defendant for the improvements the latter has made, but generally allowing the plaintiff to elect to surrender the land to the occupant upon his paying the value of the land before the improvements were made. These statutes "practically impress upon the land of a successful plaintiff in eject-

<sup>23</sup> *Unity Joint Stock Mut. Banking Assn. v. King*, 25 Beav. 72, distinguished from *Millard v. Har-*

*vey*, 10 Jur. N. S. 1167, per Romilly, M. R., where no lien was allowed.

ment a lien for the excess, above the amount due for use and occupation, of the present value of the improvements which have been placed on the land, before the commencement of the action, by a defendant or his ancestors or grantors, in good faith, and in the belief that he or they had an absolute title to the land in question, and forbids occupancy by the plaintiff until the lien is paid."<sup>24</sup>

A third class of statutes provides that the amount due the occupant for improvements, after deducting the value of the profits he has received from their use, shall be a lien on the lands, which may be enforced in the modes provided.

**§ 1141. Statutes providing compensation by set-off.**—In New York,<sup>25</sup> in an action to recover real property, the plaintiff, when he recovers judgment, is entitled to recover rents and profits for a term not exceeding six years; but the damages shall not include the value of the use of any improvements made by the defendant, or those under whom he claims. Where permanent improvements have been made in good faith by the defendant, or those under whom he claims, while holding under color of title adversely to the plaintiff, the value thereof must be allowed to the defendant in reduction of the damages of the plaintiff, but not beyond the amount of those damages.

In New Jersey,<sup>26</sup> in the action for mesne profits, the plaintiff shall be entitled to recover of the defendant as damages the full value of the use and occupation of the premises for the time such defendant was in possession thereof, not exceeding six years before the commencement of such action; but such damages shall not include the value of the use of any improvements made by the defendant; and where permanent improvements have been made in good faith on the premises

<sup>24</sup> *Griswold v. Bragg*, 18 Blatchf. (U. S.) 202, 204, per Shipman, J.      <sup>26</sup> *Comp. Stats.* 1910, p. 2063, § 47.

<sup>25</sup> *Stover's Ann. Code Civ. Proc.* 1902, § 1531.

by the defendant, or those under whom he claims, while holding adversely to the plaintiff under color of title obtained by a fair bona fide purchase from some person in possession, and supposed to have a legal right and title thereto, the value of such permanent improvements shall be allowed to the defendant, and set off against the damages of the plaintiff to the extent of such damages and no further.

In Oregon,<sup>27</sup> the plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from such commencement to the time of giving a verdict therein, exclusive of the use of permanent improvements made by the defendant. When permanent improvements have been made upon the property by the defendant, or those under whom he claims, holding under color of title adversely to the claim of plaintiff, in good faith, the value thereof at the time of trial shall be allowed as a set-off against such damages.

In Washington<sup>28</sup> the plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from such commencement to the time of giving a verdict therein, exclusive of the use of permanent improvements made by the defendant. In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he claims, holding in good faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant.

<sup>27</sup> Bellinger & Cotton's Ann. Codes & Stats. 1902, § 331.

<sup>28</sup> Remington & Ballinger's Ann. Codes and Stats. 1910, § 796.

In Arizona,<sup>29</sup> California,<sup>30</sup> Colorado,<sup>31</sup> North<sup>31a</sup> and South Dakota,<sup>32</sup> Idaho,<sup>33</sup> Montana,<sup>34</sup> Nevada<sup>35</sup> and Utah,<sup>35a</sup> when damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff in good faith, the value of such improvements must be allowed as a set-off against such damages.<sup>36</sup>

In Georgia,<sup>37</sup> against a claim for mesne profits, the value

<sup>29</sup> Rev. Stat. 1901, § 4123.

<sup>30</sup> Code Civ. Proc. 1906, § 741.

<sup>31</sup> Mills' Ann. Code (Civ. Proc.) 1896, § 258. Mines are excepted. A tenant claiming a lien for improvements made can not claim that the execution of a renewal lease without her knowing it vested the lienholder with an absolute lien. One who fails during the life of a lease to enforce his lien is held to have agreed to the renewal lease and to continue the lien subject to it. *Hughes v. Kershaw*, 42 Colo. 210, 93 Pac. 1116, 15 L. R. A. (N. S.) 723.

<sup>31a</sup> Rev. Code 1905, § 7526.

<sup>32</sup> Rev. Code (Civ. Proc.) 1903, § 681.

<sup>33</sup> Rev. Code 1908, § 4541.

<sup>34</sup> Code (Civ. Proc.) 1895, § 1313.

<sup>35</sup> Rev. Laws 1912, art. 5517.

<sup>35a</sup> Comp. Laws 1897, § 3514.

<sup>36</sup> The value of improvements can be allowed only as a set-off against damages for withholding the premises; and where no such damages are alleged and proved, proof of the value of the improvements can not be introduced. *Ford v. Holton*, 5 Cal. 319, 322. If the value of the improvements exceeds the damages claimed by the

plaintiff the defendant can be allowed the amount of the damages so that the plaintiff will recover nothing. *Welch v. Sullivan*, 8 Cal. 165, 187, 511; *Yount v. Howell*, 14 Cal. 465; *Moss v. Shear*, 25 Cal. 38, 44, 85 Am. Dec. 94. The improvements allowed for are those made before the suit was commenced. But they can not be set off if they were made before the plaintiff acquired title. The defendant's possession must also be adverse. *Bay v. Pope*, 18 Cal. 694, 695; and under color of title, *Love v. Shartzer*, 31 Cal. 487, 495. A mere trespasser can not claim the value of his improvements. *Carpenter v. Mitchell*, 29 Cal. 330, 335. The improvements must, moreover, be of permanent value, and must have been made in good faith. *Carpenter v. Small*, 35 Cal. 346; *Welch v. Sullivan*, 8 Cal. 511.

<sup>37</sup> Code 1911, § 4347. The set-off for improvements does not extend beyond the mesne profits claimed. The claim for improvements is not allowed to trench at all upon the corpus of the property. *Fields v. Carlton*, 75 Ga. 554. In a suit in equity to foreclose a mortgage upon premises which the

of improvements made by one bona fide in possession, under a claim of right, is a proper subject-matter of set-off.

In Tennessee<sup>38</sup> persons holding possession in good faith, under color of title, are entitled to have the value of their permanent improvements set-off as against the rents and profits which the plaintiff may recover.

**§ 1142. Statutes providing full equitable compensation.—**  
In Massachusetts<sup>39</sup> and Maine,<sup>40</sup> when in a writ of entry the

person in possession supposed he had good title to, and upon which he made improvements, the land, with the improvements, was ordered to be sold, and the value of the land before the improvements were made was ordered to be paid to the mortgagee and the balance to the claimant, so far as necessary to satisfy his claim for improvements. *McPhee v. Guthrie*, 51 Ga. 83. This case was decided on its own peculiar facts, an examination of which should be made before following it or relying upon it. See *Fields v. Carlton*, 75 Ga. 554, 564, per Jackson, C. J. If the improvements are temporary in their nature, and the jury believe that they will perish before the owner can reap any benefit from them, they may decline to reduce the mesne profits on account of the improvements. *Morris v. Tinker*, 60 Ga. 466. The foundation of the claim in set-off must be laid by evidence of increased value of the land. The improvements must, moreover, have been made by the defendant, or by some one through whom he claims title. Evidence must be given of the nature of the im-

provements added. *Jenkins v. Means*, 59 Ga. 55.

<sup>38</sup> Ann. Code 1896, § 5009. Where a father has given possession of land to his daughter and her husband and has promised to convey it to said daughter, and the husband makes improvements thereon because of said promise, and the father fails to convey the land, the husband of the daughter has a lien on the land for the value of the improvements. *Mechanics' Sav. Bank & Trust Co. v. Scoggin*, (Tenn.) 52 S. W. 718.

<sup>39</sup> Rev. Laws 1902, ch. 179, §§ 17, 18, 29. A tenant's possession may be so far adverse as to entitle him to compensation for improvements, although he is entitled to possession by virtue of a limited estate, if his holding is in fact under a claim of an entire interest. *Wales v. Coffin*, 100 Mass. 177; *Plimpton v. Plimpton*, 12 Cush. (Mass.) 458. The improvements for which the statute allows compensation are such as were made while the possession of the maker was adverse, or under title which

<sup>40</sup> Rev. Stats. 1903, ch. 106, §§ 20-43.

demanding premises have been in the actual possession of the tenant, or of those under whom he claims, for six successive years before the commencement of the action, such tenant shall be allowed a compensation for the value of any buildings and improvements on the premises made by him, or by those under whom he claims, to be assessed by a jury. Though the premises have not been so held for six years, the tenant is entitled to such compensation if he holds under a title which he had reason to believe to be good.<sup>41</sup> The defendant after verdict may elect to abandon the premises to the tenant at the value estimated by the jury.

In Virginia<sup>42</sup> and West Virginia<sup>43</sup> if the defendant in ejectment intends to claim allowance for improvements, made upon the premises, by himself or those under whom he claims, he shall file with his plea, or at a subsequent time before the trial (if for good cause allowed by the court), a statement of his claim therefor, in case judgment be rendered for the plaintiff. In such case, the damages of the plaintiff, and the allowance to the defendant for improvements, shall be estimated, and the balance ascertained, and judgment therefor rendered as prescribed by statute.

he supposed to be good. *Wales v. Coffin*, 100 Mass. 177. See, also, *O'Brien v. Joyce*, 117 Mass. 360; *Daggett v. Tracy*, 128 Mass. 167. A mortgagee in possession, who supposes he has become the absolute owner, is entitled to the benefits of the statute. *McSorley v. Larissa*, 100 Mass. 270. A town which illegally takes a lot of land for a school-house lot is not entitled to an allowance for improvements under the statute. *Spalding*

*v. Chelmsford*, 117 Mass. 393; *Crosby v. Dracut*, 109 Mass. 206.

<sup>41</sup> This provision is not in the Maine statute.

<sup>42</sup> Code 1904, §§ 2753, 2754.

<sup>43</sup> Code 1906, §§ 3367, 3368. In the latter states it must appear in all cases that the defendant had reason to believe his title good. The balance due the defendant, after offsetting the damages assessed for the plaintiff, constitutes a lien upon the land recovered by the plaintiff.

In New Hampshire,<sup>44</sup> any person against whom any action is brought for the recovery of real estate may, with his plea, file a brief statement, setting forth that he and the persons under whom he claims have been in the actual peaceable possession thereof, under a supposed legal title, for more than six years before the action was begun, and that the value thereof has been increased by them by buildings or other improvements. The jury, if they find a verdict for the plaintiff, shall determine whether the lands have been so possessed and improved, and the amount of the increased value thereof, after allowing for any waste or injury the same may have sustained. The judgment rendered for the plaintiff, upon such verdict, shall be conditioned that if the plaintiff shall within one year pay to the clerk of the court, for the use of the defendant, the amount of the increased value so found, a writ of possession shall issue for the plaintiff; otherwise that his right to such lands shall be barred.

In Connecticut,<sup>45</sup> final judgment shall not be rendered, in any action to recover possession of land, against any defendant who has, in good faith, believing his title to the land in question absolute, made improvements thereon before the commencement of the action, or whose grantors or ancestors have so made such improvements, until the court shall have ascertained the present value of such improvements, and the amount reasonably due to the plaintiff from the defendant for the use and occupation of said land; and if such value of such improvements exceeds such amount due for use and occupation, execution shall not be issued until the plaintiff has paid said balance to the defendant, or into court for his benefit, but if the plaintiff shall elect to have the title confirmed in the defendant, and shall, upon the rendition of the verdict, file notice of such election with the clerk of the court, the court shall ascertain what sum ought in equity to be paid

<sup>44</sup> Pub. Stats. & Sess. Laws 1901, ch. 228, §§ 2-4. *Griswold v. Bragg*, 18 Blatchf. (U. S.) 202, per Shipman, J.

<sup>45</sup> Gen. Stats. 1902, § 4052. See



to the plaintiff by the defendant, or other parties in interest, and on payment thereof may confirm the title to said land in the parties paying it.

In Vermont,<sup>46</sup> in an action of ejectment, if judgment is rendered for the plaintiff, he shall recover his damages and the seisin and possession of the premises; and, if the title of the plaintiff expires or is conveyed by him after the commencement of such action, the suit shall not thereby fail, but the plaintiff may recover judgment for his damages for the detention of the premises during the continuance of his title, with costs. The judgment recovered in an action of ejectment shall, while remaining in force, be conclusive against the parties thereto, their heirs and assigns. If, after judgment for the plaintiff in an action of ejectment, it appears to the court that he claims title to the premises by a deed of mortgage, or bargain and sale with defeasance, the condition of which has not been performed, it shall, on application of the defendant, order stay of execution thereon. The court shall then ascertain the sum equitably due the plaintiff on such mortgage or deed with defeasance, at the time the judgment is rendered, including the cost of suits, and shall order that if the defendant or his representative pays or causes to be paid the amount then due the plaintiff, with interest thereon, and the clerk's fees, to the clerk of such court by a time limited, not exceeding one year from the rendition of the judgment, it shall be vacated. If the amount secured by such mortgage or deed with defeasance is payable by installments, a part of which is not due at the time the judgment is rendered, the court may order a redemption at a future period or periods, by installments or otherwise, as is equitable, not more than one year after the last installment becomes due. If the defendant or his representative pays or causes to be paid to the clerk of the court such sums pursuant to such order, the clerk shall deliver a certificate thereof

<sup>46</sup> Pub. Stats. 1906, §§ 1846-1852.

to the person making such payment, and a record of such certificate in the office where by law a deed of the premises is required to be recorded, shall defeat such mortgage or deed with defeasance. The plaintiff or his attorney, when he receives such sum from the clerk, shall receipt therefor upon the records of the court. If the defendant or his representative does not pay or cause to be paid such sums as ordered, the plaintiff shall have his writ of possession for the premises and for his damages and costs, to be issued by the clerk of the court, and shall hold such premises to himself, his heirs and assigns, discharged from all right and equity of redemption.

In Ohio,<sup>46a</sup> a person who, without fraud or collusion on his part, obtained title to and is in the quiet possession of lands or tenements, claiming to own them, shall not be evicted or turned out of possession by any person who sets up and proves an adverse and better title, until the occupying claimant, or his heirs, is paid the value of lasting improvements made by him on the land, or by the person under whom he holds, before the commencement of suit on the adverse claim whereby such eviction may be effected, unless the occupying claimant refuses to pay to the party establishing a better title the value of the lands without the improvements made as aforesaid, on demand by him or his heirs, when: 1. Such occupying claimant holds a plain and connected title, in law or equity, derived from the records of a public office; or, 2. Holds it by deed, devise, descent, contract, bond, or agreement, from and under a person claiming title as aforesaid, derived from the records of a public office, or by deed duly authenticated and recorded; or, 3. Under sale on execution

<sup>46a</sup> Gen. Code 1910, § 11908. A tax title gives a right to the benefits of the statute. The statute provides for the assessing of values by a jury. As to what is notice to an occupying claimant

before making the improvements, and its effect, see *Robinson v. Ward*, 13 Ohio St. 293, 5 W. L. J. 465; *Beardsley v. Chapman*, 1 Ohio St. 118; *Harrison v. Castner*, 11 Ohio St. 399.

against a person claiming title as aforesaid, derived from the records of a public office, or by deed duly authenticated and recorded; or, 4. Under a sale for taxes authorized by the laws of this state; or, 5. Under a sale and conveyance made by executors, administrators, or guardians, or by any other person or persons, in pursuance of an order or decree of court, where lands are directed to be sold.

In Illinois,<sup>46b</sup> the court appoints commissioners to assess the value of the improvements, and judgment and execution issue unless a bond is given to pay the amount within twelve months. If the value of the improvements exceeds the value of the land, the owner of the better title may convey the land to the occupying claimant; and judgment is entered against the latter for the amount of such value, upon which execution may issue, unless he gives bond to pay the same within one year.

In Indiana,<sup>47</sup> when an occupant of land has color of title thereto, and in good faith has made valuable improvements thereon, and is afterward, in the proper action, found not to be the rightful owner thereof, no execution shall issue to put the plaintiff in possession of the property after filing the complaint hereinafter mentioned, until the provisions of this act are complied with. The complaint must set forth the grounds on which the defendant seeks relief, stating, among other things, as accurately as practicable, the value of the improvements on the lands as well as the value of the land aside from the improvements.

All issues joined thereon shall be tried as in other cases, and the court or jury trying the cause shall assess—First.

<sup>46b</sup> Hurd's Rev. Stats, 1913, p. 1040, §§ 55-57.

<sup>47</sup> Burns' Ann. Stats. 1914, § 1121-1126. As to color of title, see Burns' Ann. Stats. 1914, § 1127. The occupying claimant may recover the value of lasting improvements made by the party under whom he

claims, as well as those made by himself; and any person holding the premises as a purchaser, by an agreement in writing from the party having color of title shall be entitled to the remedy. Burns' Ann. Stats. 1914, § 1129.

The value of all lasting improvements made, as aforesaid, on the lands in question previous to the commencement of the action for the recovery of the lands. Second. The damages, if any, which the premises may have sustained by waste or cultivation to the time of rendering judgment. Third. The fair value of the rents and profits which may have accrued, without the improvements, to the time of rendering judgment. Fourth. The value of the estate which the successful claimant has in the premises, without the improvements. Fifth. The taxes, with interest, paid by the defendant and by those under whose title he claims.

The plaintiff in the main action may thereupon pay the appraised value of the improvements, and the taxes paid, with interest, deducting the value of the rents and profits, and the damages sustained as assessed on the trial, and take the property.

Should he fail to do this, after a reasonable time, to be fixed by the court, the defendant may take the property, upon paying the appraised value of the land, aside from the improvements.

If this be not done within a reasonable time, to be fixed by the court, the parties will be held to be tenants in common of all the lands, including the improvements, each holding an interest proportionate to the value of his property, as ascertained by the appraisement above contemplated.

In Iowa,<sup>48</sup> where an occupant of real estate has color of

<sup>48</sup> Code 1897, §§ 2964-2967. The Iowa statute only provides in particular that the petition shall state the value of the improvements, and the value of the lands aside from the improvements. The assignee of an occupying claimant has the rights and remedies of his assignor. *Craton v. Wright*, 16 Iowa 133; *Parsons v. Moses*, 16 Iowa 440. The possession of the

occupying claimant must be adverse. *Wiltse v. Hurley*, 11 Iowa 473; *Keas v. Burns*, 23 Iowa 233. The claimant must have color of title, and must have made valuable improvements in good faith. *Lunquest v. Ten Eyck*, 40 Iowa 213; *Wells v. Riley*, 2 Dill. (U. S.) 566, Fed. Cas. No. 17404; *Litchfield v. Johnson*, 4 Dill. (U. S.) 551, Fed. Cas. No. 8387.

title thereto, and in good faith has made valuable improvements thereon, and is afterwards in a proper action found not to be the owner, no execution shall issue to put the plaintiff in possession of the same, after the filing of a petition as hereinafter provided, until the provisions of this act have been complied with.

Such petition must set forth the grounds on which the defendant seeks relief, stating as accurately as practicable the value of the real estate, exclusive of the improvements thereon made by the claimant or his grantors, and the value of such improvements. The issues joined thereon must be tried as in ordinary actions, and the value of the real estate and of such improvements must be separately ascertained on the trial.

The plaintiff in the main action may thereupon pay the appraised value of the improvements and take the property, but should he fail to do this after a reasonable time, to be fixed by the court, the defendant may take the property upon paying its value, exclusive of the improvements. If this is not done within a reasonable time, to be fixed by the court, the parties will be held to be tenants in common of all the real estate, including the improvements, each holding an interest proportionate to the values ascertained on the trial.

A purchaser in good faith at any judicial or tax sale, made by the proper person or officer, has color of title within the meaning of this act, whether such person or officer has sufficient authority to sell or not, unless such want of authority was known to such purchaser at the time of the sale; and his rights shall pass to his assignees or representatives. Any person has also color of title who has occupied a tract of real estate by himself, or by those under whom he claims, for the term of five years, or who has thus occupied it for less time, if he or those under whom he claims have, at any time during such occupancy, with the knowledge or consent, express or implied, of the real owner, made any valuable improvements thereon, or if he or those under whom he claims have,

at any time during such occupancy, paid the ordinary county taxes thereon, for any one year, and two years have elapsed without a repayment or offer of repayment of the same by the owner thereof, and such occupancy is continued up to the time at which the action is brought by which the recovery of the real estate is obtained; but nothing in this act shall be construed to give tenants color of title against their landlords.

In Missouri,<sup>49</sup> if a judgment or decree of dispossession shall be given in an action for the recovery of possession of premises, or in any real actions in favor of a person having a better title thereto, against a person in the possession, held by himself or by his tenant, of any lands, tenements or hereditaments, such person may recover, in a court of competent jurisdiction, compensation for all improvements made by him in good faith on such lands, tenements or hereditaments, prior to his having had notice of such adverse title. The plaintiff in his petition shall set forth the nature of his title, the length of his possession and the kind and value of the improvements made; and shall also aver therein that he entered into the possession of the land, believing that he had good title thereto, and that he made the improvements specified in the petition in good faith, under the belief that he had good title to the land, and shall be verified by his affidavit thereto annexed.

In Alabama,<sup>50</sup> in a suit to recover the possession of land, the jury must assess the value, at the time of trial, of the permanent improvements made by the defendant, or those whose estate he has, and also ascertain by their verdict the value of the lands, and of the use and occupation thereof, not including the increased value by reason of such improvements; if the value of the use and occupation as assessed exceed the value of the permanent improvements made, judgment must be rendered against the defendant for the excess.

<sup>49</sup> Rev. Stats. 1909, §§ 2401, 2402.

<sup>50</sup> Civ. Code 1907, §§ 3847-3849.

If the value of the improvements exceeds the value of the use and occupation, no writ of possession shall issue for one year after the rendition of the judgment, unless the plaintiff or his legal representative pay the defendant, or deposit with the clerk for him, the excess of the assessed value of the improvements over the value of the use and occupation. If the plaintiff or his legal representative, neglect for the term of one year to pay such excess, and the defendant, or his legal representative, within three months after the expiration of the year, pays to the plaintiff, or to the clerk for him, the value of the land and of the use and occupation thereof as assessed by the jury, the plaintiff is forever barred from his writ of possession, and from maintaining any action whatever against the defendant, his heirs, or assigns, to recover such land or the possession thereof.

In Kansas<sup>51</sup> an occupying claimant shall not be evicted until he shall be paid full value of all lasting and valuable improvements on the land made by him, or by those under whom he claims, previous to receiving actual notice by the commencement of suit on such adverse claim by which eviction may be effected. The value of such improvements, and the value of the land, and the value of the rents and profits received by the occupying claimant, with the damages the premises have sustained by waste, shall be assessed by a jury. If the successful claimant shall elect to receive the value of the land without the improvements, and shall tender a deed of general warranty to the occupying claimant, and the latter

<sup>51</sup> Gen. Stats. 1909, §§ 6217, 6220, 6226. For other statutes similar in effect, but differing in their provisions, see Michigan, Howell's Stats. 1913, §§ 13194-13197; Minnesota, Gen. Stats. 1913, §§ 8068-8070; Nebraska, Ann. Stats. 1911, § 10857; Texas, Rev. Civ. Stats. 1911, §§ 7760-7763; Wisconsin, Stats. 1898, §§ 3096-3100. Under the Min-

nesota statute, upon the failure of the landowner to pay, within the time prescribed by the statute, the amount awarded to the occupant for improvement, the title becomes vested in the occupant. *Flynn v. Lemieux*, 46 Minn. 458, 49 N. W. 238; *Craig v. Dunn*, 47 Minn. 59, 49 N. W. 396.

shall neglect or refuse to pay the value of the land within the time allotted by the court, a writ of possession shall issue.

In Wyoming<sup>52</sup> a person in the quiet possession of lands or tenements, and claiming to own the same, who has obtained title to and is in possession of the same, without fraud or collusion on his part, shall not be evicted or turned out of possession by any person who sets up and proves an adverse and better title, until the occupying claimant, or his heirs, are fully paid the value of all lasting and valuable improvements made on the land by him, or by the person under whom he holds, previous to receiving actual notice by the commencement of suit on such adverse claim, whereby such eviction may be affected, unless such occupying claimant refuse to pay to the person so setting up and proving an adverse and better title, the value of the land, without improvements made thereon as aforesaid, upon demand of the successful claimant, or his heirs, as hereinafter provided, when: 1. Such occupying claimant holds a plain and connected title in law or equity, derived from the records of a public office; or, 2. Holds the same by deed, devise, descent, contract, bond or agreement, from and under a person claiming title as aforesaid, derived from the records of a public office, or by deed duly authenticated and recorded; or, 3. Under sale on execution, against a person claiming title as aforesaid, derived from the records of a public office, or by deed duly authenticated and recorded; or, 4. Under a sale for taxes authorized by the laws of this state; or, 5. Under a sale and conveyance made by executors, administrators or guardians, or by any other person or persons, in pursuance of an order of court, or decree in chancery, where lands are or have been directed to be sold.

<sup>52</sup> Comp. Stats. 1910, § 4971.



§ 1143. **Statutes giving the occupant a lien on the land for his improvements.**—In Kentucky<sup>53</sup> any person believing himself to be the owner by reason of a claim in law or equity, the foundation of which being of public record, who has improved the land, shall not be evicted until the value of the improvements shall be paid by the successful party to the occupant. A jury shall assess the damages done the land by waste, the rents and profits which have accrued after final judgment of eviction, and the value of the improvements upon the land. The court, after deducting the lesser from the greater assessments, may give judgment for the remainder in favor of the occupant or successful claimant, as the case may be. The occupant shall have a lien upon the land recovered from him to satisfy said judgment, and may enforce it by suit in equity, order of court, or other procedure. Satisfaction of the judgment in favor of the occupant for improvement must be sought by enforcement of such lien.

The statute of Arkansas<sup>54</sup> is somewhat similar in its provisions. The amount due the occupant for improvements is made a lien on the lands, which may be enforced by equitable

<sup>53</sup> Stats. 1909, §§ 3728, 3732, 3736-3738. Where a person makes improvements on land of a married woman, which forms no part of the homestead, by reason of her having induced him to think that he had bought it from her, equity will give him a lien thereon for the value of the improvements, though she is not bound by her contracts. In such case it is in the discretion of the chancellor to order that a certain amount of the land be sold, and that, if this be not sufficient, more be then sold. *Dailey v. Cain*, 11 Ky. L. 936, 13 S. W. 424; *Hawkins v. Brown*, 80 Ky. 186, 3 Ky. L. 664. Where under a contract of occupancy with a life

tenant it was agreed that the occupant should have the use of a farm so long as he should support the life tenant and he placed lasting improvements on the land and afterward the life tenant repudiated the contract, it was held the occupant had a lien on the life estate for the value of such improvements. *Glass v. Hampton*, (Ky. App.) 122 S. W. 803. See, also, *Robards v. Robards*, 27 Ky. L. 494, 85 S. W. 718; *Bell v. Bair*, 28 Ky. L. 614, 89 S. W. 732; *Burk's Admr. v. Lane Lumber Co.*, 28 Ky. L. 545, 89 S. W. 686.

<sup>54</sup> Dig. of Stats. 1904, §§ 2755, 2756.

proceedings at any time within three years after the date of the judgment. No account for any mesne profits shall be allowed unless the same shall have accrued within three years next before the commencement of the suit in which they may be claimed.

In Mississippi<sup>55</sup> the defendant in ejectment has a lien upon the land for the difference between the value of the mesne profits and the value of the improvements and taxes found by the jury; and no execution shall issue in favor of the plaintiff until he shall have paid the amount so due to the defendant.

In New Mexico,<sup>56</sup> when any person or his assignors may have heretofore made, or may hereafter make any valuable improvements on any lands, and he or his assignors have been or may hereafter be deprived of the possession of said improvements, in any manner whatever, he shall have the right, either in an action of ejectment which may have been brought against him for the possession, or by an appropriate action at any time thereafter within ten years, to have the value of his said improvements assessed in his favor, as of the date he was so deprived of the possession thereof, and the said value so assessed shall be a lien upon the said land and improvements, and all other lands of the person who so deprived him of the possession thereof situate in the same county, until paid; but no improvements shall be assessed which may or shall have been made after the service of summons in an action of ejectment on him, in favor of the person against whom he seeks to have said value assessed for said improvements.

In North Carolina<sup>57</sup> any defendant against whom a judg-

<sup>55</sup> Code 1906, § 1849.

<sup>56</sup> Comp. Laws 1897, § 3755.

<sup>57</sup> Revisal 1905, § 652. Section 660 provides that nothing herein shall apply to any suit brought by a mortgagee, or his heirs or assigns, against a mortgagor, or his

heirs or assigns, for the recovery of the mortgaged premises. To entitle the occupant to recover for improvements, he must show that he made them while he believed his title to be good. *Browne v. Davis*, 109 N. Car. 23, 13 S. E. 703.

ment shall be rendered for land may, at any time before the execution of such judgment, present a petition to the court, rendering the same, stating that, he, or those under whom he claims, while holding the premises under a color of title believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same, over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegation, suspend the execution of such judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for such improvements: provided, that in any such action, such inquiry and assessment may be made upon the trial of the cause.

In South Carolina,<sup>58</sup> the defendant in ejectment is entitled for betterments to a verdict for the value thereof, as of the date when the lands were recovered from him, and interest on the verdict from said date, and the lands and tenements so recovered shall be held to respond to said judgment for betterments in the same manner and for the same time as if the same had been attached on mesne process.

In Wisconsin,<sup>59</sup> in every case where a recovery shall be had of any land on which the party in possession or those under whom he claims, while holding adversely by color of title asserted in good faith, founded on descent or any written instrument, shall have made permanent and valuable improvements or shall have paid taxes assessed, such party, for him-

<sup>58</sup> Code 1912, § 3529. It is not what such improvements may have cost in dollars and cents that is allowed, but what additional value has been imparted to the premises by such improvements. *Lewis v. Price*, 3 Rich. Eq. (S. Car.) 172. On a lot belonging to an infant without guardian, living with his mother and stepfather, all of whom were destitute and home-

less, plaintiff made expenditures in the way of necessary improvements to the house, under a contract with the mother, to whom plaintiff thought it belonged. Held, that the value of the improvements to the premises would be allowed out of its rents. *Shumate v. Harbin*, 35 S. Car. 521, 15 S. E. 270.

<sup>59</sup> Stats. 1898, § 3096.

self and for the benefit of those under whom he claims, shall be entitled to have from the plaintiff, his heirs or assigns, if he insist upon his recovery, the value of such improvements at the time the verdict or decision against him is given and the amount paid for taxes, with interest from the date of the payment, to be assessed and recovered as hereinafter provided, and for the payment thereof shall have a lien on the real estate so recovered. When such recovery is of any estate less than a fee or of any share or interest less than the whole the claim for such improvements and taxes shall be proportioned to the benefits derived thereby to the estate, share or interest recovered. But the plaintiff shall be entitled to set-off against such claim for improvements and taxes any claim for rents and profits enjoyed by the defendant or those under whom he claims during any period occurring prior to and terminating six years before the commencement of such action of ejectment and which he might have recovered but for the limitation by law thereon; and also any such rents and profits enjoyed by the defendant since the verdict in the ejectment action and prior to the assessment of the value of such improvements.

§ 1144. **Owner's land not taken without consent.**—A statute for the relief of occupying claimants, which requires the value of permanent improvements made in good faith under color of title to be paid by the owner on condition of his recovering the land, rests upon a strong equity.<sup>59a</sup> Though it is

<sup>59a</sup> *Griswold v. Bragg*, 18 Blatchf. (U. S.) 202, 205, per Shipman, J. There is a natural equity which rebels at the idea that a bona fide occupant and reputed owner of land in a newly settled country, where unimproved land is of small value, or where skill in conveyancing has not been attained, or where surveys have been uncertain or inaccurate,

should lose the benefit of the labor and money which he had expended in the erroneous belief that his title was absolute and perfect. While it is true that improvements and permanent buildings upon land belong to the owner, yet, in a comparatively newly organized state, where titles are necessarily more uncertain than they are in England, there is an

an encroachment upon the common-law rights of property, it does not divest the owner of his estate in the land without his consent. An election given to the owner either to take the land on paying for the improvements, or to take its value in money without the improvements and surrender the land to the claimant, is constitutional, because even then the land is not taken from him without his consent.<sup>60</sup> But a statute which gives this option to the occupying claimant is unconstitutional, because it undertakes to deprive him of his property without his consent.<sup>61</sup>

A statute which gives the owner the election to pay the defendant the value of the improvements he has made, or to have the title confirmed to the defendant upon his paying such sum as the court shall ascertain to be equitably due to the plaintiff, is constitutional.<sup>62</sup> It does not impair the obligation of contracts, nor deprive a person of his property

instinctive conviction that justice requires that the possessor under a defective title should have recompense for the improvements which have been made in good faith upon the land of another. The maxim, often repeated in the decisions upon this subject, "*Nemo debet locupletari ex alterius incommodo*," tersely expresses the antagonism against the enrichment of one out of the honest mistake, and to the ruin, of another. It is obvious, that this statutory equity is not without occasional hardships. The true owner may be forced to sell his land against his will, and may sometimes be placed too much in the power of capital, but a carefully regulated and guarded statute should ordinarily be the means of doing exact justice to the owner.

<sup>60</sup> *Ross v. Irving*, 14 Ill. 171; *Hunt v. McMahan*, 5 Ohio 133; *Armstrong v. Jackson*, 1 Blackf. (Ind.) 374; *Fisher v. Cockerill*, 5 T. B. Mon. (Ky.) 129, 132; *Gaines v. Buford*, 1 Dana (Ky.) 481, 494. *Contra*, *Nelson v. Allen*, 1 Yerg. (Tenn.) 360.

<sup>61</sup> *McCoy v. Grandy*, 3 Ohio St. 463, 469. "However able and willing to pay the full value of the improvements put on his land without his authority, the owner is compelled to give up his land, and that too, not at the price he may fix upon it, nor even at the price for which it might be sold at a public sale to the highest bidder; but at a price to be fixed by a jury."

<sup>62</sup> *Griswold v. Bragg*, 18 Blatchf. (U. S.) 202.

without due course of law, nor deprive him of his right to trial by jury.<sup>63</sup>

§ 1145. **Constitutionality of the statutes.**—Statutes which in effect preserve the equitable lien of the occupant, and give the legal owner his election either to take possession of the land upon paying the value of the improvements which the occupant has innocently made, or to receive in place of the land its value without the improvements, are constitutional.<sup>64</sup> The Connecticut statute, which is founded on the theory of an equitable lien, and gives the owner the election to keep his land or surrender it, and receive such compensation as the court shall ascertain to be equitably due, was ably discussed as regards its constitutionality in the case already several times referred to.<sup>65</sup> “The statute is said to be unconstitutional in that it impairs the effect of conveyances, in violation of the provision of the Constitution of the United States, (art. 1, sec. 9) which prohibits a state from passing a law impairing the obligation of contracts, and that, as re-

<sup>63</sup> Per Shipman, J., in *Griswold v. Bragg*, 18 Blatchf. (U. S.) 202: “The legal owner has his election either to take possession of the land by paying the lien, or to receive, in lieu of the land, the sum which the court shall ascertain to be equitably due him. The owner’s title is not forced away from him, but the equitable lien of the occupant is preserved. There is no election on the part of the occupant to keep the land and thus compel the owner to abandon his title, neither is any judgment rendered against the owner for the value of the improvements, to be enforced by levy of execution.”

<sup>64</sup> *Griswold v. Bragg*, 18 Blatchf. (U. S.) 202. The constitutionality

of similar statutes has been discussed and sustained in the following among other cases: *Withington v. Corey*, 2 N. H. 115; *Whitney v. Richardson*, 31 Vt. 300; *Armstrong v. Jackson*, 1 Blackf. (Ind.) 374; *McCoy v. Grandy*, 3 Ohio St. 463; *Ross v. Irving*, 14 Ill. 171; *Childs v. Shower*, 18 Iowa 261. The constitutionality of the Tennessee statute was condemned in *Nelson v. Allen*, 1 Yerg. (Tenn.) 360, 376. Judge Catron says that the question of constitutionality did not properly arise in that case, and expresses no opinion upon the point.

<sup>65</sup> *Griswold v. Bragg*, 18 Blatchf. (U. S.) 202.

gards pre-existing conveyances or estates, it is contrary to the state constitution, because it deprives a person of his property without due course of law, and deprives him of his right of trial by jury." Shipman, J., answering these objections, said: "I do not think that it is necessary to enter into a critical examination of these constitutional provisions. The defendant's suggestions are founded upon a harsh view of the nature of the statute. It does not impair the obligation of any contract between the owner and his grantor or between the state and the owner. It interferes with no legal title. It interferes with, and is an abridgment of, the right to the immediate possession and beneficial enjoyment of property, as that right existed at common law, and to that extent, impairs the interest which owners formerly had in lands. It can not be said to be an unjust or unreasonable limitation of the common-law right of possession, but, on the contrary, the provisions are reasonable."

A statute giving the occupant the election to keep the land, and compel the owner to abandon the title, is unconstitutional.<sup>66</sup>

A statute authorizing the rendering of a general judgment in favor of the occupying claimant against the owner, for the value of improvements made, is unconstitutional and void.<sup>67</sup>

A statute allowing an occupant the value of his improvements is unconstitutional so far as it applies to improvements existing before the passage of such statute.<sup>68</sup>

<sup>66</sup> *McCoy v. Grandy*, 3 Ohio St. 463.

<sup>67</sup> *Childs v. Shower*, 18 Iowa 261.

<sup>68</sup> *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. ed. 212; *McPhee v. Guthrie*, 51 Ga. 83; *Society for the Propagation of the Gospel v. Wheeler*, 2 Gall. (U. S.) 105, Fed. Cas. No. 13156. There is a dictum by Judge Dillon that it is by no

means clear that the equities of an occupying claimant, who in good faith has made improvements during a period when the real owner was negligent in asserting his rights, may not be provided for by retrospective legislation. *Litchfield v. Johnson*, 4 Dill. (U. S.) 551, Fed. Cas. No. 8387.

The provisions of a statute relating to the appointment of commissioners to estimate the value of improvements made by the defendant in ejectment can not be applied in courts of the United States, where the question of such value must be determined by a jury. But there is a complete remedy for such defendant in equity.<sup>69</sup>

**§ 1146. Good faith of occupant a condition of recovery.—**

It is generally an essential condition to the recovery of the value of permanent improvements under the statutes, that the occupant has made them in good faith while holding possession under color of title.<sup>70</sup> If one through whom the defendant in ejectment claims title made improvements without such a belief on his part, the last purchaser is precluded from recovering for such improvements, although the last purchaser may have paid for the full value of the improvements.<sup>71</sup> But the last purchaser, who has purchased with the belief that he was obtaining a perfect title, may recover the value of his own improvements, and the value of the improvements made by all others through whom he claims, who purchased and made improvements with such belief on their part, though one party in the chain of title purchased without such a belief on his part.<sup>72</sup>

The statutes on this subject generally make it a condition to the right of the occupant to claim compensation for im-

<sup>69</sup> *Bank of Hamilton v. Dudley*, 2 Pet. (U. S.) 492, 7 L. ed. 496.

<sup>70</sup> *Stark v. Starr*, 1 Sawyer (U. S.) 15, Fed. Cas. No. 13307; *Fitch v. Cornell*, 1 Sawyer (U. S.) 156, 157, Fed. Cas. No. 4834; *Gaines v. Lizardi*, 1 Woods (U. S.) 56; Fed. Cas. No. 5175; *Wells v. Riley*, 2 Dill. (U. S.) 566, Fed. Cas. No. 17404; *Litchfield v. Johnson*, 4 Dill. (U. S.) 551, Fed. Cas. No. 8387; *Mathews v. Davis*, 6 Humph. (Tenn.) 324; *Cain v. Cox*, 23 W.

Va. 594; *McKim v. Moody*, 1 Rand. (Va.) 58; *Morris v. Terrell*, 2 Rand. (Va.) 6. Where improvements are made by an occupant in bad faith neither he nor his grantee has any equitable lien therefor. *Armstrong v. Ashley*, 22 App. (D. C.) 368, affd. 204 U. S. 272, 51 L. ed. 482, 27 Sup. Ct. 270.

<sup>71</sup> *Winslow v. Newell*, 19 Vt. 164.

<sup>72</sup> *Whitney v. Richardson*, 31 Vt. 300.



provements made by him that he shall have made them in good faith, believing that he had a good title in fee. The statutes of a few states give the right without such condition or requirement.

The Roman law made a distinction between necessary works and useful works; and a possessor in bad faith, as well as the possessor in good faith, was entitled to compensation for necessary works; but if they were merely useful, while the possessor in good faith was entitled to compensation, the possessor in bad faith had only the right to withdraw and keep the gain which he had derived from the improvements.<sup>73</sup>

<sup>73</sup> *Gaines v. New Orleans*, 1 Woods (U. S.) 104, 107, Fed. Cas. No. 5177, per Bradley, J., affd. 15 Wall. (U. S.) 624, 21 L. ed. 215; *Johnson v. Weinstock*, 31 La. Ann. 698, 702. The Roman law has been adopted in Louisiana with some modifications. The Civil Code 1900, art. 508, which is the same as art. 555 of the Code Napoleon, provides that when improvements have been made by a third person, with his own materials, the owner of the soil has the right to keep them, or to compel this person to take them away. But if the owner keeps them he must pay their

original cost. A possessor in bad faith is held to be entitled to compensation for improvements, if the owner of the soil accepts them; but he may require them to be removed. *Gaines v. New Orleans*, 1 Woods (U. S.) 104, Fed. Cas. No. 5177, affd. 15 Wall. (U. S.) 624, 21 L. ed. 215. Such possessor in bad faith is entitled to interest on the amount he expended for such improvements, if the owner accepts them, and he is chargeable with the rents and profits with interest. *Jackson v. Ludeling*, 2 Woods (U. S.) 254, Fed. Cas. No. 7139.

## CHAPTER XXVII.

### IMPROVEMENT LIENS OF JOINT TENANTS, TENANTS IN COMMON, AND TENANTS FOR LIFE OR FOR YEARS.

Sec.	Sec.
1147. Lien of joint tenant or tenant in common.	1154. Lien of tenant in common for price paid for adverse title.
1148. Lien against tenant in common who is an infant.	1155. No lien for rents collected.
1149. No lien except where improvements are made with consent of joint tenant.	1156. Lien of tenant in common not good as against creditors' attachment liens.
1150. Lien of tenant in common or joint tenant by agreement.	1157. Judgment creditor not a purchaser in some states.
1151. Lien of tenant in common settled before partition.	1158. Owelty of partition a first lien.
1152. Lien for excess of purchase money furnished by one tenant in common or joint tenant.	1159. Life tenant can not charge estate with value of improvements.
1153. Lien for money advanced by tenant in common to discharge mortgage.	1160. Exceptions to rule that life tenant can not charge the estate with improvements.
	1161. Lien of lessee for improvements made.
	1162. Lien for improvements under agreement for a lease.

§ 1147. **Lien of joint tenant or tenant in common.**—One joint tenant or tenant in common has a lien upon his cotenant's interest in the property for the expense of necessary and useful repairs made upon it whereby a common benefit has been conferred on the owners, so that *ex aequo et bono* they ought to pay for such a benefit.<sup>1</sup> Unless the property could

<sup>1</sup> *Lake v. Craddock*, 3 P. Wms. 290; *Scott v. Nesbitt*, 14 Ves. 437, 158; same case under name of 444; *Swan v. Swan*, 8 Price 518; *Lake v. Gibson*, 1 Eq. Cas. Abr. Coffin v. Heath, 6 Met. (Mass.) 76;

be so charged for such repairs, which one tenant is willing to make, the property might remain unfit for use, and worthless or unprofitable to both tenants. One tenant should not be forced to let his property go to ruin, or to sell his interest, because his cotenant is unwilling or unable to make the necessary repairs. Neither should the tenant who is willing to incur the cost of making such repairs be forced to do so at his own expense without security for the repayment of his cotenant's share, but the law should afford him immediate security therefor by means of a lien upon his cotenant's interest.<sup>2</sup>

### § 1148. Lien against tenant in common who is an infant.

—If the tenant in common, whose estate has been benefited by repairs made by a cotenant, be an infant, the lien against his estate can not be enforced during his minority. The most that the court could do would be to decree upon a proper bill that the infant and his guardian should be restrained from taking any share of the rents and profits of the common property until the infant should arrive at full age, unless the infant or his guardian should pay or secure to the tenant

Alexander v. Ellison, 79 Ky. 148, 2 Ky. L. 49; Torrey v. Martin (Tex.) 4 S. W. 642; Taylor v. Baldwin, 10 Barb. (N. Y.) 626; Darling v. Harmon, 47 Minn. 166, 49 N. W. 686. At common law, there was a right of action in such case, but of course no lien. Lord Coke states the common law: "If two tenants in common, or joint-tenants, be of an house or mill, and it fall in decay, and the one is willing to reparaire the same, and the other will not, he that is willing shall have a writ de reparatione facienda; and the writ saith, ad reparationem et sustentationem ejusdem domus teneantur; whereby it

appeareth, that owners are in that case bound pro bono publico to maintain houses and mills which are for habitation and use of men." Co. Lit. 200 b; Co. Lit. 54 b. And see Bowles' case, 11 Co. 79, 82. In Massachusetts, a tenant in common, who has made necessary repairs upon the common property without the consent of his cotenant, can not maintain an action at law against him to recover contribution for the cost of such repairs. Calvert v. Aldrich, 99 Mass. 74, 96 Am. Dec. 693; Doane v. Badger, 12 Mass. 65.

<sup>2</sup> Alexander v. Ellison, 79 Ky. 148, per Cofer, C. J.

who had made the repairs such portion of the money advanced as the infant would be bound to contribute on his arrival at full age.<sup>3</sup>

§ 1149. **No lien except where improvements are made with consent of joint tenant.**—A joint tenant, or tenant in common, has, as a general rule, no lien for permanent improvements made by him, unless they be made with the consent of the other joint owner or tenant, or with his agreement that the expenditure so made should constitute a lien upon his share of the property.<sup>4</sup> The distinction between the case of necessary repairs of the joint property and the case of permanent improvements of the same should be carefully kept in mind; for, while a lien may be implied in case of necessary repairs, a lien for permanent improvements can arise only from the agreement, either express or implied, of the joint owner whose property is to be charged. In the one case the lien rests upon general principles of equity, and in the other it rests upon contract.

<sup>3</sup> Coffin v. Heath, 6 Met. (Mass.) 76.

<sup>4</sup> Taylor v. Baldwin, 10 Barb. (N. Y.) 626; Carver v. Coffman, 109 Ind. 547, 10 N. E. 567; Corbett v. Laurens, 5 Rich. Eq. (S. Car.) 301, 315, per Wardlaw, Ch. "To reimburse the improving tenant in common, to the extent of the cost of the improvements to himself, would enable one of prodigality and capricious taste to deprive his fellows in the tenure of all shares in the common estate, by subjecting them to debts for structures and innovations that were valueless and distasteful. It is scarcely less objectionable to allow to an improving tenant in common, by general rule, reimbursement to

the extent of the market value imparted by his improvements to the estate; for the commercial value does not constitute the whole value of an estate. Some changes might increase the price an estate would bring at auction, which would greatly disparage it in the estimation of some of the joint owners: such as the removal of a monumental ruin for the erection of a shop. One who does not wish to sell his undivided share of an estate, can hardly be compelled, consistently with equity, to pay for improvements, so called, that are offensive to his taste or to his ancestral and patriotic pride, or disproportionate to his means."

As between tenants in common, where one has kept the other out of possession, ignorantly believing himself to be the sole owner, and has made permanent improvements, he can not recover the value of such improvements from his cotenant, unless the latter himself resorts to equity.<sup>5</sup>

But the statute relating to occupying claimants, being purely equitable, has been held to be applicable to the analogous case of one who in good faith makes valuable improvements on real estate while holding under color of title and claim to the entire estate, but is afterwards found to be the rightful owner of only an undivided interest in the property. On partition between him and his cotenant, though he himself obtains the partition, he is entitled to have the value of such improvements taken into consideration and allowed for.<sup>6</sup> A tenant in common has a lien for taxes paid by him on the entire estate.<sup>7</sup>

**§ 1150. Lien of tenant in common or joint tenant by agreement.**—It is clear that an agreement between joint tenants, or tenants in common, that one shall have a lien on the interest of the other for the latter's share of the expense of improvements made by the former for the benefit of both, constitutes such a lien as a court of equity will recognize and enforce as between the parties.<sup>8</sup>

**§ 1151. Lien of tenant in common settled before partition.**—And so, if one tenant in common seeks for a partition of property which has been permanently improved at the ex-

<sup>5</sup> Bazemore v. Davis, 55 Ga. 504, except by virtue of a statute allowing such improvements to be set off against a claim for mesne profits.

<sup>6</sup> Carver v. Coffman, 109 Ind. 547, 10 N. E. 567. In such case the tenant who has been in possession is bound to account for the annual

income or rents received above his proportionate share. Carver v. Coffman, 109 Ind. 547, 10 N. E. 567.

<sup>7</sup> Bennett v. Bennett, 84 Miss. 493, 36 So. 452.

<sup>8</sup> Houston v. McCluney, 8 W. Va. 135; Torrey v. Martin, (Tex.) 4 S. W. 642.

pense of his cotenant, a court of equity will not grant partition without first directing an account, and a suitable compensation for such expenditure made by the defendant; or else will in the partition assign to the defendant that part of the premises on which he has made the improvements.<sup>9</sup> To entitle such tenant in common to an allowance for the improvements, it is not necessary for him to show the assent of his cotenant to such improvements, or a promise on his part to contribute to the expense of them; nor is it necessary to show a previous request to join in the improvements and a refusal.<sup>10</sup>

And so, if one tenant in common makes a parol agreement with his cotenant for the purchase of his interest, and advances money in part payment, although he can not enforce a specific performance of the agreement, a court of equity, in a suit for partition, will decree the money advanced to be a lien upon the land.<sup>11</sup>

**§ 1152. Lien for excess of purchase-money furnished by one tenant in common or joint tenant.**—In the case of a joint purchase of land, an excess of purchase-money paid by one of the purchasers is a lien upon the interest of the other.<sup>12</sup> Where the adventure is joint, each is entitled to participate equally in it, without regard to equality of payment; but it is a clear principle of equity, that the common property will be held bound for any excess paid by one over the other. Where the conveyance is made to two persons jointly, the doctrine of resulting trusts does not apply; but it applies where the conveyance is to one, and the purchase-money is paid wholly or in part by another.<sup>13</sup>

<sup>9</sup> *Green v. Putnam*, 1 Barb. (N. Y.) 500. See *Carver v. Coffman*, 109 Ind. 547, 10 N. E. 567.

<sup>10</sup> Per Paige, J., in *Green v. Putnam*, 1 Barb. (N. Y.) 500.

<sup>11</sup> *Campbell v. Campbell*, 11 N. J. Eq. 268.

<sup>12</sup> *Rankin v. Black*, 1 Head (Tenn.) 650.

<sup>13</sup> *Gee v. Gee*, 2 Sneed (Tenn.) 395.

§ 1153. **Lien for money advanced by tenant in common to discharge mortgage.**—If one tenant in common redeems a mortgage upon the property held in common, he acquires an equitable lien upon the interests of his cotenant for the payment of his proportion of the redemption money; and a court of equity will enforce such lien by decreeing that the interest of such cotenant shall be sold in case of his default in repaying such money, and that the proceeds shall be applied to the extinguishment of the lien.<sup>14</sup>

A tenant for life has a lien, as against a remainder-man, for advances made by him to pay off incumbrances upon the estate.<sup>15</sup>

§ 1154. **Lien of tenant in common for price paid for adverse title.**—A joint tenant, or tenant in common, has a lien for the price paid by him in the purchase of an adverse title. The title so purchased operates for the benefit of both tenants, and the cotenant should in equity be made liable for a due proportion of the price. The rule is the same whether the purchase be made before or after partition. If such purchase be made after partition, the purchaser should be allowed to elect whether his former cotenant should share in the whole purchase, or only in so much of it as interferes with his title under the partition; and the purchaser's lien on the land will accordingly be for the sum to be contributed by his cotenant.<sup>16</sup>

§ 1155. **No lien for rents collected.**—A joint tenant has no lien against his cotenant for rents collected by the latter before a partition of the land. Such rents constitute merely a personal charge against the tenant who has collected them.<sup>17</sup> "The lien in favor of one joint owner of land, whenever rec-

<sup>14</sup> Calkins v. Steinbach, 66 Cal. 117, 4 Pac. 1103.

<sup>16</sup> Venable v. Beauchamp, 3 Dana (Ky.) 321, 28 Am. Dec. 74.

<sup>15</sup> Peck v. Glass, 6 How. (Miss.) 195; Campbell v. Campbell, 21 Mich. 438.

<sup>17</sup> Brittinum v. Jones, 56 Ark. 624, 20 S. W. 520.

ognized to exist at all, is founded upon the doctrine of contribution in equity. And the only reason for enforcing it for improvements arises from the necessity for the preservation of the estate, or the benefit to the joint owners by an enhancement of its value. But there is no reason why there should be a charge or incumbrance upon the interest of one joint owner, either before or after partition, to satisfy a claim of his cotenant for rents and profits received. The right to partition exists and may be enforced, and, pending the action therefor, the chancellor may amply protect the rights of each joint owner by placing the estate in the hands of a receiver, or by other proper provisional remedy. But it is not the policy of the law to enforce liens upon the interest of one joint owner of land in favor of another for unadjusted, and to innocent purchasers and creditors, often unknown, accounts for rents and profits."<sup>18</sup>

But in New York it is held that a tenant in common has a lien upon his cotenant's interest for a proportionate part of rents collected from the estate held in common, and appropriated by the latter,<sup>19</sup> and he may enforce the lien while the parties continue to hold the premises in common, or on a petition for a partition filed by either tenant in common.<sup>20</sup> Where the estate in common has been sold under a mortgage, the lien of one tenant in common for rents appropriated by his cotenant may be enforced in a distribution of the surplus proceeds of the sale.<sup>21</sup>

**§ 1156. Lien of tenant in common not good as against creditor's attachment liens.**—But neither an equitable lien resting upon general principles of equity, nor one resting

<sup>18</sup> Per Lewis, J., in *Burch v. Burch*, 82 Ky. 622, 6 Ky. L. 691.

<sup>19</sup> *Kingsland v. Chetwood*, 39 Hun (N. Y.) 602; *Hannan v. Osborn*, 4 Paige (N. Y.) 336; *Scott v. Guernsey*, 60 Barb. (N. Y.) 163, 180, *affd.* 48 N. Y. 106, 124.

<sup>20</sup> *Scott v. Guernsey*, 60 Barb. (N. Y.) 163, 180, *affd.* 48 N. Y. 106, 124, *Hannan v. Osborn*, 4 Paige (N. Y.) 336.

<sup>21</sup> *Kingsland v. Chetwood*, 39 Hun (N. Y.) 602.



upon the contract of the parties, is valid against creditors obtaining liens by attachment or by levy of execution, whether the creditor or the purchaser under the levy has notice of the previous equitable lien or not.<sup>22</sup> Thus, where a joint owner built a brick building upon the joint property, under an agreement that he should have a lien upon the interest of the other joint owner for the latter's share of the expenditure, and some years afterwards a creditor of the latter levied upon his interest in the joint property, and then the joint owner who made the improvements filed his bill in equity to obtain a partition, and to have a lien declared in his favor upon the interest of the other joint owner, which had been sold under execution, it was held that he had no valid lien as against the judgment creditor or the purchaser under the execution.<sup>23</sup> Upon the general principle of the registry laws in this country, such a lien must necessarily be void as against judgment creditors and subsequent purchasers without notice. Under these laws, an unrecorded deed or mortgage is invalid as against such purchasers and creditors. As against them, an equitable mortgage by a deposit of title-deeds is invalid. A parol contract for a lien can not be deemed to have any greater validity against a creditor or a purchaser without notice than a lien by a contract in writing signed by the party to be bound, but not recorded; and such a lien is void as against them under the registry laws.<sup>24</sup>

<sup>22</sup> *Houston v. McCluney*, 8 W. Va. 135, 151.

<sup>23</sup> *Houston v. McCluney*, 8 W. Va. 135.

<sup>24</sup> *Hoffman, J.*, in *Houston v. McCluney*, 8 W. Va. 135, upon this point said: "If such contract or trust were held more efficacious against these classes of persons, it would only be necessary to substitute the verbal contract or declaration for the written deed, contract or declaration of trust, in or-

der to evade effectually the operation of the recordation statutes and enforce such contracts and trusts, though made in secret, against the most innocent, vigilant and meritorious of creditors who should acquire general liens without notice or apprehension of the existence of any such contract or trust. . . . A party contracting or declaring a trust may always reduce the contract or declaration, or have it reduced, to writing; and

§ 1157. **Judgment creditor not a purchaser in some states.**—In some states, however, a judgment creditor is not treated as a purchaser. He can acquire no better right to the debtor's estate than the latter himself had.<sup>25</sup> In such states, therefore, the lien of a judgment is subordinate to existing liens, though equitable only, and to equities existing in favor of third persons; and the judgment creditor acquires or can sell, by a levy of his execution, only such a title as the debtor had, subject to such liens and equities.<sup>26</sup>

§ 1158. **Owelty of partition, a first lien.**—Owelty of partition constitutes a first lien on the share of the former tenant in common, and is entitled to the priority over a mortgage of his undivided interest given by him before partition.<sup>27</sup> "Presumably," says Mr. Justice Mercur,<sup>28</sup> "the tenant thus taking acquires an estate in land of a value as much greater than his previous estate, as the amount of the owelty is, charged thereon. Hence, although a previous lien on an undivided interest may, in form, be displaced by the lien of the owelty in partition, yet the effect is more imaginary than real. It will practically bind land of a value equal to that on which it was a lien before partition. The partition has added to the value of the estate of the tenant a sum equal to the amount of the owelty charged thereon. Conceding, however, that a second lien is not as desirable as a first one, yet, when a person obtains a lien against the es-

the party for whose benefit it is made, when not a recipient without consideration, may require this to be done. Hence the impossibility of recording a verbal contract, agreement or declaration of trust, is not an excuse for the failure to have it in writing, signed by the party to be charged, and acknowledged and recorded."

<sup>25</sup> Virginia: *Sinclair v. Sinclair*, 79 Va. 40; *Cowardin v. Anderson*,

78 Va. 88; *Floyd v. Harding*, 28 Grat. (Va.) 401.

<sup>26</sup> *Sinclair v. Sinclair*, 79 Va. 88.

<sup>27</sup> *McCandless' Appeal*, 98 Pa. St. 489, 494; *Allegheny National Bank's Appeal*, 99 Pa. St. 148; *Wright v. Vicker*, 81 Pa. St. 122; *Baltimore & O. R. Co. v. Trimble*, 51 Md. 99; *Cox v. McMullin*, 14 Grat. (Va.) 82.

<sup>28</sup> *McCandless' Appeal*, 98 Pa. St. 489.

tate of a tenant in common, he assumes that risk. He knows the estate is subject to partition and all its incidents. He can not impair any of the rights of the cotenants. Their rights are superior to the rights of a lien creditor of one tenant. Such a lien will not deprive them of any right incident to a partition, that they might otherwise have enjoyed."

Such a lien is in the nature of a vendor's lien. It accrues as soon as partition is made final by decree, and may be enforced by proceedings in equity.<sup>29</sup>

A recognizance given by a married woman for owelty of partition is a lien upon the land, both as to the share which she acquired in the partition and as to her share by descent.<sup>30</sup>

**§ 1159. Life tenant can not charge estate with value of improvements.**—A tenant for life can not ordinarily charge the estate with the value of improvements made by him with notice of the true state of his title. "The equity of a tenant for life against remainder-men for the benefit of his improvements, is inferior to that of a tenant in common in like cases. The tenant for life is exclusively entitled to the enjoyment of the estate for an indefinite term of time, as measured by the calendar, always long in his anticipation; and as to him the inference is more natural that he intends his improvements for his personal use. He is not interested in the inheritance, and has little pretension to anticipate the interests or the wishes of his successors. He is an implied trustee for the remainder-men, and, by general rule in equity, trustees are not entitled to the profits of their management of the trust estate. His estate is not unfrequently given, rather for the preservation of the rights of the remainder-men than for his own enjoyment."<sup>31</sup> Thus, where land was devised to tenants in common in fee simple, subject to the contingency that, if

<sup>29</sup> *Baltimore & O. R. Co. v. Trimble*, 51 Md. 99.

<sup>30</sup> *Snively's Appeal*, 129 Pa. St. 250, 18 Atl. 124.

<sup>31</sup> *Corbett v. Laurens*, 5 Rich. Eq. (S. Car.) 301, 315, per Ward-law, Ch.

either of them should die without issue, the survivor should take the whole estate, and one of them built a house upon the land while the other was a minor, and mortgaged his interest to secure a loan made for the purpose of paying for such improvements, and afterwards died without issue, it was held that the improvements passed with the land to the surviving tenant, and that the improvements could not be subjected under the mortgage to the payment of the mortgage debt.<sup>32</sup> The improvements were not of a character which one tenant in common may charge upon the other as necessary repairs; and the other tenant was incapable of consenting that the improvements should be made a charge upon the land.

**§ 1160. Exceptions to rule that life tenant can not charge the estate with improvements.**—There are some proper exceptions to the rule that a life tenant is not entitled to compensation from the remainder-man for improvements put upon the land. Thus, if a testator was engaged in building a house at the time of his death, the tenant for life may complete the building, and have the expense of the improvement declared a charge upon the land, if it appears that it was for the benefit of all parties interested in the property that the building should be completed.<sup>33</sup> The reason for this excep-

<sup>32</sup> *Taylor v. Foster*, 22 Ohio St. 255. In Connecticut, Gen. Stats. 1902, § 373, it is provided by statute that any person having any vested remainder interest in any real estate in which any other person has a life interest, who has paid or shall pay any money for necessary repairs or improvements upon such real estate, shall have a lien thereon for the same; and the court of probate in the district in which such estate, or any part thereof, is situated, may, upon his written application, made

during the continuance of said life estate, or within sixty days thereafter, and after such notice to parties in interest as it may prescribe, ascertain the amount so necessarily expended, and may order the sale, subject to said life interest, if it be not terminated, of so much of said estate as will liquidate the sums so advanced.

<sup>33</sup> *Hibbert v. Cooke*, 1 Sim. & Stu. 552; *Dent v. Dent*, 30 Beav. 363. And see *Sohier v. Eldredge*, 103 Mass. 345, 351.

tion is twofold: the benefit to the remainder-man, which is not a sufficient ground by itself; and the implied intention of the testator, from the unfinished condition of the property, that it should be finished out of his estate in order to render it useful to both the tenant for life and the remainder-man.<sup>34</sup>

**§ 1161. Lien of lessee for improvements made.**—A lessee may have an equitable lien upon the leased property for improvements made thereon by him under the terms of the lease.<sup>35</sup> Thus, if the lease provides that the lessee may erect a building upon the demised premises, and that the lessor shall at the end of the term pay for the same at a fair valuation, the lessee has an equitable lien upon the premises, and the right to retain possession until payment is made according to the terms of the lease.<sup>36</sup> This is but carrying out the common-law rule that the person who makes or repairs a piece of machinery, or any other article of personal property, may retain the property so repaired or made in his possession until he is paid for the value of his work upon it.<sup>37</sup> The tenant is not in such case obliged to yield up possession at the expiration of his term, and resort to his action at law to recover damages for a breach of the covenant of the lease.

Where a tenant for years under a lease made by trustees erected a building upon the premises in pursuance of an agreement with the trustees that they would at the termination of the lease pay to him a certain portion of the expenditure, and it appeared that the trustees were not personally bound, and it did not appear that there was any other property belonging to the estate, it was held that the lessee was entitled to have the amount due him under the covenant de-

<sup>34</sup> *Ex parte Palmer*, 2 Hill Eq. (S. Car.) 215.

<sup>35</sup> *Berry v. Van Winkle*, 2 N. J. Eq. 269.

<sup>36</sup> *Ecke v. Fetzer*, 65 Wis. 55, 26

N. W. 266; *Hopkins v. Gilman*, 22 Wis. 476, 47 Wis. 581, 3 N. W. 382.

<sup>37</sup> *Per Taylor, J.*, in *Ecke v. Fetzer*, 65 Wis. 55, 26 N. W. 266.

clared a lien upon the property, and to have the premises sold, if necessary, to satisfy the demand.<sup>38</sup>

But it has been held that a tenant who has made improvements, under an agreement that he should occupy the premises until the improvements should be paid for, has no lien on the land for the cost of the improvements in case he is wrongfully evicted by the landlord before the rents amount to the cost of the improvements.<sup>39</sup> "Rent paid in improvements," said Horton, Chief Justice, "is no more sacred than rent paid in money. Certainly no recognized principle of equity can be pointed out supporting the proposition that, because a tenant who has paid his rent in advance has been evicted by the wrongful act of his landlord, he has a lien on the premises for the rent."

§ 1162. **Lien for improvements under agreement for a lease.**—The same rule applies where improvements have been made under an agreement for a lease. Where one agreed to make a lease of certain paper mills, and the proposed lessee agreed to rebuild and repair some of the buildings, and it was stipulated that, if the lease was not executed within three months, the former should repay to the latter the amount of his outlay and the agreement should cease, and improvements were made by the latter within that time, and the lessor was unable to make a good lease, it was held that the lessee had a lien on the premises for his outlay.<sup>40</sup>

<sup>38</sup> *Fowler v. Mutual Life Ins. Co.*, 28 Hun (N. Y.) 195.

<sup>40</sup> *Middleton v. Magnay*, 2 Hem. & Mil. 233.

<sup>39</sup> *Beck v. Birdsall*, 19 Kans. 550, 555.

## CHAPTER XXVIII.

### LIENS ARISING UNDER DEVISES.

Sec.		Sec.	
1163.	Equitable lien on devise of real estate subject to debts and legacies.	1169.	Waiver by legatee of lien on devisee's land.
1164.	Mode of imposing the lien or charge.	1170.	Effect of executor's bond on lien.
1165.	Debts and legacies payable out of personal estate.	1171.	Lien not discharged by accepting note or security.
1166.	When devised land is charged with payment of legacies.	1172.	As against purchasers and creditors.
1167.	Lien of legatee for support.	1173.	Probate of will as notice of liens created by it.
1168.	Superiority of lien of legatee over lien for improvements.	1174.	Lien of debts on land of deceased during administration.

§ 1163. **Equitable lien on devise of real estate subject to debts and legacies.**—An equitable lien arises upon the devise of real estate subject to the payment of debts and legacies, or of specific debts or charges, though such legacies, debts, or charges be not in express terms made a charge upon the land devised.<sup>1</sup> If the burden be not imposed by express terms, it

<sup>1</sup> *Sands v. Champlin*, 1 Story (U. S.) 376, Fed. Cas. No. 12303; *Thayer v. Finnegan*, 134 Mass. 62, 45 Am. Rep. 285. New York: *Hallett v. Hallett*, 2 Paige (N. Y.) 15; *Harris v. Fly*, 7 Paige (N. Y.) 421; *Brown v. Knapp*, 79 N. Y. 136; *Dodge v. Manning*, 1 N. Y. 298, 4 How. Prac. 365; *Bennett v. Akin*, 38 Hun (N. Y.) 251; *Finch v. Hull*, 24 Hun (N. Y.) 226. Indiana: *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; *Lindsey v. Lindsey*, 45 Ind. 552; *Wilson v. Piper*, 77 Ind. 437; *Cann v. Fidler*, 62 Ind. 116; *Wilson v. Moore*, 86 Ind. 244; *Castor v. Jones*, 86 Ind. 289; *Nash v. Taylor*, 83 Ind. 347; *Manifold v. Jones*, 117 Ind. 212, 20 N. E. 124; *Watt v. Pittman*, 125 Ind. 168, 25 N. E. 191; *Davidson v. Coon*, 125 Ind. 497, 25 N. E. 601, 9 L. R. A.

is incumbent upon the person claiming a lien to show that the testator intended to make it a lien upon the property.<sup>2</sup> But on the other hand, if the burden be expressly imposed, the lien will exist, unless it appears with equal distinctness that the testator intended otherwise.<sup>3</sup>

Whether in a particular case there is a charge imposed by will depends upon the intention of the testator as gathered from the whole will in view of the existing circumstances.<sup>4</sup> "Particular facts have often been declared to be especially significant, as indicating such intention, and sometimes, indeed, a rule has been laid down in terms apparently absolute."<sup>5</sup> Thus it is said that, "if legacies are given generally, and the residue of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real as well as personal estate."<sup>6</sup>

584; *Duncan v. Wallace*, 114 Ind. 169, 16 N. E. 137; *Jennings et al. v. Sturdevant*, 140 Ind. 641, 40 N. E. 61. Other states: *Mathewson v. Saunders*, 11 Conn. 144; *Schanck v. Arrowsmith*, 9 N. J. Eq. 314; *Merrill v. Bickford*, 65 Maine 118; *Dudgeon v. Dudgeon*, 87 Mo. 218; *Bank v. Donaldson*, 6 Pa. St. 179; *Lockett v. White*, 10 Gill & J. (Md.) 480; *Siron v. Ruleman*, 32 Grat. (Va.) 215; *Makings v. Makings*, 1 De G., F. & J. 355. For a statement of the various rules of the English and American courts on the matter of charges upon realty implied in devises, see 3 *Pomeroy's Eq. Jur.*, §§ 1244, 1248. Where by a will real estate is converted into personalty the lien of an inheritance tax provided by law is transferred to the fund. In

*re Brown's Estate*, 5 Pa. Dist. R. 286.

<sup>2</sup> *Kirkpatrick v. Chesnut*, 5 S. Car. 216; *Rosborough v. Rutland*, 2 S. Car. 378.

<sup>3</sup> *Clyde v. Simpson*, 4 Ohio St. 445.

<sup>4</sup> *Thayer v. Finnegan*, 134 Mass. 62, 45 Am. Rep. 285; *Hoyt v. Hoyt*, 85 N. Y. 142.

<sup>5</sup> *Thayer v. Finnegan*, 134 Mass. 62, 45 Am. Rep. 285, per C. Allen, J.

<sup>6</sup> *Hawkins on Wills*, 294; *Greville v. Browne*, 7 H. L. Cas. 689, 696; *Francis v. Clemow*, Kay 435; *Harris v. Watkins*, Kay 438; *Wheeler v. Howell*, 3 Kay & J. 198; *Cole v. Turner*, 4 Russ. 376; *Corwine v. Corwine*, 24 N. J. Eq. 579. And see *Davis' Appeal*, 83 Pa. St. 348; In *re Leuengood's Estate*, 38 Pa. Super. Ct. 491.



§ 1164. **Mode of imposing the lien or charge.**—When a devise is made conditional upon the payment of a legacy, it is in the strongest terms made a charge upon land devised. The acceptance of the devise in such case, as well as in many cases of an express charge, imposes upon the devisee a personal obligation to pay the legacy.<sup>7</sup> An express direction in any form of words to a devisee, to pay a legacy out of the land devised, makes the legacy an effectual charge upon the land.<sup>8</sup> What amounts to an express charge is a matter of construction; and many different forms of expression may be used for that purpose.<sup>9</sup> The charge may also be implied from the whole will taken together.<sup>10</sup> The implication must, however, be a fair and reasonable one.<sup>11</sup> The testator may make his debts in general, or any particular debt, a lien upon the lands devised, and any one or more of the creditors in whose favor the charge is made may enforce the lien.<sup>12</sup> Where real

<sup>7</sup> *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; *Lofton v. Moore*, 83 Ind. 112; *Burch v. Burch*, 52 Ind. 136; *Manifold v. Jones*, 117 Ind. 212, 20 N. E. 124; *Davidson v. Coon*, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584; *Jennings v. Sturdevant*, 140 Ind. 641, 40 N. E. 61; *Harris v. Fly*, 7 Paige (N. Y.) 421; *Brown v. Knapp*, 79 N. Y. 136. See, for cases of direct charge, *Kempe v. Kempe*, 5 De G., M. & G. 346; *In re Cooper's Trusts*, 4 De G., M. & G. 757; *Maskell v. Farrington*, 3 De G., J. & S. 338; *Makings v. Makings*, 1 De G., F. & J. 355; *In re Hill's Trusts*, 16 Ch. Div. 173; *Taylor v. Taylor*, L. R. 17 Eq. 324; *Canal Bank v. Hudson*, 111 U. S. 66, 28 L. ed. 354, 4 Sup. Ct. 303; *Brisben's Appeal*, 70 Pa. St. 405; *Corwine v. Corwine*, 23 N. J. Eq. 368, affd. 24 N. J. Eq. 579; *Frampton v. Blume*, 129 Mass. 152.

<sup>8</sup> *Horning v. Wiederspallen*, 28 N. J. Eq. 387; *Manifold v. Jones*, 117 Ind. 212, 20 N. E. 124; *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243.

<sup>9</sup> *Frampton v. Blume*, 129 Mass. 152.

<sup>10</sup> *In re Bailey*, 12 Ch. Div. 268; *Heslop v. Gatton*, 71 Ill. 528; *Anderson v. Davison*, 42 Hun (N. Y.) 431, 5 N. Y. St. 48; *Scott v. Stebbins*, 91 N. Y. 605.

<sup>11</sup> *Taylor v. Harwell*, 65 Ala. 1; *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Owens v. Claytor*, 56 Md. 129.

<sup>12</sup> *King v. Denison*, 1 Ves. & B. 260, 274; *Brudenell v. Boughton*, 2 Atk. 268; *Graves v. Graves*, 8 Sim. 43; *Metcalf v. Hutchinson*, 1 Ch. Div. 591; *Dill v. Wisner*, 88 N. Y. 153, affg. 23 Hun (N. Y.) 123; *In re Fox*, 52 N. Y. 530, 11 Am. Rep. 751; *Lupton v. Lupton*, 2 Johns. Ch. (N. Y.) 614; *Wertz' Appeal*, 69 Pa. St. 173.

estate was devised subject to the payment of certain legacies, but the testator before his death had entered into a contract for the sale of the real estate, stipulating that the deed should be executed upon the payment of the purchase-money, but died before the deed was executed, and the vendee paid all the purchase-money and received a deed from the devisee, it was held that the legacies were not a lien upon the real estate, but that the lien was transferred from that to the purchase-money.<sup>13</sup> If land is devised at a valuation or a price to be paid by the devisee, the money payable is a charge upon the land, and the lien of such charge is superior to the lien of judgments subsequently entered against the devisee.<sup>14</sup>

### § 1165. Debts and legacies payable out of personal estate.

—Unless there is a clear expression to the contrary, debts and legacies are payable out of the personalty, and they can be made a charge upon the real estate only by a clear expression of the testator's intent.<sup>15</sup> The legatee is not precluded from enforcing the payment of the legacy out of the personalty of the testator's estate, in the usual course of administration, unless the testator has expressly exonerated the personalty.<sup>16</sup> But by means of the charge upon the real estate, the legatee has a three-fold remedy: one against the executor in the usual course; one against the realty by enforcing his lien in equity; and another by action at common law against the devisee upon his promise to pay the legacy, implied from his acceptance of the devise.<sup>17</sup> But the devisee's personal liability to pay the legacy arises only when he has been directed to pay it, or the devise is made condi-

<sup>13</sup> *Guelich v. Clark*, 3 Thomp. & C. (N. Y.) 315.

<sup>14</sup> *Lancaster Co. Bank's Appeal*, 127 Pa. St. 214, 17 Atl. 896.

<sup>15</sup> *Ancaster v. Mayer*, 1 Bro. C. C. 454; *Philips v. Philips*, 2 Bro. C. C. 273; *Bright v. Larcher*, 4 De G. & J. 608; *Richardson v. Morton*, L. R. 13 Eq. 123; *Hewes v.*

*Dehon*, 3 Gray (Mass.) 205; *Chapin v. Waters*, 116 Mass. 140; *Bynum v. Hill*, 71 N. Car. 319.

<sup>16</sup> *Taylor v. Dodd*, 58 N. Y. 335.

<sup>17</sup> *Brown v. Knapp*, 79 N. Y. 136; *Dill v. Wisner*, 23 Hun (N. Y.) 123, *affd.* 88 N. Y. 153; *Lord v. Lord*, 22 Conn. 595, 602; *Olmstead v. Brush*, 27 Conn. 530.

tional upon his paying the legacy. When the land is devised, subject merely in a general way to the charge, the legatee's remedy, so far as the devise is concerned, is confined to his lien.

§ 1166. When devised land is charged with payment of legacies.—If a devisee be appointed executor, and he is directed to pay legacies, the land devised is charged with the payment of the legacies.<sup>18</sup> Especially is this the case where all the testator's property is devised and bequeathed to the executor.<sup>19</sup>

§ 1167. Lien of legatee for support.—A legatee may have a lien for support as well as a lien for a pecuniary legacy.<sup>20</sup> If several pecuniary legacies to the testator's daughters are made a charge upon land, and one daughter has a further charge upon the land for her support, and it appears that the testator desired to treat his daughters equally, the lien of the pecuniary legacies will be given priority over the lien for support provided for one of them.<sup>21</sup> The use of a room in a house may be made a charge on a devise.<sup>22</sup>

§ 1168. Superiority of lien of legatee over lien for improvements.—The lien of a legatee upon land charged with its payment is superior to a lien of the owner for money expended in improvements, although the value of the land may have been increased thereby to the extent of the expenditure.<sup>23</sup> If the land alone was of sufficient value to pay the

<sup>18</sup> *Dover v. Gregory*, 10 Sim. 393; *Henvell v. Whitaker*, 3 Russ. 343; *Van Winkle v. Van Houten*, 3 N. J. Eq. 172, 191; *In re Tanqueray-Willaume*, 20 Ch. Div. 465.

<sup>19</sup> *Thayer v. Finnegan*, 134 Mass. 62, 45 Am. Rep. 285.

<sup>20</sup> *Rhoades v. Rhoades*, 88 Ill. 139; *Donnelly v. Edelen*, 40 Md.

117; *Willett v. Carroll*, 13 Md. 459; *Gardenville, etc., Loan Asso. v. Walker*, 52 Md. 452.

<sup>21</sup> *Bennett v. Akin*, 38 Hun (N. Y.) 251.

<sup>22</sup> *Ogle v. Tayloe*, 49 Md. 158.

<sup>23</sup> *Bennett v. Akin*, 38 Hun (N. Y.) 251.

legacy, the legatee is not concerned in the improvement. If the land be insufficient, the owner, making his improvements with full knowledge of the charge upon it, will not be allowed to put the expense of his improvement ahead of the lien of the legacy.

§ 1169. **Waiver by legatee of lien on devisee's land.**—Of course a legatee may waive his lien upon the devisee's land. This he may do by joining the devisee in a conveyance or mortgage of the land. In case he joins in a mortgage of the land, he waives his lien in the first instance as against the mortgagee; and after a foreclosure of the mortgage, his right to proceed against the land is wholly gone. At most he had only an equitable right in the land; and by joining in the mortgage, he transferred his whole equitable right to the mortgagee.<sup>24</sup>

§ 1170. **Effect of executor's bond on lien.**—The lien of a legacy or charge upon land devised is not removed by the giving of a bond by the executors of the will conditioned to pay all debts and legacies; and though the devisee join in the bond, he can not convey the land devised to a bona fide purchaser free of the lien for the legacy, unless the legatee expressly or impliedly waives the lien.<sup>25</sup> "If a testator expressly charges a legacy on a particular piece of land, which is specifically devised subject to the charge, or if he imposes on a particular devisee the personal duty of paying the legacy, as the condition on which he is to take a specific devise of land, in such case the giving of a bond by the executors with condition to pay all debts and legacies will not have the effect to discharge the lien on the land which is created directly by the will itself, or to supersede the duty of the devisee to pay the legacy. It is, at most, but a supplementary

<sup>24</sup> *Thayer v. Finnegan*, 134 Mass. 62, 45 Am. Rep. 285.

<sup>25</sup> *Amherst College v. Smith*, 134 Mass. 543.

obligation and security. The burden and duty will still rest primarily on the estate devised, and on the devisee; and only secondarily on the general estate of the testator, and upon the sureties on the executor's bond."<sup>26</sup>

**§ 1171. Lien not discharged by accepting note or security.**

—The giving of a receipt in full, and taking the debtor's promissory note or other security for the amount, does not necessarily discharge a lien.<sup>27</sup> A devise of land subject to the payment of certain legacies creates a lien upon the land for the payment of such legacies. A receipt by the legatee acknowledging payment of the legacy in full, standing unimpeached, is a discharge of the lien. But as between the parties, a receipt is not conclusive; it is open to explanation. It is competent for the legatee to show that the money was not paid, or that the receipt was not in fact what it purports to be. If the legatee gives such a receipt upon receiving the promissory note of the devisee, although the presumption is that the legatee intended to discharge the land from the lien, yet this presumption may be overcome by positive testimony or by circumstances.<sup>28</sup> Such receipt may be explained by showing negatively that there was no contract or contemplation to discharge the lien; and by showing positively, by even slight facts, that a different purpose induced the transaction.<sup>29</sup>

A mortgagee taking a mortgage or a creditor recovering a judgment after such a lien had attached, with knowledge of the giving of the receipt and the taking of a note for the amount of the legacy, would stand in the same relation to

<sup>26</sup> Per C. Allen, J., in *Amherst College v. Smith*, 134 Mass. 543, 545.

<sup>27</sup> *Sutton v. The Albatross*, 2 Wall. Jr. 327, 1 Phila. 423, Fed. Cas. No. 13645; *Schanck v. Arrowsmith*, 9 N. J. Eq. 314; *Jones v. Shawhan*, 4 Watts & S. (Pa.) 257,

263; *Coleman v. Howell* (N. J.) 16 Atl. 202.

<sup>28</sup> *Schanck v. Arrowsmith*, 9 N. J. Eq. 314.

<sup>29</sup> *Sutton v. The Albatross*, 2 Wall. Jr. 327, 1 Phila. 423, Fed. Cas. No. 13645.

the lien as the devisee himself. They may have been mistaken as to the legal effect of the receipt and note; but, knowing the legacy was not paid otherwise than by a promissory note for the amount, they have no greater rights than the devisee himself.<sup>30</sup>

A release of a charge created by a will on land devised, executed by the trustees of the person entitled to the payment so charged, is ineffectual and void if no money was in fact paid, and the release was without consideration. The land remains subject to the charge, which is superior to judgments entered against the devisee.<sup>31</sup>

§ 1172. **As against purchasers and creditors.**—The lien binds the land charged with it, not only in the hands of the devisee, but as against his grantees, mortgagees, and creditors.<sup>32</sup> Thus, where land was devised to trustees charged with the payment of a legacy when the legatee should attain her majority, and the devisee mortgaged the land, and even obtained a release of the lien from the legatee's guardian, the guardian giving a bond and charging himself with the amount of the legacy, it was held that the lien was not impaired; for under the circumstances of the case the transaction was a violation of the guardian's trust, and, though not intended to be fraudulent, was in equity a fraud on the legatee.<sup>33</sup> As regards the mortgagee, he was bound to know by what authority the guardian assumed to discharge the lien.<sup>34</sup>

§ 1173. **Probate of will as notice of liens created by it.**—The will when probated is notice to all the world of any

<sup>30</sup> Schanck v. Arrowsmith, 9 N. J. Eq. 314.

<sup>31</sup> Coleman v. Howell, (N. J.) 16 Atl. 202; Lancaster County Nat. Bank's Appeal, 127 Pa. St. 214, 17 Atl. 896.

<sup>32</sup> Perkins v. Emory, 55 Md. 27; Wilson v. Piper, 77 Ind. 437; Ogle v. Tayloe, 49 Md. 158; Mea-

kin v. Duvall, 43 Md. 372, 378; Donnelly v. Edelen, 40 Md. 117; Manifold v. Jones, 117 Ind. 212, 20 N. E. 124.

<sup>33</sup> Blauvelt v. Van Winkle, 29 N. J. Eq. 111.

<sup>34</sup> Swarthout v. Curtis, 5 N. Y. 301, 55 Am. Dec. 345.

liens created thereby, and subsequent purchasers of the property charged take it with notice of such liens.<sup>35</sup> The lien continues until it is released, or satisfied, or lost by laches in enforcing it.<sup>36</sup> The lien cannot be discharged by payment of the legacy or debt to the executor, unless this be done with the express consent of the legatee or creditor.<sup>37</sup>

**§ 1174. Lien of debts on land of deceased during administration.**—The liability of the land of a deceased person to sale for the payment of his debts is a kind of statutory lien running with the land during the limited period in which such sale may be made.<sup>38</sup> The mere existence of the debt creates no lien upon the land while the debtor lives; but upon his death the character of the debt is changed by the statute authorizing a sale for the payment of his debts, if application be made within the time specified by the statute. The land descends to the heir, or passes to the devisee, chargeable with the payment of the debts of the deceased owner. During the period of limitation the heirs or devisees cannot convey or dispose of the land so as to defeat the claims of creditors upon it. After the expiration of that period the debts of the decedent cease to be a charge or lien upon the real estate.

The administrator is generally empowered by statute to control and sell the lands of his intestate for the purpose of paying debts.<sup>39</sup> This power is wholly statutory, for at common

<sup>35</sup> *Wilson v. Piper*, 77 Ind. 437.

<sup>36</sup> *Smiley v. Jones*, 3 Tenn. Ch. 312. Here there was a delay of more than fifty years, and the remedy was held to be gone.

<sup>37</sup> *Terhune v. Colton*, 10 N. J. Eq. 21; *Schanck v. Arrowsmith*, 9 N. J. Eq. 314; *Grode v. Van Valen*, 25 N. J. Eq. 95; *Jenkins v. Freyer*, 4 Paige (N. Y.) 47.

<sup>38</sup> *Platt v. Platt*, 42 Hun (N. Y.) 592, 659, 4 N. Y. St. 501, modified 105 N. Y. 488, 12 N. E. 22; *Covell*

*v. Weston*, 20 Johns. (N. Y.) 414; *Waring v. Waring*, 3 Abb. Pr. (N. Y.) 246; *Jewett v. Keenholts*, 16 Barb. (N. Y.) 193; *Hyde v. Tanner*, 1 Barb. (N. Y.) 75; *Wilson v. Wilson*, 13 Barb. (N. Y.) 252; *Stewart v. Smiley*, 46 Ark. 373; *Haston v. Castner*, 31 N. J. Eq. 697; *Ridgely v. Iglehart*, 3 Bland Ch. (Md.) 540.

<sup>39</sup> In Florida it is provided that, whenever any estate, real or personal, bequeathed, devised or ap-

law the administrator had nothing to do with the lands of his intestate. This charge is not a perpetual one, even if the debts of the estate remain unpaid. The heirs cannot be forever debarred from the possession of the lands of their ancestor by the neglect of the administrator and the creditors to enforce payment of the ancestor's debts by the sale of his lands.<sup>40</sup> Generally the debts are barred by statute within a short period, perhaps two years in most of the states, after the granting of administration. After the debts are discharged by limitation or in any other way, the right of the administrator to control or sell the lands is gone.<sup>41</sup>

portioned to any person, shall be sold for the payment of the debts of the estate, all other legatees, devisees, or heirs shall contribute their average or proportionate part of such debt to the person from whom such estate, real or personal, shall be thus taken away; and in case of sales under execution or lien, the lien shall be preserved in favor of the party from whom the estate is taken and sold as aforesaid, against the other parties, upon the property derived by them from the estate, to the extent of their proportionate part of the debt. Gen. Stats. 1906, § 2432.

<sup>40</sup> *Mays v. Rogers*, 37 Ark. 155.

<sup>41</sup> *Stewart v. Smiley*, 46 Ark. 373; *Welsh's Appeal*, 5 Sad. (Pa.) 494, 10 Atl. 34. The records of the orphan's court showing that an executrix, who was the sole devisee, after giving the required notice to creditors, had filed her final account, exhibiting, after the payment of all debts, legacies and costs of administration, a large amount of personalty in her hands, are sufficient notice to her vendee that the title to the lands of the estate vested in her unincumbered by the claims of testator's creditors. *Van Bibber v. Reese*, 71 Md. 608, 18 Atl. 892, 6 L. R. A. 332.



## CHAPTER XXIX.

### LIENS ARISING UNDER TRUSTS.

Sec.		Sec.	
1175.	For repairs and improvements.	1179a.	Extent of lien to secure trust funds.
1176.	Lien of next friend on estate of minor benefited by him.	1180.	Equitable lien in favor of owner of trust fund.
1177.	Lien of trustee for expenses in executing his trust.	1181.	Lien in favor of cestui que trust upon securities.
1178.	Resulting trusts an equitable lien.	1182.	Whether creditor has lien on property purchased by his debtor.
1179.	Lien of owner of trust funds invested in lands where title not in his name.	1183.	No equitable lien on account of money expended in removing incumbrances.

§ 1175. **For repairs and improvements.**—A trustee, in making repairs and improvements upon the trust property, should have regard to the probable duration of the trust in determining whether temporary and slight or permanent improvements should be made. Ordinarily a trustee has no lien for expenses incurred in making permanent improvements, such as the erection of new buildings, at the expense of the cestui que trust, because his interests may thereby be prejudiced. But even in case such improvements are made by the trustee, the cestui que trust may be put to his election, either to allow the trustee the expense of such improvements, or to be deprived of the increase of rent obtained by means of such improvements.<sup>1</sup>

The members of a club authorized a committee to raise

<sup>1</sup> Rathbun v. Colton, 15 Pick. (Mass.) 471.

money to make additions and improvements upon their buildings, and to provide fittings and furniture therefor. The committee being unable to raise the money by mortgage of the club property, some individual members of the committee raised it on their own credit, and afterwards had to pay the amount. It was held that such members of the committee had a lien on the premises so added to and improved.<sup>2</sup>

**§ 1176. Lien of next friend on estate of minor benefited by him.**—In like manner a next friend who has benefited the estate of minors, for whom he has obtained a decree securing to them a remainder interest, has an equitable lien on the estate which he has benefited for all proper expenditures of money made by him, though not for his personal services. There being an intermediate life estate in another, the decree should be so framed as to operate as a present lien upon the estate in remainder, to be enforced when this falls into possession by the termination of the life estate.<sup>3</sup>

**§ 1177. Lien of trustee for expenses in executing his trust.**—It is clear that, if a trustee incurs expenses in the execution of his trust, he is entitled to retain them out of the trust property. This is the general principle of law as declared by Lord Kingsdown in a case before the House of Lords.<sup>4</sup> It is everywhere the general rule that the expenses of properly administering a trust are a lien on behalf of the trustee on the estate in his hands; and he cannot be com-

<sup>2</sup> *Minnitt v. Talbott*, L. R. Ir. 1 Ch. Div. 143. The Master of the Rolls inquired, "In the name of common sense could the club have said, 'We will not allow you to be repaid it, for we did not authorize you to advance it; though it is true we authorized the improvements to be made, we only authorized them to be made by borrowed money; we have availed

ourselves of them, we have played in the new billiard-rooms, and slept in the new bedrooms built with your money, but we will not recoup you'? I think that the club could not be listened to for a moment in putting forward such an unconscionable proposition."

<sup>3</sup> *Daniel v. Powell*, 29 Ga. 730.

<sup>4</sup> *Bristow v. Whitmore*, 9 H. L. Cas. 391.

pelled to part with his control of that estate until such expenses are paid. But this lien, unless it may be in exceptional cases, does not extend to persons employed by the trustee. In general, their only remedy for compensation is personal against the trustee employing them. Therefore, in the absence of any specific agreement therefor, a broker who procures for a trustee a loan for the benefit of the trust estate has no lien on such estate for his commission, his remedy being against the trustee personally. Nor is such lien created by the fact that pending the negotiation the trustee dies, and the loan is consummated by his successor, in the absence of any showing that the estate of the first trustee is insolvent.<sup>5</sup>

§ 1178. **Resulting trust, an equitable lien.**—A resulting trust is sometimes spoken of as an equitable lien. It is a well settled rule in equity that if one person buys land with the money of another, and takes a conveyance to himself without any declaration of trust, a trust results by implication of law in favor of the person whose money paid for the land.<sup>6</sup> The trust may be established by parol, though clear and distinct proof is always required. If a part only of the purchase money is paid by another, the land is charged pro tanto.<sup>7</sup>

<sup>5</sup> Johnson v. Leman, 131 Ill. 609, 23 N. E. 435, per Scholfield, J.

<sup>6</sup> Boyd v. McLean, 1 Johns. Ch. (N. Y.) 582, 584; Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405; Sinclair v. Sinclair, 79 Va. 40; Kane v. O'Connors, 78 Va. 76; Phelps v. Seely, 22 Grat. (Va.) 573; Miller v. Blose, 30 Grat. (Va.) 744; Lewis v. Harris, 4 Metc. (Ky.) 353; Boyd v. Jones, 8 Ky. L. (abst.) 602, 2 S. W. 552; Williams v. Rice, 60 Mich. 102, 26 N. W. 846. Where a mother paid a part of the purchase-

price of a house purchased by her son on a verbal agreement that she should have a life estate in the property purchased in common with her son, the mother may have an equitable lien declared in her favor to the amount of the fund paid by her. Long v. Scott, 24 App. D. C. 1.

<sup>7</sup> Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405; Kane v. O'Connors, 78 Va. 76; Morey v. Herrick, 18 Pa. St. 123, 129.

Even where a husband used his wife's separate estate to pay his debts with the knowledge of the creditor, and the latter invested the funds in real estate, it was held that the wife had a lien upon this for the amount of her property so used.<sup>8</sup>

**§ 1179. Lien of owner of trust funds invested in lands where title not in his name.**—Trust funds which have been misapplied by the trustee to the purchase of lands in his own name may be declared a lien upon such lands; but it must be clearly proved that the trust funds were invested in the lands. It is not sufficient to show that the trustee was in possession of the funds, and while in possession of them he purchased and paid for the lands; for in such case no presumption arises that the lands were purchased with such funds.

If the trust money has been mingled with other moneys of the trustee so as to be indistinguishable, and the trustee has made investments generally with the moneys in his possession, the cestui que trust cannot claim a specific lien upon the property or funds constituting the investments.<sup>9</sup>

<sup>8</sup> *Maddox v. Oxford*, 70 Ga. 179.

<sup>9</sup> *Ferris v. Van Vechten*, 73 N. Y. 113. "To follow money into lands, and impress the latter with the trust, the money must be distinctly traced and clearly proved to have been invested in the lands. While money, as such, has no earmark by which, when once mingled in mass, it can be traced, it is, nevertheless, capable under some circumstances of being followed to, and identified with, the property into which it has been converted; but the conversion of the trust money specifically, as distinguished from other money of the trustee into the property sought

to be subjected to the trust, must be clearly shown. It does not suffice to show the possession of the trust funds by the trustee, and the purchase by him of property—that is, payment for property generally by the trustee does not authorize the presumption that the purchase was made with trust funds. The product of, or substitute for, the original trust fund follows the nature of the fund as long as it can be ascertained to be such; and if a trustee purchase lands with trust money, a court of equity will charge them with a resulting trust for the person beneficially interested. But it must be

In Pennsylvania, the mere fact that the owner of land uses trust funds in the improvement of it does not raise an equitable lien upon such land in favor of the beneficiaries of such funds. The Supreme Court, so deciding, declares that an equitable lien is unknown to the jurisprudence of that state, and they referred to an earlier case in which the same court said that liens upon land are not favored or to be implied, and they are consequently to be created by plain terms.<sup>10</sup>

**§ 1179a. Extent of lien to secure trust funds.**—Where the trust fund traceable into land constitutes a part only of the purchase money, this constitutes a lien on the land only for the amount of the trust money so used; but, where the entire land is clearly the fruit of the trust fund, the cestuis que trust must, upon principle, have a right to take the land itself.<sup>11</sup> A trust resulting from a payment of a distinct portion of the purchase money of real estate arises, if at all, immediately on the payment of the money and the taking of the conveyance. Therefore if an administrator applies trust money in which a life estate and a remainder are given by the will of his decedent to the purchase of land, and causes the land to be conveyed in fee to the life tenant of the fund, with the consent of the remainder-man, under the oral agreement of all parties that at the death of the life tenant, whose individual money is also used in the purchase, the remainder-man shall have the land, the latter is not entitled to an aliquot part of the land upon the death of the former, but to a lien only for the trust money so used. The agreement by

clear that the lands have been paid for out of the trust money." Per Allen, J.

<sup>10</sup> Cross & Gault's Appeal, 97 Pa. St. 471; Hepburn v. Snyder, 3 Pa. St. 72. In this case the court was asked to declare a covenant by a grantee to indemnify the grantor whose place in a partner-

ship the grantee was taking, against the liabilities of the partnership, to be a lien upon the land; but they said that by no interpretation could there be more in this case than an equitable lien, which, however, has not been engrafted on our jurisprudence.

<sup>11</sup> Lewin, Trusts, 9th ed. 1024.

the remainder-man that the fund shall be so invested does not preclude him from claiming an equitable lien on the land for the amount of the trust fund used in its purchase, after the land has descended to the heirs of the life tenant.<sup>12</sup>

§ 1180. **Equitable lien in favor of owner of trust fund.**—Where a trustee misapplies trust funds and converts them into different property, they may be followed wherever they can be traced through their transformations, and subjected to an equitable lien in favor of the rightful owner or cestui que trust.<sup>13</sup> This lien may be asserted as against the trustee and his assignee for the benefit of his creditors. It is superior to the rights of the trustee's general creditors, but is subordinate to the rights of purchasers and of other persons acquiring liens in good faith and without notice. A receiver or voluntary assignee standing in the place of the general creditors takes the property subject to the same equitable lien, and impressed with the same trust under which the trustee held it. His estate is enriched and enlarged to the extent of the moneys he misappropriated and converted into other property.<sup>14</sup>

§ 1181. **Lien in favor of cestui que trust upon securities.**—A lien in favor of the cestui que trust may be declared upon a security which the trustee is ordered to replace, especially if time be allowed him for making sale of such security.<sup>15</sup> Thus, where trustees invested the trust fund in a hazardous security which greatly depreciated in value, the security being a brick-field, which was subject to the vicissitudes of trade, and the trustees were ordered to replace the fund,

<sup>12</sup> Warner v. Morse, 149 Mass. 400, 21 N. E. 960.

<sup>13</sup> Cook v. Tullis, 18 Wall. (U. S.) 332, 21 L. ed. 933; Ferris v. Van Vechten, 73 N. Y. 113, 9 Hun (N. Y.) 12; Haddow v. Lundy, 59, N. Y. 320; McColl v. Fraser, 40 Hun

(N. Y.) 111; Chanslor v. Chanslor, 11 Bush (Ky.) 663.

<sup>14</sup> McColl v. Fraser, 40 Hun (N. Y.) 111, per Barker, J.

<sup>15</sup> Whiteley v. Learoyd, L. R. 33 Ch. Div. 347, 354, affg. L. R. 32 Ch. Div. 196.

but at their request the sale of the depreciated security was delayed, a lien in the meantime on this security in favor of the cestui que trust was declared. Lord Justice Cotton said: "Now, in my opinion, in the ordinary course of things it would be right to direct the property to be sold, and to make the trustees answerable for any loss on the sale; but the trustees desiring that that course should not be taken, and that the brick-field should not be put up for sale at present, the sale is postponed at their desire. Till there is a sale, and the property is realized, it is quite right to say that those who are interested in the trust should have a lien on, or claim to be enforced against the property, if the money is not otherwise provided, for that which the trustees, in error and for want of sufficient care, invested on that property. If the trustees desired that there should be an immediate sale, that would be a different matter; but as I understand they desire that there should be delay, so that if trade revives, the property may sell better, and in that view in my opinion it was quite right to say that till sale the persons interested in the trust should have a lien on this security on which the trust money was invested."

**§ 1182. Whether creditor has lien on property purchased by his debtor.**—A creditor cannot follow money which he has loaned or advanced, and make it a charge upon lands in which it is invested. Thus, a guardian having borrowed money to pay off an incumbrance upon the infant's estate, upon the promise to give security for it, and having died before doing so, the court declined to decree a satisfaction of the debt out of the infant's estate, the incumbrance upon which the creditor's money had paid.<sup>16</sup> No equitable lien exists against the estate in the hands of an executor or administrator on the ground that one has advanced money to the intestate which he applied to the purchase of land.<sup>17</sup> The solicitor of

<sup>16</sup> Hooper v. Eyles, 2 Vern. 480.

<sup>17</sup> McKay v. Green, 3 Johns. Ch. (N. Y.) 56.

the executor and devisee, paying a sum of money in exoneration of an adverse claim on part of the testator's estate, does not, as against creditors of the testator, necessarily and by force of the transaction alone, acquire a lien upon the estate, or on the title-deeds, for the sum which he so pays.<sup>18</sup>

§ 1183. **No equitable lien on account of money expended in removing incumbrances.**—The expenditure of money in removing incumbrances from, or in making improvements upon, the lands of another, or lands in which another has a prior interest or lien, creates no equitable lien which will override the interest of such prior owner or incumbrancer, unless the expenditure be made at his request, or with his sanction, express or implied.<sup>19</sup> But where a remainder-man, representing himself as having the right to sell, with the concurrence of the tenant for life, sold property to a purchaser who advanced money to pay off a heavy and pressing incumbrance, and entered into possession before obtaining a conveyance, it was held that he had such an equitable title as to be entitled to a lien on the property, which equity would protect by enjoining the tenant for life, who was liable for the charge from which the purchaser had cleared the estate, from proceeding by ejectment to obtain possession until the cause should be finally determined on the hearing.<sup>20</sup>

<sup>18</sup> *Christian v. Field*, 2 Hare 177.

<sup>20</sup> *Ludlow v. Grayall*, 11 Price

<sup>19</sup> *Cook v. Banker*, 50 N. Y. 655. 58.



## CHAPTER XXX.

### MECHANICS' LIENS.—STATUTORY PROVISIONS WITH ANNOTATIONS.

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§ 1184. Mechanic's lien a creature of statute.—A mechanic's lien upon real property is wholly a creature of statute. At common law a mechanic has no lien upon a building for labor done upon it. Equity raises no lien upon it

other than the grantor's lien for purchase-money.<sup>1</sup> There is no common-law lien of any kind upon real property. A mechanic has a lien at common law for labor done upon a chattel so long as he retains possession of it; but a mechanic or laborer can not retain possession of real property upon which he has performed labor.<sup>2</sup> A mechanic's lien upon real property has been declared to be in the nature of a mortgage of the property,<sup>3</sup> though it is imposed by statute in favor of a whole class of persons. It has also been likened to an attachment, and to a *lis pendens*.<sup>4</sup>

The repeal of a lien law without a saving clause as to pending cases destroys all right to a lien, as it is entirely of statutory origin and not dependent upon contract.<sup>5</sup>

§ 1184a. **What law governs.**—The statute in force at the time a building contract is executed governs the rights of the parties in a proceeding to enforce a claim for a mechanic's lien thereunder.<sup>6</sup> Thus though a lien is sought to be enforced after the passage of a new law, the law as it stood at the time the contract was made will govern the rights of the parties.<sup>7</sup> But the remedy is controlled by the law in force at the time suit is brought to enforce the lien.<sup>8</sup>

<sup>1</sup> *Ellison v. Jackson Water Co.*, 12 Cal. 542.

<sup>2</sup> *Pratt v. Tudor*, 14 Tex. 37, 39; *Gaylord v. Loughridge*, 50 Tex. 573; *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39, 46, per Francis, J.; *Ayers v. Revere*, 25 N. J. L. 474, 481; *Mochon v. Sullivan*, 1 Mont. 470.

<sup>3</sup> *Ritter v. Stevenson*, 7 Cal. 388, 389; *Curnow v. Blue Gravel H. Co.*, 68 Cal. 262, 9 Pac. 149.

<sup>4</sup> *Robins v. Bunn*, 34 N. J. L. 322.

<sup>5</sup> *Wilson v. Simon*, 91 Md. 1, 45 Atl. 1022, 80 Am. St. 427.

<sup>6</sup> *Treloar v. Hamilton*, 225 Ill. 102, 80 N. E. 75; *Culver v. Atwood*,

170 Ill. 432, 48 N. E. 979, affg. 67 Ill. App. 303; *Andrews & Co. v. Atwood*, 167 Ill. 249, 47 N. E. 387.

<sup>7</sup> *Kendall v. Fader*, 199 Ill. 294, 65 N. E. 318; *Jones v. Young*, 78 Ill. App. 78, revd. 180 Ill. 216, 54 N. E. 235.

<sup>8</sup> *Weber v. Bushnell*, 171 Ill. 587, 49 N. E. 728, revg. 69 Ill. App. 26; *Joseph N. Eisendrath Co. v. Gebhardt*, 222 Ill. 113, 78 N. E. 22. See *Higley v. Ringle*, 57 Kans. 222, 45 Pac. 619; *Nixon v. Cydon Lodge No. 5, Knights of Pythias of Salina*, 56 Kans. 298, 43 Pac. 236; *Mahan v. Surerus*, 9 N. Dak. 57, 81 N. W. 64.

§ 1185. **Lien reserved by written contract.**—By written contract, independently of statute, a mechanic's lien may doubtless be reserved upon a building and the land connected with it. This lien would be valid between the parties, and might be enforced as against others who might subsequently acquire an interest in the property, with notice of such reserved lien,<sup>9</sup> which would be in the nature of a mortgage, just as in a deed a lien reserved for the purchase-money is in effect a mortgage securing the purchase-money. The chief difficulty about such a lien would be in giving and proving notice to purchasers and creditors who might become interested in the property by conveyance, by attachment or execution, or by the attaching of statutory liens.

§ 1186.—**Plan of stating the statutory law.**—Inasmuch as the mechanic's lien law is wholly the creature of statute, it is essential to an intelligent understanding of the subject to first examine the statutory law. It would be an interesting study to follow its evolution from the earliest enactments in Maryland and Pennsylvania at the beginning of this century down to the present time. These statutes were limited in their application to a city or county, and their scope of operation was in every way very limited as compared with existing statutes. Since that time the changes in the law have all been in one direction,—that of the extension of the remedy. The benefit of the remedy has been extended to new classes of persons. The remedy itself has been made more complete and effectual. The legislation on the subject has outgrown the wretched stage of special enactments. Moreover, every state and territory has its mechanics' lien law. The frequency of the changes in the statutes indi-

<sup>9</sup> Smith v. Kennedy, 89 Ill. 485; *dine v. Berwin*, 62 Tex. 341; Gay-Martin v. Roberts, 57 Tex. 564; *lord v. Loughridge*, 50 Tex. 573. Taylor v. Huck, 65 Tex. 238; Mun-

cates the difficulty of making the law both satisfactory and just to all parties in its operation.<sup>10</sup>

There is a great diversity of provisions in the statutes. The statutes of no two states are alike. There are to be found in them several distinct plans or theories. Yet, as substantially the same end is sought in all of them and substantially the same constitutional and legal limitations apply everywhere, the statutes agree in substance in their more important features, though these may be stated differently. It happens, therefore, that the adjudications upon the subject are of two kinds. Some interpret and construe statutory provisions which are peculiar to a single state, or perhaps to a very few states; while others relate to the general features common to all the statutes. The plan of treating the subject must, therefore, recognize and follow this natural division of the cases relating to it.

Starting, then, with the statutory law, the present chapter will contain a statement of the principal provisions of the law of each state, with annotations of cases relating to such of the provisions as are special rather than general in the legislation upon this subject. Then will follow several chapters in which will be stated the judicial interpretations of what is of general or universal application in them. In this part of the subject it will be observed that the courts, as the result of several thousand decisions, have formulated many propositions or rules, which, with the statutes, make a new subject of jurisprudence, of which the common law took no cognizance.

It is not practicable in this statement of the statute law to give all the details of the statutes. The more important provisions are given in the words of the statutes. Some less important provisions are stated in substance only; while many details of minor importance, especially those of pleading and practice, are not referred to. It is intended to state

<sup>10</sup> See Phillips' *Mechanics' Liens* (3rd ed.), ch. 1.

only so much of the statutes as seems necessary for an understanding of their general features and the decisions of the courts.

§ 1187. **Alabama.**<sup>11</sup>—Every mechanic, person, firm or corporation who shall do or perform any work or labor upon, or furnish any material, fixture, engine, boiler, or machinery for any building or improvement on land,<sup>12</sup> or for repairing, altering or beautifying the same, under or by virtue of any contract with the owner or proprietor thereof,<sup>13</sup> or his agent, architect, trustee, contractor, or subcontractor, upon complying with the provisions of this article, shall have a lien therefor on such building or improvement, and on the land on which the same is situated, to the extent in ownership of all the right, title, and interest therein of the owner or proprietor, and to the extent in area of the entire lot or parcel of land in a city, town, or village, or, if not in a city, town, or village, of one acre; or if employes of the contractor or persons furnishing material to him the lien shall extend only to the amount of any unpaid balance due the contractor by the owner or proprietor, and such

<sup>11</sup> Code 1907, §§ 4754, 4755, 4758, 4761, 4762, 4777. This act was originally a copy of the statute of Missouri. *Bedsole v. Peters*, 79 Ala. 133, 137, per Somerville, J. A statutory provision that failure to notify a laborer or material-man shall be prima facie evidence of the owner's consent is unconstitutional. *Randolph v. Builders & Supply Co.*, 106 Ala. 501, 17 So. 721; so is a provision giving laborers and material-men a lien without regard to the amount due on the principal contract. *Selma Sash & Factory v. Stoddard*, 116 Ala. 251, 22 So. 555. The act approved Feb. 12, 1891, entitled "An act to provide liens for mechanics and ma-

terial-men," is unconstitutional and the existing statute continues in force. *Greene v. Robinson*, 110 Ala. 503, 20 So. 65; *Randolph v. Builders & Supply Co.*, 106 Ala. 501, 17 So. 721.

<sup>12</sup> A coal mine is an improvement and coal cars are fixtures or machinery, within the meaning of this provision. *Central Trust Co. v. Sheffield & B. R. Co.*, 42 Fed. 106, 9. L. R. A. 67.

<sup>13</sup> A material-man has a lien for materials furnished, whether his contract be with the owner or with a subcontractor. *Willingham v. Long*, 70 Ala. 587; *Welch v. Porter*, 63 Ala. 225; *Geiger v. Hussey*, 63 Ala. 338.

employes and material-men shall also have a lien on such unpaid balance.

But if the person, firm, or corporation, before furnishing any material, shall notify the owner or his agent in writing that such certain specified material will be furnished by him to the contractor for use in the building or improvements on the land of the owner or proprietor at certain specified prices, unless the owner or proprietor or his agent objects thereto, the furnisher of such material shall have a lien for the full price thereof as specified in the notice to the owner or proprietor without regard to whether the amount of the claim for such material so furnished exceeds the unpaid balance or not, unless on the notice herein provided for being given, the owner or proprietor or his agent shall notify such furnisher in writing before the material is used, that he will not be responsible for the price thereof.

Such lien, as to the land, shall have priority over all other liens, mortgages, or incumbrances created subsequently to the commencement of the work on the building or improvement, and, as to the building or improvement, it shall have priority over all other liens, mortgages, or incumbrances, whether existing at the time of the commencement of such work, or subsequently created; and the person entitled to such lien may, when there is a prior lien, mortgage, or incumbrance on the land, have it enforced by a sale of the building or improvement under the provisions of this article, and the purchaser may, within a reasonable time thereafter, remove the same.

It shall be the duty of every original contractor within six months,<sup>14</sup> and of every journeyman and day-laborer, within thirty days, and of every other person entitled to such lien within four months, after the indebtedness has ac-

<sup>14</sup> One who furnishes materials for building a planing-mill, under contract with the owner, is an original contractor, and may file

his claim within six months. *Lane v. Jones*, 79 Ala. 156; *Geiger v. Hussey*, 63 Ala. 338, 342.

crued, to file in the office of the judge of probate of the county in which the property upon which the lien is sought to be established is situated, a statement in writing, verified by the oath of the person claiming the lien, or of some other person having knowledge of the facts, containing a just and true account of the demand secured by the lien, after all the just credits have been given, a description of the property on which the lien is claimed, and the name of the owner or proprietor thereof, but no error in amount of the demand or name of the owner or proprietor, shall affect the lien; and unless such statement is so filed, the lien shall be lost.<sup>15</sup>

When the land on which the building or improvement is situated is not in a city, town, or village, and exceeds in area one acre, any person having a lien, or his personal representative, may at any time prior to filing his statement in the office of the judge of probate, select the one acre which shall be subject to the lien; such selection to include the site of such building or improvement, and the land contiguous thereto, and to constitute but one lot or parcel.

Every person, except the original contractor, who may wish to avail himself of the provisions of this article, shall, before filing his statement in the office of the judge of probate give notice in writing to the owner<sup>16</sup> or proprietor, or his agent, that he claims a lien on such building or improvement, setting forth the amount thereof, for what and from whom it is owing;<sup>17</sup> and after such notice, any unpaid

<sup>15</sup> It is also made the duty of the judge of probate to make an abstract of such account and record it in a book kept for the purpose. Code 1907, § 4760. When this is done, the withdrawal of the claim from the files of the court does not destroy the lien nor defeat the constructive notice resulting from the recording of the abstract. *Bell v. Teague*, 85 Ala. 211,

3 So. 861; *Mars v. McKay*, 14 Cal. 127.

<sup>16</sup> Such notice must be in writing. *Seibs v. Engelhardt*, 78 Ala. 508; *Miller v. Hoffman*, 26 Mo. App. 199.

<sup>17</sup> A notice which does not state "for what and from whom" the debt is owing is fatally defective. *Trammell v. Hudmon*, 86 Ala. 472, 6 So. 4. Since a claimant may be

balance in the hands of the owner or proprietor shall be held subject to such lien. But the provisions of this section shall not apply to the case of any material furnished for such building or improvement, of which the owner was notified in advance.<sup>18</sup>

All liens shall be deemed lost, unless suit for the enforcement thereof be commenced within six months after the maturity of the entire indebtedness secured thereby.<sup>19</sup>

§ 1187a. **Alaska.**<sup>20</sup>—Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, teamster, drayman and other person performing labor upon or furnishing material of any kind to be used in the construction, development, alteration, or repair, either in whole or in part of any building, wharf, bridge, flume, mine, tunnel, fence, machinery, or aqueduct, or any structure or superstructure, shall have a lien upon the same for the work or labor done and material furnished at the instance of the owner of the building or other improvement, or his agent. And every contractor, subcontractor, architect, builder, or other person having charge of the construction, alteration, or repair, shall be held to be the agent of the owner.

entitled to a lien on the building alone, a misdescription of land in a case will not invalidate the lien. *Salter v. Goldberg*, 150 Ala. 511, 43 So. 571.

<sup>18</sup> See Civ. Code 1907, § 4754.

<sup>19</sup> The remedy provided by statute must be pursued. This is analogous to a bill in chancery. But a court of equity has no jurisdiction to enforce such lien except as provided. *Walker v. Daimwood*, 80 Ala. 245; *Chandler v. Hanna*, 73 Ala. 390. Common counts may be joined with the special count to enforce the lien, and the plaintiff

may have a personal judgment though he fails to establish his lien. *Bedsole v. Peters*, 79 Ala. 133.

<sup>20</sup> *Carter's Ann. Code* 1900, p. 409, § 262. The mechanic's lien law of Alaska is to be liberally construed. *Jorgensen Co. v. Sheldon*, 2 Alaska 607. Including in a claim for services such services for which the statute affords no lien will not defeat the claimant's lien for the services covered by the law. *Pioneer Mining Co. v. Delamotte*, 185 Fed. 752, 108 C. C. A. 90.



§ 1188. **Arizona.**<sup>21</sup>—Any person, firm, or corporation who may labor or furnish material, machinery, fixtures, or tools to erect any house or improvement, or to alter or repair any building or improvement whatever, shall have a lien on such house, building, fixtures, or improvements, and shall also have a lien on the lot or lots or land necessarily connected therewith, to secure payment for the labor done, lumber, material, machinery or fixtures and tools furnished for construction, alteration or repairs.<sup>22</sup>

In order to fix and secure the lien, the person, firm, contractor, mechanic, artisan or lumber dealer performing labor or furnishing material, shall have the right at any time within sixty days after the completion of such labor or the completion of the furnishing of such material, to file his contract, or an itemized account duly verified before a notary public or other person qualified to administer oaths, in the office of the county recorder of the county in which such property is situated, and cause the same to be recorded in a book to be kept by the county recorder for that purpose.

If the contract, order or agreement be verbal, a duplicate copy of the bill of particulars shall be made under oath, one to be delivered to the recorder to be filed and recorded as provided for written contracts, and the other to be furnished to the party owing the debt, or to his agent if to be found

<sup>21</sup> Rev. Stats. 1901, §§ 2888, 2900, 2908, 2909.

<sup>22</sup> A lien is also given to those who labor or furnish material in the construction, alteration or repair of any canal, water ditch, flume or aqueduct, or reservoir, bridge, fence or other structure or improvement; also to miners, laborers and others who furnish material for use in any mine or mining claim; also to those who furnish material or labor upon any

lot in any incorporated city, town or village, or fills in or otherwise improves the same, or the street in front of or adjoining the same. Also foundrymen, boiler-makers, and all persons laboring upon or furnishing machinery, boilers, castings, or other material for the construction, alteration, repairs, or carrying on of any mill, manufactory, or hoisting works, have a lien. Rev. Stats. 1901, §§ 2903, 2905, 2906.

in the county where the property is situated. If neither the party owing the debt or his agent can be found in the county, then the furnishing the copy to the party owing the debt or his agent may be dispensed with.

Both the contracts and accounts when filed and recorded shall be accompanied by a description of the lands, lots, houses, and improvements made against which the lien is claimed. When such contract or account is filed and recorded, it shall be deemed sufficient diligence to secure the lien herein provided.

If outside the limits of a city, town or village the lien shall extend to and include ten acres upon which such labor has been performed or upon which the houses or improvements are made.<sup>23</sup> If in a city, town, or village, it shall extend to and include such lot or lots upon which such houses, fixtures, or improvements are situated, or upon which such labor was performed.

The lien herein provided for labor performed or material furnished shall extend to the land designated, and the person enforcing the same may have the lot or land and improvements sold together, or he may have the improvements alone, sold when the same can be done without material injury to the property beyond the value of the improvements. When the improvements are sold separately, the purchaser, shall be by the officer making the sale, placed in possession thereof, and he shall have the right to remove the same within reasonable time from the date of purchase.

Every sale must be made upon judgment rendered by some court of competent jurisdiction, foreclosing such lien, and ordering sale of such property.

Every mechanic, lumber dealer, material-man, millman, artisan or other person doing and performing any work, or furnishing any material towards the erection, alteration, re-

<sup>23</sup> Only the interest of such party can be ordered to be sold to satisfy the lien. *Bremen v. Foreman*, 1 Ariz. 413, 25 Pac. 539.

pair, construction or completion of any building erected or improvement made under a contract between the owner of said building erected or improvements and the original contractors, whose demand for work and labor performed or material furnished towards the completion of said building or improvement has not be paid, shall deliver to the owner of said building or improvements, or to his agent in charge, if to be found in the county, and if not, then to the county recorder of the proper county within sixty days from the completion of such building or improvements an attested account of the amount and value of the labor or material thus furnished remaining unpaid, and thereupon the owner may, for his own protection, retain out of the amount due, or to become due such original contractors, if any, the amount of said labor or material furnished, as shown by said attested account, and such owner and the building and improvement and the land upon which the same is situated shall be liable for the reasonable value of such labor done and material furnished, notwithstanding the fact that such owner may have taken from such original contractor a bond conditioned for the faithful performance of his contract, and that such building should be turned over free from incumbrances.

A compliance with the provisions of the preceding paragraph, shall be sufficient diligence to fix the liability of the owner of such building or improvements for the payment of such demand, and to secure the lien on the building and improvements for the amount of such demand.

Whenever such an account shall be placed in the hands of such owner, or his authorized agent, it shall be the duty of such owner or his agent to furnish his contractor with a true copy of such attested account, and if said contractor shall not within ten days after the receipt of said copy give the owner written notice that he intends to dispute said

claim, he shall be considered as assenting to the demand, which shall be paid by the owner, when it becomes due.

The liens provided for are preferred to all liens, mortgages, and other incumbrances which shall have attached upon the property, subsequent to the time when the labor was commenced, or the materials commenced to be furnished. Also to all liens, mortgages, and other incumbrances of which the lienholder had notice, either actual or constructive.

No lien created by this act shall continue for a longer period than four months after the filing thereof in the county recorder's office of the proper county, unless suit is brought within such period in the proper court to enforce the same.

§ 1189. **Arkansas.**<sup>24</sup>—Every mechanic, builder, artisan, workman, laborer or other person, who shall do or perform any work upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection, improvement upon land, or upon any boat or vessel of any kind, or for repairing same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or subcontractor, upon complying with the provisions of this act shall have for his work or labor done, or materials, fixtures, engine, boiler or machinery furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre; or if such building, erection or improvement be upon any lot of land in any town, city or village, then such lien shall be upon such building, erection or improvements and the lots or land upon which the same are situated; or if such erection or improvement be upon any boat or vessel, then upon such boat or vessel, to secure the payment of such work or labor done,

<sup>24</sup> Dig. of Stats. 1904, §§ 4970- 4972, 4974, 4976, 4978, 4979, 4981.

or materials, fixtures, engine, boiler or machinery furnished<sup>25</sup> as aforesaid.<sup>26</sup>

The entire land, to the extent aforesaid, upon which any building, erection or other improvement is situated, including as well that part of said land which is not covered with such building, erection or other improvement as that part thereof which is covered with the same, shall be subject to all liens created by this act to the extent and only to the extent of all the right, title and interest owned therein by the owner or proprietor of such building, erection or other improvement for whose immediate use or benefit the labor was done or things were furnished.

The lien for the things aforesaid, or work, shall attach to the buildings, erections or other improvements, for which they were furnished or work was done, in preference to any prior lien or incumbrance or mortgage existing upon said land before said buildings, erections, improvements or machinery were erected or put thereon, and any person enforcing such lien may have such building, erection or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter; provided, however, that in all cases where said prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make

<sup>25</sup> A lien for machinery or the like attaches whether the building for which it is supplied is in process of construction or has been already completed. *White v. Chaffin*, 32 Ark. 59. Each building is held liable for the materials furnished and used in its construction. *Central Lumber Co. v. Brad-dock Land & Granite Co.*, 84 Ark. 560, 105 S. W. 583. Before an owner trying to defeat a claim for materials, because the contract was

abandoned by the contractor and it cost the owner more to complete the building than the contract price, can succeed, he must prove that the increased cost was in completing the building according to the specifications of the original contract. *Long v. Abeles*, 77 Ark. 156, 93 S. W. 67.

<sup>26</sup> For section showing when owner not liable to subcontractors, see *Castle's Supp.* 1911, § 4970a; *Acts* 1911, Act 446.

such erections, improvements or buildings, then said lien shall be prior to the lien given by this act.

The lien for work and materials as aforesaid shall be preferred to all other incumbrances which may be attached to or upon such building, bridges, boats or vessels or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements.

Every person, except the original contractor, who may wish to avail himself of the benefit of the provisions of this act, shall give ten days' notice<sup>27</sup> before the filing of the lien, as herein required, to the owner, owners or agent, or either of them, that he holds a claim against such building or improvement, setting forth the amount and from whom the same is due. Such notice may be served by any officer authorized by law to serve process in civil actions or by any person who would be a competent witness. When served by an officer, his official return indorsed thereon shall be proof thereof, and when served by any other person, the fact of such service shall be verified by affidavit of the person so serving.

In all cases where a lien shall be filed under the provisions of this act by any person other than a contractor, it shall be the duty of the contractor to defend any action brought thereupon, at his own expense; and during the pendency of such action, the owner may withhold from such contractor the amount of money for which such lien shall be filed; and in case of judgment against the owner or his property upon the lien, he shall be entitled to deduct from any amount due by him to the contractor the amount of such judgment and costs, and, if he shall have settled with the contractor in full, shall be entitled to recover back from

<sup>27</sup> If the subcontractor does not notify the owner as provided, but can safely withhold any amount from the contractor. Dig. of Stats. 1904, § 4976.  
furnishes the account, he has the lien to the extent that the owner

the contractor any amount so paid by the owner for which the contractor was originally liable.<sup>28</sup>

The liens for work and labor done or things furnished as specified in this act shall be upon an equal footing, without reference to the date of filing the account or lien; and in all cases where such a sale shall be ordered and the property sold, which may be described in any account or lien, the proceeds arising from such sale, when not sufficient to discharge in full all the liens against the same without reference to the date of filing the account or lien, shall be paid pro rata on the respective liens; provided, such account or liens shall have been filed and suit brought as provided by this act.

It shall be the duty of every person who wishes to avail himself of this act to file with the clerk of the circuit court of the county in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after the things aforesaid shall have been furnished or the work or labor done or performed, a just and true account of the demand due or owing to him, after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit.<sup>29</sup>

All liens created by virtue of this act shall be enforced in the circuit court of the county wherein the property on which the lien is attached is situated, and any person having such lien may enforce the same in said circuit court, without regard to the amount thereof.

<sup>28</sup> The owner is liable to the subcontractor only for the market value of materials furnished, and not the contract price. If the principal contractor abandons his contract, the subcontractor must present his claim within ten days after such abandonment. *Basham*

*v. Toors*, 51 Ark. 309, 11 S. W. 282.

<sup>29</sup> An account for machinery furnished must be filed within ninety days from the time it is placed upon the premises to be charged with the lien. *White v. Chaffin*, 32 Ark. 59; *Cohn v. Hager*, 30 Ark. 25.

All actions under this act shall be commenced within fifteen months after filing the lien and prosecuted without unnecessary delay<sup>30</sup> to final judgment, and no lien shall continue to exist by virtue of the provisions of this act for more than fifteen months after the lien shall be filed, unless within that time an action shall be instituted thereon as hereinbefore described.

Every manufacturer or contractor who shall furnish to any landowner any soil or drain pipe or tile for drainage of his land, or who shall put in soil or drain tile for any land shall have a lien for each tract of forty acres or less, of the real estate upon which the tile is placed, for the payment of the same, which lien shall extend for a period of two years.

The lien for said tile shall attach to the said real estate and all improvements thereon in preference to any subsequent liens, or incumbrances, or mortgage executed upon said land after the purchase of said title, which lien shall be enforced in the same manner as mechanics' or contractors' liens.<sup>31</sup>

**§ 1190. California.**<sup>32</sup>—Mechanics, material-men, contractors, subcontractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon, or bestowing

<sup>30</sup> Under a former statute it was held that the statutory remedy did not oust the jurisdiction of chancery, but was cumulative only. *Murray v. Rapley*, 30 Ark. 568. A justice of the peace has no jurisdiction to declare a laborer's lien, and the circuit court acquires none on appeal. *Hoye Coal Co. v. Colvin*, 83 Ark. 528, 104 S. W. 207.

<sup>31</sup> Acts 1913, p. 1060.

<sup>32</sup> Code Civ. Proc. 1906, §§ 1183,

1187, 1190, 1192, 1194, as amended by Stats. and Amends. to Codes 1911, §§ 1183-1185, 1187, 1190, 1192, 1194. The Constitution, art. 20, § 15, gives all laborers a lien, and the lien law only provides how it may be enforced. *Goldtree v. San Diego*, 8 Cal. App. 512-546, 97 Pac. 216-18. The lien is in the nature of a mortgage of the property. *Ritter v. Stevenson*, 7 Cal. 388, 389; *Curnow v. Blue Gravel & H. Co.*, 68 Cal. 262, 6 Pac. 149.



skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair,<sup>33</sup> either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power, whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise;<sup>34</sup> and every contractor, subcontractor, architect, builder or other person having charge of the construction, alteration, addition to or repair either in whole or in part of any building, or other improvement as aforesaid shall be held to be the agent of the owner for the purpose of this act. Any person who performs labor in any mining claim<sup>35</sup> or

<sup>33</sup> It is immaterial whether or not the form and structure are changed. *Donahue v. Cromartie*, 21 Cal. 80, 86. An owner is not liable for materials beyond the contract price where he has complied with his contract. *Butler v. Ng Chung*, 160 Cal. 435, 117 Pac. 512.

<sup>34</sup> A lien is also given for grading, filling in, or improving a lot, or the street, highway, or sidewalk in front of it. Code of Civ. Proc. 1906, § 1191, as amended by Stats. & Amends. to Codes 1913, p. 333. There can be no lien on a building for materials furnished but not used because the owner changed his plans after the materials have been delivered. *California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal.

App. 692, 118 Pac. 113. A cook for laborers of a contractor has no lien for his services. *Clark v. Beyrle*, 160 Cal. 306, 116 Pac. 739. A foreman is entitled to a lien. *Kritzer v. Tracy Eng. Co.*, 16 Cal. App. 287, 116 Pac. 700.

<sup>35</sup> This term does not include mineral lands held under a Mexican or Spanish grant. *Williams v. Santa Clara Min. Co.*, 66 Cal. 193, 5 Pac. 85. The term "mining claim" applies to a mine the title to which has been acquired in fee, as well as to a mining claim in its technical sense. *Bewick v. Muir*, 83 Cal. 368, 23 Pac. 389. The lien upon a mining claim is upon the claim as a whole. *Silvester v. Coe Quartz M. Co.*, 80 Cal. 510, 22 Pac. 217. One who performs labor in any pit, shaft or gallery of a

claims, or in or upon any real property worked as a mine, either in the development thereof or in working thereon by the subtractive process or furnishes materials to be used or consumed therein, has a lien upon the same and the works owned and used by the owners for milling or reducing the ores from the same, for the value of the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of such mining claim or claims or real property worked as a mine, or his agent, and every contractor, subcontractor, superintendent or other person having charge of any mining or work or labor performed in and about such mining claim or claims or real property worked as a mine, either as lessee or under a working bond or contract thereon shall be held to be the agent of the owner for the purposes of this act. The liens in this act provided for shall be direct liens, and shall not in the case of any claimants, other than the contractor be limited as to amount, by any contract price agreed upon between the contractor and the owner except as hereinafter provided; but said several liens shall not in any case exceed in amount the reasonable value of the labor done or material furnished, or both, for which the lien is claimed, nor the price agreed upon for the same between the claimant and the person by whom he was employed; nor in any case, where the claimant was employed by a contractor, or subcontractor, shall the lien extend to any labor or materials not embraced within or covered by the original contract between the contractor and the owner, or any modification thereof made by or with the consent of such owner, and of which such contract, or modification thereof, the claimant shall have had actual notice before the performance of such labor or the furnishing of such

mine is entitled to a lien upon the whole mining claim. *Helm v. Chapman*, 66 Cal. 291, 5 Pac. 352. An eighty acre tract of land in

process of development as an oil mine is a mining claim. *Berentz v. Belmont Oil Min. Co.*, 148 Cal. 577, 84 Pac. 47.

materials. The filing of such original contract, or modification thereof, in the office of the county recorder of the county where the property is situated, before the commencement of the work, shall be equivalent to the giving of such actual notice by the owner to all persons performing work or furnishing materials thereunder. In case said original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties in an amount not less than fifty (50) per cent. of the contract price named in said contract, which bond shall in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work, and shall also by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract so as to give such persons a right of action to recover upon said bond in any suit brought to foreclose the liens provided for in this act or in a separate suit brought on said bond, then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor, and render judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both. No change or alteration of the work or modification of any such contract between the owner and his contractor shall release or exonerate any surety or sureties upon any bond given under this section. It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties in the amount and upon

the conditions as herein provided. It shall be lawful for the owner to protect himself against any failure of the contractor to perform his contract and make full payment for all work done and materials furnished thereunder by exacting such bond or other security as he may deem satisfactory.<sup>36</sup>

<sup>36</sup> The legislature has the power to provide that, if the contract was not executed and filed in a certain manner, the owner should become liable to the material-men and laborers for the value of their materials and labor. *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588, writ of error dismissed, 136 U. S. 639, 34 L. ed. 557, 10 Sup. Ct. 1069. When the original contractor has not filed his contract under this provision, and the material-man has not filed any lien as provided, there is of course no lien for either the contractor or the material-man, and the owner is not liable to a personal judgment for the value of materials which he has not himself purchased. "This section," says the court, "as it seems to us, means to preserve the right of the material-man who has duly filed his lien according to the statute, in cases where the contractor has failed, by reason of not filing his contract, to preserve the material-man's rights thereunder; and the language of the statute announces the law to be that where such is the case the material-man may duly file his lien and enforce it just as if the owner of the building had bought from or contracted for the materials with the material-man in the beginning, instead of the contractor." *Southern*

*Cal. Lumber Co. v. Schmitt*, 74 Cal. 635, 16 Pac. 516, 517. The contract between the subcontractor and contractor for material is valid notwithstanding the original contract was void as between the parties to it. *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419. As the contract is void when not recorded, the material-men are not limited in their right to a lien to the amount due the contractor on the contract, though they had actual notice that there was such a contract. *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588, writ of error dismissed, 136 U. S. 639, 34 L. ed. 557, 10 Sup. Ct. 1069; *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860. If the contract is void for failure to record the same, or other defects, the bond thereto attached, conditioned that the contractor will not permit any valid claim or lien to be placed on the building, is void also; and the fact that a material-man was surety thereon does not estop him from setting up a lien on the building. *Stovell v. Neal*, 90 Cal. 213, 27 Pac. 192. See *Kiessig v. Allspaugh*, 91 Cal. 234, 27 Pac. 662. Failure to give a description of the property affected by the contract does not invalidate it, as no description is required by statute.

No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion

San Diego Lumber Co. v. Wooldredge, 90 Cal. 574, 27 Pac. 431. To render a judgment for a mechanic's lien valid, where the contract is not recorded, there must have been an allegation in the complaint, and a finding of the court, as to the value of the material furnished and the work done. Booth v. Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101. Plans and specifications referred to and forming part of the contract must be filed in the office of the recorder, otherwise the contract is void. Holland v. Wilson, 76 Cal. 434, 18 Pac. 412; Willamette Steam Mills Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; Yancy v. Morton, 94 Cal. 558, 29 Pac. 111; Smith v. Bradbury, 148 Cal. 41, 82 Pac. 367, 113 Am. St. 189; Willamette Steam Mills Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629; San Francisco Lumber Co. v. O'Neill, 120 Cal. 455, 52 Pac. 728; West Coast Lumber Co. v. Knapp, 122 Cal. 79, 54 Pac. 533; Donnelly v. Adams, 115 Cal. 129, 46 Pac. 916. Filing a contract signed by both parties, specifications signed by the owner and plans signed by the contractor has been held sufficient. Howe v. Schmidt, 151 Cal. 436, 90 Pac. 1056. A trustee who holds the legal title to land under a contract

whereby he is to build a factory on the land, and then convey the whole property to the *cestui que trust*, is the "owner," within this statute, though he has already received the consideration of the contract. Hinckley v. Cracker Co., 91 Cal. 136, 27 Pac. 594, under § 1183 of the Code of Civil Procedure (which, however, was amended by Stats. and Amends. to Codes 1911, p. 1313) it was held that where the contract price is less than \$1,000 it need not be in writing, nor twenty-five per cent. of the price reserved until after completion of the contract. Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. 932; Kerckhoff-Cuzner Co. v. Cummings, 86 Cal. 22, 24 Pac. 814. A contract providing for final payment in thirty days after the completion of the work is not invalid, as the statute requires liens to be filed within thirty days after completion of a building, and no prejudice could arise. San Diego Lumber Co. v. Wooldredge, 90 Cal. 574, 27 Pac. 431. The contract is void where it provides, "the last and final payment to be made thirty-five days after completion of the work," without specifying the amount of such payment. Willamette Steam Mills Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. 629. Where the third pay-

of specified portions of the work, or on the completion of the whole work; provided, that at least twenty-five per cent of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract.

No payment made prior to the time when the same is due, under the terms and conditions of the contract shall be valid for the purpose of defeating, diminishing or discharging any lien in favor of any person, except the contractor, but as to such liens, such payments shall be deemed as if not made, and shall be applicable to such liens, notwithstanding that the contractor to whom it was paid may thereafter abandon his contract, or be or become indebted to the reputed owner in any amount for damages or otherwise, for nonperformance of his contract or otherwise. As to all liens, except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaims in favor of the reputed owner and against the contractor; no alteration of any such contract shall affect any lien acquired under the provisions of this act. In case such contracts and alterations thereof do not conform substantially to the provisions of this paragraph, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof.

ment of the owner is payable on the completion of the building and the approval of the architect, payment without the latter's approval is not invalid as against lienholders, as the owner may waive such approval. *Valley Lumber Co. v. Struck*, 146 Cal. 266, 80 Pac. 405. A promise by an owner to pay a material man for materials furnished the contractor is not a pay-

ment and does not offend against the statutory provision as to when payments shall be made. *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200. A painter who contracts to paint a hotel is an original contractor, and the contract is not void because part of the price is to be paid in land. *Baird v. Peall*, 92 Cal. 235, 28 Pac. 285.

Any of the persons mentioned in the preceding paragraph, except the contractor, may at any time give to the owner a notice<sup>37</sup> that they have performed labor or furnished materials, or both, to the contractor or other person acting by the authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor and materials and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both, and any of said persons who shall on the written demand of the owner refuse to give such notice shall thereby deprive himself of the right to claim a lien under this act. Such notice may be given by delivering the same to said owner personally, or by leaving it at his residence or place of business with some person in charge, or by delivering it to his architect, or by leaving it at the latter's office with some person in charge. No such notice shall be invalid by reason of any defect in form; provided, it is sufficient to inform the

<sup>37</sup> Code Civ. Proc. 1906, as amended by Stats. and Amends. to Codes 1911, p. 1315, § 1184, for mode of service, etc. As to sufficiency of notice, see *Davis v. Livingston*, 29 Cal. 283. As to the effect of the notice, see *McAlpin v. Duncan*, 16 Cal. 126. When the construction contract is not recorded it is void, and in that case the statutory notice of the material-men's claim is not necessary to reach the money due the contractor, the statute itself being notice to the owner. *Kellog v. Howes*, 81 Cal. 170, 22 Pac. 509. Under this provision a complaint to foreclose a lien for materials furnished is sufficient when it avers that due notice was given the owner of the amount and

value of the materials to be furnished the contractors. *Russ Lumber Co. v. Garretson*, 87 Cal. 589, 25 Pac. 747. Upon receipt of the notice, the owner becomes liable as on garnishment or assignment. *McAlpin v. Duncan*, 16 Cal. 126; *Bates v. Santa Barbara*, 90 Cal. 543, 27 Pac. 438. Prior to this section, which was passed in 1885, a notice to the owner that a balance was due him from the original contractor imposed no duty on the owner to retain money to meet the claim. *McCants v. Bush*, 70 Cal. 125, 11 Pac. 601. A material-man is entitled to a lien where the owner has notice of it and has not paid the contractor. *Snell v. Clark Const. Co.*, 16 Cal. App. 253, 116 Pac. 699.

owner of the substantial matters herein provided for. Upon such notice being given it shall be lawful for the owner to withhold, and in the case of property which, for reasons of public policy or otherwise, be not subject to the liens in this act provided for, the owner or person who contracted with the contractor, shall withhold from the contractor sufficient money due or that may become due to such contractor to answer such claim and any lien that may be filed therefor including the reasonable cost of any litigation thereunder.

The land upon which any building, improvement, well or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing of the material for the same, the land belonged to the person who caused said building, improvement, well or structure to be constructed, altered or repaired, but if such person, owned less than fee simple estate in such land, then only his interest therein is subject to such lien, except as provided in the following paragraph.<sup>37a</sup>

Every building or other improvement or work mentioned in any of the preceding paragraphs of this section constructed, altered or repaired upon any land with the knowledge of the owner or of any person having or claiming any estate therein, and the work or labor done or materials furnished mentioned in any of said paragraphs with the knowledge of the owner or persons having or claiming any estate in the land, shall be held to have been constructed, performed or furnished at the instance of such owner or person having or claiming any estate therein, and such interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act, unless such owner

<sup>37a</sup> Stat. and Amens. to Codes 1911, § 1192.



or person having or claiming any estate therein shall, within ten days after he shall have obtained knowledge of such construction, alteration or repair or work or labor, give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon the property, and shall also, within the same period, file for record a verified copy of said notice in the office of the county recorder of the said county in which said property or some part thereof is situated. Said notice shall contain a description of the property affected thereby sufficient for identification, with the name, and the nature of the title or interest of the person giving the same, said copy so recorded may be verified by any one having a knowledge of the facts, on behalf of the owner or person for whose protection the notice is given.<sup>38</sup>

The liens are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished.

Every original contractor<sup>39</sup> claiming the benefit of this act,

<sup>38</sup> Sections 1185 and 1192 of the Code of Civil Procedure, 1906, must be construed together harmoniously if possible, and while the first charges the holder of a leasehold interest with a lien only to the extent of his interest, the latter adds a provision that, if the building is constructed with the knowledge of the owner of the fee, it must be held to have been constructed at his instance, so as to charge his estate with the lien,

unless he gives notice as therein provided that he will not be responsible therefor. *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 32 Pac. 231; *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686.

<sup>39</sup> Not every one who deals with the owner is an original contractor. Material-men furnishing materials for the construction of a building, though under a contract with the owner, and persons directly employed by him to work

within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this act, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion<sup>40</sup> of the original contract, if any, under which he was employed, must file for record with the county recorder of the county or city and county in which such property or some part thereof is situated, a claim of lien containing a statement of his demand after deducting all just credits and off-sets, with the name of the owner or reputed owner, if known, also the name of the person by whom he was employed, or to

on the building, are not original contractors, and therefore must file their claims within thirty days from the completion of the building. *Sparks v. Butte County Grav. M. Co.*, 55 Cal. 389.

<sup>40</sup> A lien filed before the building is completed is void, unless it appears that the original purpose was to build only in part, or that the original purpose to finish was abandoned. *Schwartz v. Knight*, 74 Cal. 432, 16 Pac. 235. The claimant is entitled to a lien, though the building is not completed, if he alleges and proves that the defendant did not intend to complete it, and that he had notified the claimant to that effect. *Harmon v. Ashmead*, 68 Cal. 321, 322, 9 Pac. 183; *Germania B. & L. Assn. v. Wagner*, 61 Cal. 349. Where the contract between the owner and contractor was void because not properly filed, mechanics' liens filed before the actual completion of the building were premature,

and can not be enforced. *Willamette Steam Mills Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629. Where a contract for the erection of a building is void, under Code Civ. Proc. 1906, § 1183, for not having been recorded, claims for mechanics' liens thereon may be filed within thirty days after the actual completion of the building, irrespective of previous acceptance or occupancy by the owner. *Willamette Steam Mills Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629, followed; *Willamette Steam Mills Co. v. Kremer*, 94 Cal. 205, 29 Pac. 633. The occupation of improvements by the owner is held to be equivalent to a completion of such improvements as affects the time for filing liens, but the occupation while the work was in progress did not start the time running for filing such liens. *Farnham v. California Safe Deposit etc. Co.*, 8 Cal. App. 266, 96 Pac. 788.

whom he furnished the materials,<sup>41</sup> with a statement of the price, if any, agreed upon for the same and when payable, and of the work agreed to be done and when the same was to be done,<sup>42</sup> if agreed upon, and also a description of the property to be charged, with the lien, sufficient for identification, which claim must be verified<sup>43</sup> by the oath of himself or of some other person. Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, improvement or structure, or of the alteration, addition to or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and, in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this act: the occupation or use of a building, improvement, or structure, by the owner, or his representative; or the acceptance by said owner or said agent, of said building, improvement, or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for. The owner may within ten days after

<sup>41</sup> The requirement in regard to the name of the person by whom the claimant was employed is the statement of a fact, not a conclusion of law. If he states the name of the person by whom he was employed, the requirement is met, though it turns out that such employer was a member of a firm, and employed him on behalf of the firm. *McDonald v. Backus*, 45 Cal. 262. One who furnishes materials to a railroad contractor, and afterwards to his assignee, need not state what portion he furnished to each, since there is but one contract, and the company has to settle only with the assignee. *Har-*

*man v. San Francisco & S. R. Co.*, 86 Cal. 617, 25 Pac. 124.

<sup>42</sup> If there is no agreement as to time, there need be no statement of the time given. *Hills v. Ohlig*, 63 Cal. 104.

<sup>43</sup> As to sufficiency of notice in general see *McIntyre v. Trautner*, 63 Cal. 429; *Blackman v. Marsicano*, 61 Cal. 638; *Selden v. Meeks*, 17 Cal. 128; *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507; *Hooper v. Flood*, 54 Cal. 218; *Tredinnick v. Red Cloud Consol. Min. Co.*, 72 Cal. 78, 13 Pac. 152; *San Diego Lumber Co. v. Wooldredge*, 90 Cal. 574, 27 Pac. 431.

completion of any contract, or within forty days after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred, together with his name and the nature of his title, and a description of the property sufficient for identification, which notice shall be verified by himself or some other person on his behalf. The fee for recording the same shall be one dollar. In case such notice be not filed then the said owner and all persons deraigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this act from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this act; provided, that all claims of lien must be filed within ninety days after the completion of any building, improvement or structure, or the alteration, addition or repair thereto.

No lien provided for in this act binds any property for a longer period than ninety days after the same has been filed, unless proceedings be commenced<sup>44</sup> in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than one year from the time the work is completed, by any agreement to give credit, and in case such proceedings be not prosecuted to trial within two years after the commencement thereof, the court may in its discretion dismiss the same for want of prosecution, and in all cases the dismissal of such action

<sup>44</sup> The action is an equitable one, and a party is not entitled to a trial by a jury as a matter of right. The granting or refusing such a trial is within the discretion of the court. *Curnow v. Blue Gravel & H. Co.*, 68 Cal. 262, 6 Pac. 149.

The action must be commenced within the limited time, notwithstanding the insolvency of the debtor. The proceedings are not stayed by the insolvency act. *Bradford v. Dorsey*, 63 Cal. 122

(unless it be expressly stated that the same is without prejudice) or a judgment rendered therein that, no lien exists, shall be equivalent to the cancellation and removal from the record of such lien.

It is held that the superior court acquires jurisdiction of all suits to enforce liens because they are proceedings in equity. This court will retain jurisdiction to dispose of such cases although the lien claim fails and the amount involved is not enough to give the court jurisdiction, because the original nature of the suit was within the scope of its jurisdiction.<sup>44a</sup>

When there are different liens on the same property, the judgment must declare their priority in the following order: 1. All persons performing manual labor in or about the same; 2. Persons furnishing materials; 3. Subcontractors; 4. Original contractors.<sup>45</sup>

The charges paid by county boards of horticultural commissioners for removing pests injurious to fruits, where the owner has neglected or refused to eradicate them after notice served, become a lien on the property and premises from which the nuisance has been removed.<sup>46</sup>

§ 1191. **Colorado.**<sup>47</sup> — Mechanics, material-men, contractors, subcontractors, builders, and all persons of every

<sup>44a</sup> *Becker v. Superior Court*, 151 Cal. 313, 90 Pac. 689. But see *Winrod v. Wolters*, 141 Cal. 399, 74 Pac. 1037.

<sup>45</sup> The California statute is constitutional in so far as it prefers the lien of laborers over material-men; but preferring both laborers and material-men to contractors is not objectionable. *Miltimore v. Nofziger Bros. etc. Co.*, 150 Cal. 790, 90 Pac. 114. A reasonable attorney's fee is allowed as part of

the plaintiff's costs; and a stipulation of the parties in regard to judgment does not exclude such fee, unless the exclusion be express. *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. 325.

<sup>46</sup> *Gen. Laws* 1906, p. 472; *Riverside County v. Butcher*, 133 Cal. 324, 65 Pac. 745; *Pike v. Empfield*, 21 Colo. App. 161, 120 Pac. 1054.

<sup>47</sup> *Mills' Ann. Stats.* 1912, §§ 4580, 4582, 4585, 4588-4590.

class<sup>48</sup> performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, mill, bridge, ditch, flume, aqueduct, reservoir, tunnel, fence, railroad, wagon road, tramway or any other structure or improvement, upon land,<sup>49</sup> and also architects, engineers, draughtsmen and artisans who have furnished designs, plans, plats, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other professional or skilled service, or bestowed labor in whole or in part, describing or illustrating, or superintending such structure, or work done or to be done, or any part connected therewith, shall have a lien upon the property upon which they have rendered service or bestowed labor or for which they have furnished materials or mining or milling machinery or other fixtures for the value of such services rendered or labor done or material furnished, whether at the instance of the owner, or of any other person acting by his authority or under him, as agent, contractor, or otherwise; for the work or labor done or services rendered or materials furnished, by each respectively, whether done or furnished or rendered at the instance of the owner of the building or other improvement, or his agent; and every contractor, architect, engineer, subcontractor, builder, agent or other person having charge of the construction, alteration, addition to, or repair, either in

<sup>48</sup> A lien is also given miners and others doing work or furnishing materials for working in any mine. Mills' Ann. Stats. 1912, § 4583. As to what a mining lien covers, see *Keystone Min. Co. v. Gallagher*, 5 Colo. 23; *Barnard v. McKenzie*, 4 Colo. 251. Where a contractor in his contract provided that he will not permit a subcontractor to assert any lien, there is nothing in such contract to prevent the contractor himself from filing a lien.

*Aste v. Wilson*, 14 Colo. App. 323, 59 Pac. 846, and cases there cited.

<sup>49</sup> Laying a sidewalk in front of a city lot is not an improvement for which a lien can be claimed. *Fleming v. Prudential Ins. Co.*, 19 Colo. App. 126, 73 Pac. 752. These mechanics' lien statutes and amendments to them have no retroactive effect. *Spangler v. Green*, 21 Colo. 505, 42 Pac. 674, 52 Am. St. 259.

whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act. In case of a contract for the work, between the reputed owner and a contractor, the lien shall extend to the entire contract price and such contract shall operate as a lien in favor of all persons performing labor or services or furnishing materials as herein provided under contract, express or implied, with said contractor, to the extent of the whole contract price; and after all such liens are satisfied, then as a lien for any balance of such contract price in favor of the contractor. All such contracts shall be in writing, when the amount to be paid thereunder exceeds five hundred dollars, and shall be subscribed by the parties thereto, and the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, together with the times or stages of the work for making payments, shall, before the work is commenced, by the owner or reputed owner be filed in the office of the county recorder of the county where the property, or the principal portion thereof, is situated; and in case such contract is not filed, as above provided, the labor done and materials furnished by all persons aforesaid before such contract or memorandum is filed, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof.

Every person given a lien by this act whose contract, either express or implied, is with the owner or reputed owner or his agent or other representative, shall be a principal contractor and all others subcontractors; and in every case in which different liens are claimed against the same property the rank of each lien, or class of liens, as between the different lien claimants, shall be declared and ordered

to be satisfied in the decree or judgment in the following order named:

First. The liens of all those who were laborers or mechanics working by the day or piece, but without furnishing material therefor, either as principal or subcontractors;

Second. The liens of all other subcontractors and of all material-men whose claims are either entirely or principally for materials, machinery or other fixtures, furnished either as principal or subcontractors;

Third. The liens of all other principal contractors; and all funds realized in any and all actions for the satisfaction of liens against the same improvements or structures shall be paid out in the order designated.<sup>50</sup>

Any person wishing to avail himself of this act shall file for record, in the office of the county recorder of the county wherein the property, or the principal part thereof, to be affected by the lien is situated, a statement containing:

First. The name or names of the owner or owners or reputed owner or owners of such property, or in case such name or names be not known to him, a statement to that effect.

Second. The name of the person claiming the lien, the name of the person who furnished the material or performed the labor for which the lien is claimed, and the name of the contractor when the lien is claimed by a subcontractor or by the assignee of a subcontractor, or, in case the name of such contractor is not known to the lien claimant, a statement to that effect.

Third. A description of the property to be charged with the lien, sufficient to identify the same; and

Fourth. A statement of the total amount of the indebtedness, the amount of the credits thereon, if any, and the balance or amount due or owing such claimant.

<sup>50</sup>A personal judgment can not be entered for part of the claim independently of the right of lien.

Barnard v. McKenzie, 4 Colo. 251;  
Hart v. Mullen, 4 Colo. 512.



Such statement shall be signed and sworn to by the party, or by one of the parties, claiming such lien, or by some other person in his or their behalf, to the best knowledge, information and belief of the affiant; and the signature of any such affiant to any such verification shall be a sufficient signing of the statement. In order to preserve a lien for work performed or materials furnished by a subcontractor there must be served upon the owner or reputed owner of the property or his agent at or before the time of filing with the county clerk and recorder the statement above provided for, a copy of such statement; but if neither the owner, or reputed owner, nor any agent of the owner or reputed owner can conveniently be found in the county where the property, or the principal part thereof, is situated, an affidavit to that effect shall be filed for record with the aforesaid statement and thereupon no such notice shall be required.

All such lien statements claimed for labor and work by the day or piece, but without furnishing material therefor, must be filed for record after the last labor for which the lien claimed has been performed and at any time before the expiration of one month next after the completion of the building, structure or other improvement; all lien statements of all other subcontractors and of all material-men whose claims are either entirely or principally for materials, machinery or other fixtures, must be filed for record after the last labor is performed or the last material furnished for which the lien is claimed and at any time before the expiration of two months next after the completion of such building, structure or other improvement, and the lien statements of all other principal contractors must be filed for record as aforesaid after the completion of their respective contracts and at any time within three months next after the completion of the building, structure or other improvement.

New or amended statements may be filed within the periods above provided, for the purpose of curing any mis-

take, or for the purpose of more fully complying with the provisions of this act.

Any trivial imperfection in, or omission from the said work, or in the construction of any building, improvement or structure, or of the alteration, addition to or repair thereof, shall not be deemed such lack of completion as to prevent the filing of any lien; and in case of contractors, the occupation or use of the building, improvement or structure by the owner, or his representative, or any other person with the consent of the owner or his agent, or the acceptance by said owner or his agent of said building, improvement or structure, shall, for the purpose of this act, be deemed conclusive evidence of completion; and cessation from labor for thirty days upon any unfinished contract or upon any unfinished building, improvement or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof, for all the purposes of this act.

The liens granted by this act shall extend to and cover so much of the lands whereon such building, structure or improvement shall be made as may be necessary for the convenient use and occupation of such building, structure or improvement, and the same shall be subject to such liens; and in case any such building shall occupy two or more lots, or other subdivisions, shall be deemed one lot for the purposes of this act, and the same rule shall hold in cases of any other such improvements that shall be practically indivisible, and shall attach to all machinery and other fixtures used in connection with any such lands, buildings, mills, structures or improvements.

When the lien is for work done or material furnished for any entire structure, erection or improvement, such lien shall attach to such building, erection or improvement for or upon which such work was done, or materials furnished, in preference to any prior lien or encumbrance, or mortgage upon the land upon which the same is erected, or put, and

any person enforcing such lien may have such building, erection or improvement sold under execution and the purchaser at any such sale may remove the same within thirty days after such sale.

All liens, established by virtue of this act shall relate back to the time of the commencement of work under the contract between the owner and the first contractor, or, if said contract be not in writing, then such liens shall relate back to and take effect as of the time of the commencement of the work upon the structure for improvement, and shall have priority over any and every lien or encumbrance subsequently intervening, or which may have been created prior thereto, but which was not then recorded, and of which, the lienor, under this act, did not have actual notice. Nothing herein contained, however, shall be construed as a valid encumbrance [encumbrance] upon any such land, duly made and recorded prior to the signing of such contract, or the commencement of work upon such improvement or structure. No attachment, garnishment or levy under an execution upon any money due or to become due to a contractor from the owner, or reputed owner, of any such property, subject to any such lien, shall be valid as against such lien of a subcontractor or material-men, and no such attachment, garnishment, or levy upon any money due to a subcontractor or material-men of the second class, as herein provided, from the contractor shall be valid as against any lien of a laborer employed by the day or piece, who does not furnish any material as herein classified.

No lien claimed by virtue of this act shall hold the property longer than six months after the completion of the building, structure or other improvement, or the completion of the alteration, addition to, or repair thereof, as prescribed in this act, unless an action be commenced within that time to enforce the same;<sup>51</sup> provided, that where two or more

<sup>51</sup> Mills' Ann. States. 1912, § the lien are in their nature equitable. San Juan & St. L. M. & S. 4590. The proceedings to enforce

liens are claimed of record against the same premises or property, the commencement of any action within that time by any one or more of such lien claimants in which action or actions all the lien claimants as appear by the records, are made parties, either plaintiff or defendant, shall be sufficient.

§ 1192. **Connecticut.**<sup>52</sup>—If any person shall have a claim for more than ten dollars for materials furnished or services rendered in the construction, raising, removal, or repairs of any building, or any of its appurtenances, and such claim shall be by virtue of an agreement with or by consent of the owner of the land upon which such building is erected or has been moved, or of some person having authority from or rightfully acting for such owner in procuring such labor or materials, such building with the land on which it stands shall be subject to the payment of such claim. Such claim shall be a lien on such land, building, and appurtenances, and shall take precedence of any other incumbrance originating after the commencement of such services, or the furnishing of any such materials, subject to apportionment as provided in a subsequent paragraph; but in case of removal no such lien shall take precedence of any incumbrance upon the land to which the building is removed which accrues before the building has been actually moved upon the land. Said premises may be foreclosed by the owner of such claim in the same manner as if held by mortgage.

No such lien shall be valid unless, within sixty days after

Co. v. Finch, 6 Colo. 214; Clear Creek Co. v. Root, 1 Colo. 374. Suit must be commenced within the time limited, whether the lien be filed prior or subsequent to the completion of the building. Hart v. Mullen, 4 Colo. 512. An action to foreclose lien must be begun within six months and it must be against all persons against whom priority of lien is claimed. John-

son v. Bennett, 6 Colo. App. 362, 40 Pac. 847. But where the lien has been completed against the owner a suit can be filed after the expiration of six months to determine its priority over other liens. Monat Lumber &c. Co. v. Freeman, 7 Colo. App. 152, 42 Pac. 1040.

<sup>52</sup> Gen. Stats. 1902, §§ 4135, 4138, 4141, 4142, 4148.

the person performing such services, or furnishing such materials, has ceased so to do,<sup>52a</sup> he shall lodge with the town clerk of the town in which said building<sup>52b</sup> is situated a certificate in writing describing the premises, the amount claimed as a lien thereon, and the date of the commencement of the claim, the same being first subscribed and sworn to as the amount justly due, as nearly as the same can be ascertained, which certificate shall be recorded by the town clerk with deeds of land;<sup>53</sup> but in case of the death of a party who might have filed such a certificate before filing the same, his executor or administrator may make and lodge such a certificate within three months from the time of his qualification as such, and within six months from the decease of the original claimant.

No person other than the original contractor<sup>54</sup> for the construction, raising, removal, or repairing of the building, or a subcontractor, whose contract with such original contractor is in writing, and has been assented to in writing by the other party to such original contract,<sup>55</sup> shall be entitled to claim any such lien, unless he shall, after commencing, and not later than sixty days after ceasing, to furnish materials or render services for such construction, raising, removal, or repairing, give written notice to the owner of such building that he has furnished or commenced to furnish materials, or rendered or commenced to render services, and intends to claim a lien therefor on said building; which shall be served upon said owner, if he resides in the same town in which said building is being erected, raised, removed, or repaired, by any indifferent person, by leaving with him or at his usual place of abode a true and attested

<sup>53</sup> The town clerk is to index the owner's name. Gen. Stats. 1902, § 1849.

<sup>54</sup> As to distinction between an original and a subcontractor, see

Kinney v. Blackmer, 55 Conn. 261, 10 Atl. 568.

<sup>55</sup> No particular form in such written assent is required. Hartford Bldg. &c. Assn. v. Goldreyer, 71 Conn. 95, 41 Atl. 659.

copy thereof; and if said owner does not reside in said town, but has a known agent therein, such notice may be so served upon said agent, otherwise it may be served by any indifferent person, by mailing a true and attested copy of said notice to such owner at the place where he resides; and when there shall be two or more owners, such notice to one of them shall be notice to all; and said notice with the return of the person who served it indorsed thereon shall be returned to the original maker thereof within said period of sixty days.<sup>53</sup> No subcontractor, without a written contract complying with the provisions of this section, and no person who furnishes material or renders services by virtue of a contract with the original contractor or with any subcontractor shall be required to obtain an agreement with, or the consent of, the owner of the land, as provided in a preceding paragraph to enable him to claim a lien under this section.

No such lien shall attach to any building or its appurtenances, or to the land on which the same may stand, in favor of any person, to a greater amount in the whole than the price which the owner agreed to pay for such building and its appurtenances; and when there shall be several claimants,

<sup>53</sup> The notice must be given in the mode prescribed, and the landowner can not waive a defect in the notice so as to make the lien a valid one as against other parties claiming liens. *White v. Washington School District*, 42 Conn. 541. Where there are several liens of subcontractors, and the amount due from the owner to the original contractor is insufficient to pay all the liens in full, and the owner apportions the fund pro rata among them, one of the claimants who has objected to the division, and refused to take his share, may take advantage of the defective

character of the liens of others in respect to the notice, and the owner cannot avail himself of the payments made to them. *White v. Washington School District*, 42 Conn. 541. In making a claim for materials furnished, if the delivery of the materials is completed within sixty days after it was commenced, the notice to the owner may be given and the certificate filed with the town clerk at the same time; and it is immaterial that the certificate is filed before the notice is given. *Shattuck v. Beardsley*, 46 Conn. 386.

and the amount of their united claims shall exceed such price, the claimants, other than the original contractor, shall be first paid in full, if the amount of such price is sufficient for that purpose; but if not, it shall be apportioned among the claimants having such liens, other than the original contractor, in proportion to the amount of the debts due them respectively; and the court having jurisdiction thereof, on application of any person interested, may direct the manner in which such claims shall be paid; but in determining the amount to which any lien or liens shall attach upon any land or building, the owner of such land or building shall be allowed whatever payments he shall have made, in good faith, to the original contractor or contractors, before receiving notice of such lien or liens.<sup>57</sup> No payments made in advance of the time stipulated in the original contract shall be considered as made in good faith, unless notice of intention to make such payment shall have been given in writing to each person known to have furnished materials or rendered services at least five days before such payment is made.

All liens may, on motion of any party to the suit, be foreclosed by a decree of sale instead of a strict foreclosure, at the discretion of the court, before which foreclosure proceedings are pending.

<sup>57</sup> *Spaulding v. Thompson Ecclesiastical Soc.*, 27 Conn. 573, 577. A verbal guaranty by the owner to pay certain debts does not constitute payment. *Gridley v. Sumner*, 43 Conn. 14. The rights of a subcontractor with respect to his lien are determined by the state of things at the time he gives notice to the owner of his lien; and therefore if at that time the owner has verbally guaranteed the payment of certain debts, this does not amount to pay-

ment, and is not to be regarded; and it is of no consequence that the owner afterwards, before suit is brought to enforce the lien, pays the bills he has guaranteed. *Gridley v. Sumner*, 43 Conn. 14. A subcontractor can have no lien where the owner has paid the contractor the full contract price, where no notice is given the owner before he pays the contractor, as provided by § 4137, Gen. Stat. 1902. *Kelly v. Alling*, 84 Conn. 487, 80 Atl. 782.

The court in such proceedings may appoint a person to make such sale, and fix a day therefor, and shall direct whether the property shall be sold as a whole or in parcels, and how such sale shall be made and advertised; but in all cases in which such sale is ordered, the court shall appoint three disinterested persons who shall, under oath, appraise the property to be sold, and make return of their appraisal to the clerk of the court, and the expense of such appraisal shall be paid by the plaintiff and be taxed with the costs of the case.

No mechanic's lien continues in force for a longer period than two years after it has been perfected, unless the claimant within such time commences an action to foreclose it, and proceeds to final judgment.

§ 1194. **Delaware.**<sup>58</sup>—Any person having performed or furnished work and labor or material, or both, to an amount exceeding twenty-five dollars, in or for the erection, alteration, or repair of any house, building, or structure, in pursuance of any contract, express or implied, with the owners of such house, building, or structure, or with the agent of such owner, or with any contractor who shall have contracted for the erection, alteration, or repair of the same, and for the furnishing of the whole or any **part of the materials** therefor, may obtain a lien upon such building, house, or structure, and upon the ground upon which the same may be situated or erected.

No contractor shall file any statement of his claim until after the expiration of ninety days from the completion of the building,<sup>59</sup> but he must file it within thirty days after the expiration of the ninety days. All other persons must

<sup>58</sup> Rev. Code 1893, pp. 818-820. A claim for work done and material used in painting, glazing, and varnishing a house, is within the purview of the statute. *France v. Woolston*, 4 *Houst. (Del.)* 557.

<sup>59</sup> A judgment entered on a claim prematurely filed, in the absence of any defense, will not be set aside. *France v. Woolston*, 4 *Houst. (Del.)* 557.



file statements of their liens within ninety days from the completion of their work or last delivery of materials. The statement must be filed in the office of the prothonotary of the superior court in the county wherein such building or structure is situated. The statement shall contain and set forth: 1. The names of the party, claimant and owner, or reputed owner of the building, house, or structure, and also of the contractor, and whether the contract of the claimant was made with such owner or his agent, or with such contractor; 2. The amount or sum claimed to be due, the nature and kind of the work and labor done, or a bill of particulars of the kind and amount of materials furnished; 3. The time when the said work and labor, or the furnishing of said materials, was commenced and finished; 4. The locality of the building, house, or structure, with such description as may be sufficient to identify the same; 5. That the said work and labor were performed, or said materials were furnished, on the credit of the said building, house, or structure; 6. That the amount of the said claim exceeds twenty-five dollars, and that the same has not been paid to the claimant. The claimant shall make affidavit to the truth and correctness of the said claim and of the facts stated therein.

Any judgment obtained, upon such claim shall become a lien upon such building, house, or structure, and upon the ground upon which the same is situated, erected, or constructed,<sup>60</sup> and shall relate back to the day upon which said work and labor was begun, or the furnishing of said materials was commenced, and shall take priority accordingly.

Proceedings to recover the claim are by *scire facias*.<sup>60a</sup>

<sup>60</sup> See *Capelle v. Baker*, 3 Houst. (Del.) 344.

<sup>60a</sup> Where a writ of *scire facias* was voluntarily stayed by the plaintiff's attorney and a second writ was not issued till after the expiration of a year, such writ will

be quashed and the statement of claim stricken from the record for want of prosecution. *Peninsular Lumber Co. v. Fehrenbach*, 1 Marv. (Del.) 98, 1 Hard. (Del.) 84, 37 Atl. 38. Service of a *scire facias* upon a mechanic's lien must be upon de-

§ 1195. **District of Columbia.**<sup>61</sup>—Every building erected, improved, added to, or repaired by the owner or his agent, and the lot of ground on which the same is erected, being all the ground used or intended to be used in connection therewith, or necessary to the use and enjoyment thereof, to the extent of the right, title, and interest, at that time existing, of such owner, whether owner in fee or of a less estate, or lessee for a term of years, or vendee in possession under a contract of sale, shall be subject to a lien in favor of the contractor with such owner or his duly authorized agent for the contract price agreed upon between them, or, in the absence of an express contract, for the reasonable value of the work and materials furnished for and about the erection, construction, improvement, or repair of or addition to such building, or the placing of any engine, machinery, or other thing therein or in connection therewith so as to become a fixture, though capable of being detached: provided, that the person claiming the lien shall file the notice herein prescribed.

Any such contractor wishing to avail himself of the provision aforesaid, whether his claim be due or not, shall file in the office of the clerk of the supreme court of the district during the construction or within three months after the completion of such building, improvement, repairs, or

fendant, also a copy left with some person residing in the building, if occupied as a residence; or if not, affixed upon the door of the building. *Carswell v. Patzowski*, 3 Pennw. (Del.) 593, 53 Atl. 54.

<sup>61</sup> Code 1901, §§ 1237, 1246. Under a previous statute, that of March 2, 1833, a contractor was not entitled to a lien. *Winder v. Caldwell*, 14 How. (U. S.) 434, 14 L. ed. 487. For materials furnished, or labor done in filling up any lot, or constructing any wharf thereon, or

in dredging the channel of the river in front thereof under contract with the owner, there is a lien upon the lot or wharf. Code 1901, § 1259. There is also a lien upon lots and wharves for materials or labor in filling or erecting. One must follow the requirements of the mechanics' lien law to secure a valid enforceable lien. *Fidelity Storage Corporation v. Trussed Concrete Steel Co.*, 35 App. D. C. 1; *James B. Lambie Co. v. Bigelow*, 34 App. D. C. 49.

addition, or the placing therein or in connection therewith of any engine, machinery, or other thing so as to become a fixture, a notice of his intention to hold a lien on the property hereby declared liable to such lien for the amount due or to become due to him, specifically setting forth the amount claimed, the name of the party against whose interest a lien is claimed, and a description of the property to be charged, and the said clerk shall file said notice and record the same in a book to be kept for the purpose.

Any person directly employed by the original contractor, whether as subcontractor, material-man or laborer, to furnish work or materials for the completion of the work contracted for as aforesaid, shall be entitled to a similar lien to that of the original contractor upon his filing a similar notice with the clerk of the supreme court of the district to that above mentioned, subject, however, to the conditions set forth below.

All such liens in favor of parties so employed by the contractor shall be subject to the terms and conditions of the original contract except such as shall relate to the waiver of liens and shall be limited to the amount to become due to the original contractor and be satisfied, in whole or in part, out of said amount only; and if said original contractor, by reason of any breach of the contract on his part, shall be entitled to recover less than the amount agreed upon in his contract, the liens of said parties so employed by him shall be enforceable only for said reduced amount, and if said original contractor shall be entitled to recover nothing said liens shall not be enforceable at all.

The said subcontractor or other person employed by the contractor as aforesaid, besides filing a notice with the clerk of the supreme court as aforesaid, shall serve the same upon the owner of the property upon which the lien is claimed, by leaving a copy thereof with said owner or his agent, if said owner or agent be a resident of the district, or if neither can be found, by posting the same on the premises; and on

his failure to do so, or until he shall do so, the said owner may make payments to his contractor according to the terms of his contract, and to the extent of such payments the lien of the principal contractor shall be discharged and the amount for which the property shall be chargeable in favor of the parties so employed by him reduced.

After notice shall be filed by said party employed under the original contractor and a copy thereof served upon the owner or his agent as aforesaid, the owner shall be bound to retain out of any subsequent payments becoming due to the contractor a sufficient amount to satisfy any indebtedness due from said contractor to the said subcontractor, or other person so employed by him, secured by lien as aforesaid, otherwise the said party shall be entitled to enforce his lien to the extent of the amount so accruing to the principal contractor.

Any subcontractor or other person employed by the contractor as aforesaid shall be entitled to demand of the owner or his authorized agent a statement of the terms under which the work contracted for is being done and the amount due or to become due to the contractor executing the same, and if the owner or his agent shall fail or refuse to give the said information, or wilfully state falsely the terms of the contract or the amounts due or unpaid thereunder, the said property shall be liable to the lien of the said party demanding said information, in the same manner as if no payments had been made to the contractor before notice served on the owner as aforesaid.

If the owner, for the purpose of avoiding the provisions hereof, and defeating the lien of the subcontractor or other person employed by the contractor, as aforesaid, shall make payments to the contractor in advance of the time agreed upon therefor in the contract, and the amount still due or to become due to the contractor shall be insufficient to satisfy the liens of the subcontractors or others so employed by the contractor, the property shall remain subject to said

liens in the same manner as if such payments had not been made.

The lien hereby given shall be preferred to all judgments, mortgages, deeds of trust, liens, and incumbrances which attach upon the building or ground affected by said lien subsequently to the commencement of the work upon the building, as well as to conveyances executed, but not recorded, before that time, to which recording is necessary, as to third persons; except that nothing herein shall affect the priority of a mortgage or deed of trust given to secure the purchase-money for the land, if the same be recorded within ten days from the date of the acknowledgment thereof. When a mortgage or deed of trust of real estate securing advances thereafter to be made for the purpose of erecting buildings and improvements thereon is given, or when an owner of lands contracts with a builder for the sale of lots and the erection of buildings thereon, and agrees to advance moneys toward the erection of such buildings, the lien hereinbefore authorized shall have priority to all advances made after the filing of said notices of lien, and the lien shall attach to the right, title, and interest of the owner in said building and land to the extent of all advances which shall have become due after the filing of such notice of such lien, and shall also attach to and be a lien on the right, title, and interest of the person so agreeing to purchase said land at the time of the filing of said notices of lien. When a building shall be erected or repaired by a lessee or tenant for life or years, or a person having an equitable estate or interest in such building or land on which it stands, the lien created by this act shall only extend to and cover the interest or estate of such lessee, tenant, or equitable owner.

The proceeding to enforce the lien hereby given shall be a bill in equity, which shall contain a brief statement of the contract on which the claim is founded, the amount due thereon, the time when the notice was filed with the clerk, and a copy thereof served on the owner or his agent, if so

served, and the time when the building or the work thereon was completed, with a description of the premises and other material facts; and shall pray that the premises be sold and the proceeds of sale applied to the satisfaction of the lien. If such suit be brought by any person entitled, other than the principal contractor, the latter shall be made a party defendant, as well as all other persons who may have filed notices of liens, as aforesaid. All or any number of persons having liens on the same property may join in one suit, their respective claims being distinctly stated in separate paragraphs; and if several suits are brought by different claimants and are pending at the same time, the court may order them to be consolidated.

§ 1196. **Florida.**<sup>63</sup>—Liens prior in dignity to all others accruing thereafter shall exist in favor of the following persons, upon the following described real estate, under the circumstances hereinafter mentioned, to wit: In favor of any mechanic, laborer or other person who shall perform by himself or others any labor upon, or in the construction or repair of any building or other work or structure, or of additions to or upon any fixtures therein or thereon; upon such building, work or structure and the land upon which it stands. In favor of any person performing by himself or others any labor upon any railroad, canal, telegraph or telephone line, wharf, mill, distillery or other manufactory, whether in the construction, operation or repair, thereof; upon such line, wharf, mill, distillery, or other manufactory, any and all franchises, machinery, and equipments connected therewith or thereon, and on the land upon which they stand. In favor of any person performing by himself or others any labor upon or in any farm, orchard, grove, gar-

<sup>63</sup> Gen. Stats. 1906, §§ 2190-2193, 2195, 2210 (1), (2a), 2211 (1), 2211 (1a), 2212, 2213, 2223. *Hume v. Simmons*, 34 Florida 584, 16 So. 552. Under a former statute it was not

necessary to give notice of a lien claim. *Nutt v. Codington*, 34 Fla. 77, 15 So. 667; *Scott v. Hempel*, 33 Fla. 313, 14 So. 840.

den, park or other grounds, whether in clearing up, fencing, ditching or draining, or in maintaining, improving or cultivating the same; upon such farm, orchard, grove, garden, park or other grounds. In favor of any person who shall furnish any building material for the construction, repair or use of any building, railroad, canal, or telegraph line, wharf, bridge, mill, distillery or other manufacturing work or structure; upon the said buildings, lines, or other property and the lands upon which they stand.

If the labor or materials mentioned herein shall be done or furnished by the procurement of the owner of the property, or his agent, or of a person contracting with him to have the work done or material furnished, the lien shall be upon interest of such owner; but if the labor be done or the materials furnished by the procurement of a person having less than the absolute interest, or of his agent, or of any person contracting with him to have the work done or material furnished, the lien shall be only upon the limited interest of such person.

As against the owner, absolute or limited, of the property, real or personal, upon which a lien is claimed, or person deriving through his death, or purchasers or creditors with notice, the lien hereinbefore provided for shall be acquired by any person in privity with such owner, by the performance of the labor or the furnishing of the materials. Any purchaser or creditor whose title, interest, lien or claim in or to the property shall be created, or shall arise, while the construction or repair of such property as aforesaid is in progress shall be deemed and held to be a purchaser or creditor, with notice.

As against purchasers and creditors of such owner without notice, such lien shall be acquired upon real estate only from the time of the record in the office of the clerk of the circuit court of the county where the real estate lies of a notice of such lien. Such notice shall contain a statement of the amount claimed, a description of the property upon

which the lien is claimed, and a notice of the intention to hold a lien for the said amount, and shall be verified by the oath of the lienor or his agent. It shall be filed only after the labor has been entirely performed and the materials entirely furnished. No such notice of a perfected lien shall be effectual against creditors or purchasers of the owner without notice unless it be filed with three months after the entire performance of the labor or the entire furnishing of the material.<sup>64</sup>

A person entitled to acquire a lien, not in privity with the owner, as aforesaid, shall acquire a lien upon such owner's real or personal property as against him, and persons claiming through his death, and purchasers and creditors with notice, by the delivery to him, or his agent, of a written notice that the contractor, or other person for whom the labor has been performed, or the material furnished, is indebted to the person performing the labor or furnishing the materials in the sum stated in the notice; but if a person who is performing or is about to perform, by himself or others, labor, or is furnishing or is about to furnish materials shall so desire, he may deliver to the owner, or his agent, a written cautionary notice that he will do certain work, or will furnish certain materials, or both. A lien shall exist from the time of the service of the notice for the amount unpaid on the contract of and by the owner to the contractor or the person for whom the work was done or the materials furnished. Such services shall also create a personal liability against the owner of the property in favor of the lienor giving such notice, for the amount due by the said owner, at the time of service of the notice, to the contractor or other person for whom the work was done or the materials furnished.

<sup>64</sup> Even where the owner has paid the contractor he is still liable for the amount due the subcontractor who served him with

a cautionary notice provided for by Gen. Stats. 1906, § 2211. *Stringfellow v. Coons*, 57 Fla. 158, 49 So. 1019.



As against purchasers and creditors of such owners without notice, such liens against real estate shall be acquired only from the time of the recording in the office of the clerk of the circuit court, in the county, of a notice of lien similar to that above provided. Any person or creditor whose title, interest, lien or claim in or to the property shall be created or shall arise while the construction or repair of such property as aforesaid is in progress shall be deemed and held to be a purchaser or creditor with notice.

The lien is enforceable, by persons in privity with the owner, by a bill in equity; by an ordinary suit at law, and the levy of the execution obtained therein on the property on which the lien is held; by a suit at law in which the declaration shall state the manner in which the lien arose, the amount for which the lien is held, the description of the property, and a prayer that the property be sold to satisfy the lien. In such suit the judgment for the plaintiff shall be a personal judgment against the defendant as well as declare the lien upon the property, describing it; and shall direct execution against such property, as well as against the property generally of the defendant.

A person not in privity with the owner may resort to any of the remedies prescribed by the foregoing paragraph, except the last above named; but in every suit at law or in chancery, the contractor or person for whom the labor was performed or the materials furnished must be made a party defendant to the suit; and the judgment or decree may provide for the recovery from the contractor or other person as aforesaid of the amount due by him, and from the owner of the amount due by him to the contractor or other person as aforesaid at the time of the service of the notice provided for, as well as decree and enforce the lien against the property of such owner for such amount, but only one satisfaction of such judgment shall be had. And although no lien be found to exist and no judgment be rendered against the owner, judgment may be rendered against the contractor,

or other person for whom the labor was performed or the materials furnished for the amount due by him.

When there has been no record of a notice of a lien, suit to enforce such lien (if it exists without such record) must be brought within twelve months from the performance of the work or the furnishing of the materials; and if there has been such record, such suit must be brought within twelve months from the time of such record.

§ 1197. **Georgia.**<sup>65</sup>—All mechanics of every sort, who have taken no personal security therefor, shall, for work done and material furnished in building, repairing or improving any real estate of their employers; all contractors, material-men, and persons furnishing material for the same, or furnishing material for the improvement of real estate; all contractors<sup>66</sup> for building factories, furnishing material for the same, or furnishing machinery for the same; and all machinists

<sup>65</sup> Code 1911, §§ 3352, 3353, 3356; Georgia Steel Co. v. White, 136 Ga. 492, 71 S. E. 890. This act has been so construed that a material-man furnishing material to a subcontractor who has no contract with the owner can not maintain a lien. General Supply Co. v. Hunn, 126 Ga. 615, 55 S. E. 957; Pittsburg Plate Glass Co. v. Peters Land Co., 123 Ga. 723, 51 S. E. 725; Sparks v. Dunbar, 102 Ga. 129, 29 S. E. 295; Cambridge &c. Mfg. Co. v. Germania Bank, 128 Ga. 178, 57 S. E. 311, overruling in part. Heard v. Holmes, 113 Ga. 159, 38 S. E. 393. A tenant does not come within the phrase "contractor or other person" in the statute. Central of Georgia R. Co. v. Shiver, 125 Ga. 218, 53 S. E. 610.

<sup>66</sup> A carpenter who builds under a contract with the owner oc-

cupies the position both of a contractor and of a mechanic, and has a right of lien in either capacity, or in both capacities. Thurman v. Pettitt, 72 Ga. 38. Under a previous statute no lien existed in favor of contractors merely; and where the declaration was for a contractor's lien, the court permitted the plaintiff to amend it, and show that the contract was made with him as a mechanic. Savannah, G. & N. A. R. Co. v. Grant, 56 Ga. 68. Whether or not a material-man furnishing materials for an addition of two rooms and a hallway to a house is entitled to a lien depends on whether the work amounts to a rebuilding, or only to a repairing. Willis v. Boyd, 103 Ga. 130, 29 S. E. 707. See also, Tuck v. Moss Mfg. Co., 127 Ga. 729, 56 S. E. 1001.

and manufacturers of machinery, including corporations engaged in such business, who may furnish or put up in any county of this state any steam mill or other machinery, or who may repair the same; and all contractors to build railroads,—shall each have a special lien on such real estate, factories, and railroads.

When work done or material furnished for the improvement of real estate is done or may be furnished upon the employment of a contractor, or some other person than the owner, then, and in that case, the lien given by this section shall attach upon the real estate improved as against such true owner for the amount of the work done, or material furnished, unless such true owner shows that such lien has been waived in writing, or produces the sworn statement of the contractor, or other person, at whose instance the work was done or material was furnished, that the agreed price or reasonable value thereof has been paid; provided, that in no event shall the aggregate amount of liens set up hereby, exceed the contract price of the improvements made.<sup>67</sup>

To make good the liens specified above, they must be created and declared in accordance with the following provisions, and on failure of either the lien shall cease, viz.: 1. A substantial compliance by the party claiming the lien with his contract for building, repairing, or improving, or for materials or machinery put up or furnished, as above set forth.

<sup>67</sup> The notice must be given to the owner and not to an agent; and if the owner is a corporation, whose principal place of business is not in the county where the agent resided at the time the notice was served, but was in another county of the state, the notice is not sufficient. *Pon v. Covington & M. R. Co.*, 84 Ga. 311, 10 S. E. 744. Notice must be

served on the owner himself; service on agent is not good. *Bullard v. Dudley*, 101 Ga. 299, 28 S. E. 845. Prior to the act of Dec. 19, 1899 (Acts of 1899, p. 33), a mechanic's lien had to be filed and enforced against the true owner and not against her husband. *Reaves v. Meredith*, 123 Ga. 444, 51 S. E. 391.

2. The recording of his claim of lien within three months after the completion of the work, or within three months after such material or machinery is furnished, in the office of the clerk of the superior court in the county where such property is situated, which claim shall be in substance as follows: "A. B., a mechanic, contractor, material-man, machinist, manufacturer, or other person (as the case may be), claims a lien on the house, factory, steam mill, machinery, or railroad (as the case may be), and the premises or real estate on which it is erected or built, of C. D. (describing the houses, premises, real estate, or railroad), for building, repairing, improving, or furnishing material (or whatever the claim may be)."

3. As between themselves, the liens herein provided for shall rank according to date, but all of the liens herein mentioned for repairs, building or furnishing materials, upon the same property, shall, as to each other, be of the same date when declared and recorded within three months after the work is done, or before that time. Said liens herein provided for shall be inferior to liens for taxes, to the general and special liens of laborers, to the general lien of landlords for rent when reduced to execution and levied, to claims for purchase-money due persons who have only given bonds for title, and to other general liens, when actual notice of such general lien of landlords and others has been communicated before the work was done, or materials furnished; but the said liens provided for in said section shall be superior to all other liens not herein excepted.

Proprietors of planing-mills<sup>68</sup> and other similar establish-

<sup>68</sup> Code 1911, § 3356. A former provision of the statute regarding time in which to commence an action to enforce a lien has been construed in *Snow v. Council*, 65 Ga. 123; *Love v. Cox*, 68 Ga. 269; *Allred v. Hale*, 84 Ga. 570, 10 S. E. 1095. These cases hold that a

laborers' lien can not be foreclosed upon realty by affidavit, but only by action after properly recording the claim of lien. A cropper who is himself to perform services falls within the terms of the Act of 1903 and is entitled to a mechanic's lien. Vin-

ments shall have the same lien as mechanics have on personalty, for work done on material furnished by others, and when they furnish material they shall have the same liens provided for material-men; and proprietors of sawmills, when furnishing material for the improvement of real estate, to purchasers from them for that purpose, shall be entitled to the same lien as provided for mechanics on realty, to be governed, where the same are applicable, by the rules laid down for mechanics' liens on realty.

It has been held that after delivery of the lumber sawed by the owner of a sawmill, he must record his lien within ten days as required by statute.

**§ 1197a. Hawaii.**<sup>69</sup>—Any person or association of persons furnishing labor or material to be used in the construction or repair of any building, structure, railroad or other undertaking, shall have a lien for the price agreed to be paid for such labor or material (if it shall not exceed the value thereof) upon such building, structure, railroad or other undertaking, as well as upon the interest of the owner of such building, structure, railroad or other undertaking in the land upon which the same is situated.

The lien herein provided for shall not attach unless a notice thereof shall be filed in writing in the office of the clerk of the circuit court, where the property is situated, and a copy of the notice be served upon the owner of the property. Such notice shall set forth the amount of the claim, the labor or materials furnished, a description of the property sufficient to identify the same, and any other matter necessary to a clear understanding of the same. The lien shall continue for three months, and no longer, after the completion

son v. State, 124 Ga. 19, 52 S. E. 79. Counter affidavit before affiant's attorney void. Moultrie Lumber Co. v. Jenkins, 121 Ga. 721, 49 S. E. 678. Issue on coun-

ter affidavit triable at next term. Martin v. Nichols, 121 Ga. 506, 49 S. E. 613.

<sup>69</sup> Rev. Laws 1905, §§ 2173-2178.

of the construction or repair of the building, structure, railroad or other undertaking against which it shall have been filed, unless the same shall have been satisfied, or proceedings commenced, to collect the amount due thereon by enforcing the same.

The clerks of the circuit courts shall keep in each office a book called "Mechanics' lien record," in which shall be entered a memorandum of each lien filed. The record shall be arranged alphabetically in the name of the owner of the property, and shall state in addition to such name the amount of the lien or claim, by whom filed, the date of filing, a brief description or identification of the property against which it is filed, the date of proceeding to enforce, the date of discharge, and any other matter deemed necessary.

The lien herein provided shall have force only from the date of filing. It shall have priority in the order of filing over other liens of any nature, and shall be subject to any prior recorded lien or judgment. Whenever the lien hereby provided shall be satisfied (other than by the limitations above expressed), a written notice thereof shall be filed with the clerk of the circuit court, which shall be noted in the mechanics' lien record.

The liens hereby provided may after demand and refusal of the amount due, or upon neglect to pay the same upon demand, be enforced by proceedings in any court of competent jurisdiction, by service of summons, as in other cases. Such summons shall set forth the ordinary allegations in assumpsit, and, in addition thereto, note that a lien has been filed. Before proceeding to trial, the defendant shall be served with a detailed specification of the claim, provided that no such specification shall have been furnished before proceedings were commenced. Judgment upon such proceedings shall be as in ordinary cases, and may be enforced by execution as allowed by law. In case the contract for services or material upon which the lien has accrued shall have been directly with the owner of the property, an at-

tachment may issue in connection with the suit upon the filing of a bond of indemnity to the said owner in such sum as the magistrate or court may fix. If it shall appear that such bond is insufficient, the magistrate or court shall cause a new bond to be filed for a greater amount, or with additional security.

Whenever the work or material for which a lien is filed shall be furnished to any contractor for use as set forth above, the owner may retain from the amount payable to the contractor sufficient to cover the amount due or to become due to the person or persons who filed the lien.

§ 1198. *Idaho*.<sup>70</sup>—Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of, any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement or his agent.<sup>71</sup> And every contractor, subcontractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this act; provided, that the lessee or lessees of any mining claim shall not be considered at the agent or agents of the owner under the provisions of this act. The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the

<sup>70</sup> Rev. Codes 1908, §§ 5110, 5113-5116, 5118-5120.

and *Smelter Supply Co. v. Idaho Consol. Mines Co.*, 20 Idaho 300,

<sup>71</sup> *Weeter Lumber Co. v. Fales*, 20 Idaho 255, 118 Pac. 289; *Mine*

118 Pac. 301.

court on rendering judgment, is also subject to the lien, if, at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, or structure to be constructed, altered or repaired; but if such person owns less than a fee simple estate in such land, then only his interest therein is subject to such lien.

The liens are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance, of which the lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished.

Every original contractor claiming the benefit of this act must, within ninety days, and every other person must, within sixty days, after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or in case he ceases to labor thereon before the completion thereof, then after he so ceases to labor or after he has ceased to labor thereon for any cause, or after he has ceased to furnish materials therefor, or after the performance of any labor in a mine or mining claim, file for record with the county recorder for the county in which such property or some part thereof is situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner, or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes the same to be just.



When one claim of lien is filed against two or more buildings or other improvements, mines, mining claims, owned by the same person, it must at the same time designate the amount due on each of said buildings or other improvements, mines, mining claims; otherwise the lien of such claim is postponed to other liens. Such lien does not extend beyond the amount designated, as against other creditors having liens by judgment, mortgage, or otherwise upon either of such buildings or other improvements, or upon the land upon which the same are situated.

No lien binds any building, mining claim, improvement, or structure for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then six months after the expiration of such credit; but no lien shall continue in force for a longer period than two years from the time the work is completed, or credit given, unless proceedings to enforce the same shall have been commenced.

The original or subcontractor shall be entitled to recover, upon the claim filed by him, only such amount as may be due to him according to terms of his contract, after deducting all claims of other parties for work done and materials furnished to him as aforesaid, of which claim of lien shall have been filed as required by this act, and in all cases when a claim shall be filed under this act for work done or materials furnished to any subcontractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the person indebted to the contractor may withhold from such contractor the amount of money for which claim is filed; and in case of judgment upon the lien, the person indebted in the contract shall be entitled to deduct from any amount due or to become due by him to such contractor, the amount of such judgment and costs; and if the amount of such judgment and costs

shall exceed the amount due from him to such contractor, if the person indebted in the contract shall have settled with such contractor in full, he shall be entitled to recover back from such contractor any amount so paid by him in excess of the contract price, and for which such contractor was originally the party liable.

In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien or class of liens which shall be in the following order: 1. All laborers, other than contractors or subcontractors. 2. All material-men, other than contractors or subcontractors. 3. Subcontractors. 4. The original contractor. And in case the proceeds of sale under this act shall be insufficient to pay all lienholders under it: 1. The liens of all laborers, other than the original contractor and subcontractor, shall first be paid in full, or pro rata, if the proceeds be insufficient to pay them in full. 2. The lien of material-men, other than the original contractor or subcontractor, shall be paid in full, or pro rata if the proceeds be insufficient to pay them in full. 3. Out of the remainder, if any, the subcontractors shall be paid in full, or pro rata if the remainder be insufficient to pay them in full, and the remainder, if any, shall be paid to the original contractor; and each claimant shall be entitled to execution for any balance due him after such distribution, such execution to be issued by the clerk of the court upon demand, at the return of the sheriff or other officer making the sale showing such balance due.

Where the owner of an orchard, nursery or field fails or neglects or refuses to eradicate pests or diseases from the same, the district inspector is empowered to cause the nuisance to be abated at once. All sums paid therefor shall constitute a lien on the property.<sup>72</sup>

<sup>72</sup> Sess. Laws 1913, p. 81.

§ 1199. *Illinois*.<sup>73</sup>—Any person who shall by any contract<sup>74</sup> or contracts, express<sup>75</sup> or implied, or partly expressed

<sup>73</sup>Rev. Stats. 1913, pp. 1559-1567, §§ 15, 20, 21, 23, 30, 32-35, 38, 41.

<sup>74</sup>Under the original statute, a contract arose only upon the owner's contract. *Dawson v. Harrington*, 12 Ill. 300. So under Rev. Stats. 1845. *Underhill v. Corwin*, 15 Ill. 556. Under the Act of 1861, the contract might be express or implied. *Roach v. Chapin*, 27 Ill. 194; *Rowley v. James*, 31 Ill. 298; *Chicago Artesian Well Co. v. Corey*, 60 Ill. 73. Prior to Act of 1874 there was no lien for alterations. *Bryan v. Whitford*, 66 Ill. 33. The contract must be with one having some interest in the land. *Tracy v. Rogers*, 69 Ill. 662. The contract must refer to a specific piece of land. *Burkhart v. Reisig*, 24 Ill. 529. But the land need not be described. *Power v. McCord*, 36 Ill. 214; *Chisholm v. Randolph*, 21 Ill. App. 312. Of course a misdescription of the premises in the written contract does not prevent a laborer from having a lien on the premises upon which the work was actually done. *Clark v. Manning*, 90 Ill. 380. The contract need not be for a definite sum. *Brown v. Lowell*, 79 Ill. 484; *Thielman v. Carr*, 75 Ill. 385, 386. The lien attaches from the date of the contract. When the labor or materials are furnished under the contract, the lien for them relates back to the contract, and is superior to a mortgage executed subsequently, though before the labor and material are expended. *Stout v. Sower*, 22 Ill. App. 65; *Clark v.*

*Moore*, 64 Ill. 273; *Thielman v. Carr*, 75 Ill. 385, 386; *Brown v. Moore*, 26 Ill. 421, 425, 79 Am. Dec. 383; *Hughes v. McCasland*, 122 Ill. App. 365. There is no preference between liens of mechanics and material-men on account of priority of date of contract. *Wing v. Carr*, 86 Ill. 347.

<sup>75</sup>As to whether a contract is express, see *Grundeis v. Hartwell*, 90 Ill. 324, *Belanger v. Hersey*, 90 Ill. 70; *Clark v. Manning*, 90 Ill. 380; *Powell v. Webber*, 79 Ill. 134; *Fish v. Stubbings*, 65 Ill. 492. What contract is sufficient within the limitation of performance within three years, see *Reed v. Boyd*, 84 Ill. 66; *Senior v. Brebnor*, 22 Ill. 252. The terms of the mechanics' lien law must be strictly complied with. *Joseph N. Eisendrath Co. v. Gebhart*, 222 Ill. 113, 78 N. E. 22; *Turnes v. Brenckle*, 249 Ill. 394, 94 N. E. 495; *Provost v. Shirk*, 223 Ill. 468, 79 N. E. 178; *Snitzler v. Filer*, 135 Ill. App. 61. A former statute (*Hurd's Rev. Stats.* 1891, ch. 82) provided that when the contract is expressed no lien should be created if the time stipulated for the completion of the work was beyond three years from the commencement thereof, or the time of the payment beyond one year from the time stipulated for the completion thereof. This statute was followed in *Adler v. World's Pastime Exposition Co.*, 26 Ill. App. 528, *affd.*, 126 Ill. 373, 18 N. E. 899; *Haines v. Chandler*, 26 Ill. App. 400; *Provost v. Shirk*, 223 Ill. 468, 79 N. E. 178. A

or implied, with the owner of a lot or tract of land, or with one whom such owner has authorized or knowingly permitted to contract for the improvement of, or to improve the same, furnish material, fixtures, apparatus or machinery, forms or form work used in the process of construction where cement, concrete or like material is used for the purpose of or in the building, altering, repairing or ornamenting any house or other building, walk or sidewalk, whether such walk or sidewalk be on the land or bordering thereon, driveway, fence or improvement or appurtenances thereto on such lot or tract of land or connected therewith, and upon, over or under a sidewalk, street or alley adjoining; or fill, sod or excavate such lot or tract of land, or do landscape work thereon or therefor; or raise or lower any house thereon or remove any house thereto; or perform services as an architect for any such purpose; or furnish or perform labor or services as superintendent, timekeeper, mechanic, laborer or otherwise, in the building, altering, repairing or ornamenting of the same; or furnish material, fixtures, ap-

contract which provides for the giving of a note payable "in twelve months" does not necessarily extend the time of payment, including three days of grace, beyond one year. *Stout v. Sower*, 22 Ill. App. 65. No lien can be enforced under a contract which provides for payment by a note due more than one year from the completion of the house. *Simon v. Blocks*, 16 Bradw. (Ill.) 450; *Beasley v. Webster*, 64 Ill. 458. The character of the lien as between the parties to the original contract, and as against subsequent incumbrances, is fixed by the signing of the contract, and the only thing remaining to complete it is furnishing the labor

and materials. The extension of the time for the completion of the work, or of the times of payment, does not forfeit the lien as against subsequent incumbrances, if the lien is claimed and prosecuted within the time limited. *Stout v. Sower*, 22 Ill. App. 65; *Cook v. Vreeland*, 21 Ill. 431, 436; *Chisholm v. Randolph*, 21 Ill. App. 312; *Simon v. Blocks*, 16 Bradw. (Ill.) 450. Where a contract provides for payment within one year from the completion of the work, the fact that after the execution of the contract the time for payment is extended will not defeat the lien. *Williams v. Chisholm*, 128 Ill. 115, 21 N. E. 215.

paratus, machinery, labor or services, forms or form work used in the process of construction where concrete, cement or like material is used, on the order of his agent, architect or superintendent having charge of the improvements, building, altering, repairing or ornamenting the same, shall be known under this act as a contractor, and shall have a lien upon the whole of such lot or tract of land and upon the adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business; and in case the contract relates to two or more buildings, on two or more lots or tracts of land, upon all such lots and tracts of land and improvements thereon for the amount due to him for such material, fixtures, apparatus, machinery, services or labor, and interest from the date the same is due. This lien shall extend to an estate in fee, for life, for years, or any other estate or any right of redemption, or other interest which such owner may have in the lot or tract of land at the time of making such contract or may subsequently acquire therein, and shall be superior to any right of dower of husband or wife in said premises, provided the owner of such dower interest had knowledge of such improvement and did not give written notice of his or her objection to such improvement before the making thereof; nor shall the taking of additional security by the contractor or subcontractor be a waiver of any right of lien which he may have by virtue of this act, unless made a waiver by express agreement of the parties; and this lien shall attach as of the date of the contract.

In no event shall it be necessary to fix or stipulate in any contract a time for the completion<sup>76</sup> or a time for payment

<sup>76</sup> No lien can be allowed under a written contract which provides for partial payments as the work progresses and the balance on completion, but fails to fix a time

for such completion. *Bolter v. Kozlowski*, 211 Ill. 79, 71 N. E. 858, affg. 112 Ill. App. 718; *King v. Lamon*, 193 Ill. 537, 61 N. E. 1074, affg. 91 Ill. App. 74. Where the orig-

in order to obtain a lien under this act, provided, that the work is done or material furnished within three years from

inal contract does not fix a time for the completion of the work so that the original contractor can not claim a lien, a subcontractor can not claim one; but the subcontract need not fix a time for completion. *Von Platin v. Winterbotham*, 203 Ill. 198, 67 N. E. 843; *Williams v. Rittenhouse & Co.*, 198 Ill. 602, 64 N. E. 995, overruling *Keeling Brew. Co. v. Neubauer Decorating Co.*, 194 Ill. 580, 62 N. E. 923. See *Roulet v. Hogan*, 203 Ill. 525, 68 N. E. 97, affg. 107 Ill. App. 164, as to when contract specifies time for completion; and *Webbe v. Curran*, 198 Ill. 18, 64 N. E. 710, revg. 97 Ill. App. 525. Under earlier statutes it has been held that when the written contract is silent as to the time when the work is to be completed, it is partly express and partly implied, and it must be completed within one year. *Younger v. Louks*, 7 Bradw. (Ill.) 280; *Haines v. Chandler*, 26 Ill. App. 400; *Orr v. North Western M. L. S. Co.*, 86 Ill. 260; *Driver v. Ford*, 90 Ill. 595; *Graham v. Meehan*, 4 Bradw. (Ill.) 522; *Austin v. Wohler*, 5 Bradw. (Ill.) 300; *Rogers v. Powell*, 1 Bradw. (Ill.) 631; *Chicago Artesian Well Co. v. Corey*, 60 Ill. 73; *Clark v. Manning*, 90 Ill. 380; *Grundeis v. Hartwell*, 90 Ill. 324. Under a verbal contract provision must be made for payment within one year from the date of making the contract. Actual completion within six months

will not help a contract otherwise bad. *Dymonds v. Bruhns*, 209 Ill. 292, 65 N. E. 641; *M. Pugh Co. v. Wallace*, 198 Ill. 422, 64 N. E. 1005; *Harvey v. Wallace*, 99 Ill. App. 212. But later cases seem to sustain the rule that no lien can be claimed under such a contract even though the work is completed within a year. *Kelley v. Northern Trust Co.*, 190 Ill. 401, 60 N. E. 585; *Freeman v. Rinaker*, 185 Ill. 172, 56 N. E. 1055; *Adler v. World's Pastime Exposition Co.*, 126 Ill. 373, 18 N. E. 899, affg. 26 Ill. App. 528. A lien can be claimed under a contract which states it shall be completed within one year from date. *Snitzler v. Filer*, 135 Ill. App. 61. Where a contract for work and materials is verbal and no time is expressed for its completion, the law will not imply any time. *Hindert v. American T. & S. Bank*, 100 Ill. App. 85, affd. 198 Ill. 538, 64 N. E. 1008. A mechanic or material-man has a lien for labor performed or materials furnished at the owner's request, for erecting or repairing any building on his land, within one year from the date of the undertaking. It is not necessary that the contract, whether express or implied, should prescribe the time within which the work must be completed or the materials furnished. *Cunningham v. Ferry*, 74 Ill. 426; *Clark v. Manning*, 90 Ill. 380, overruling to the contrary *Fish v. Stubbings*, 65 Ill. 492; *Powell v. Webber*, 79 Ill. 134.

the commencement of said work or the commencement of furnishing said material.

No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or incumbrancer or purchaser, unless within four months after completion, or if extra or additional work is done or material is delivered therefor within four months after the completion of such extra or additional work or the final delivery of such extra or additional material he shall either bring suit to enforce his lien therefor or he shall file with the clerk of the circuit court in the county in which the building, erection or other improvement to be charged with the lien is situated, a claim for lien, verified by the affidavit of himself, or his agent or employe, which shall consist of a brief statement of the contract, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tracts of land to identify the same. Such claim for lien may be filed at any time after the contract is made and within two years after the completion of said contract, or the completion of any extra work or the furnishing of any extra material thereunder, and as to such owner may be amended at any time before the final decree. No such lien shall be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefor under this act, unless it shall be shown that such error or overcharge is made with intent to defraud; nor shall any such lien for material be defeated because of lack of proof that the material after the delivery thereof, actually entered into the construction of such building or improvement, although it be shown that such material was not actually used in the construction of such building or improvement: provided, it is shown that such material was delivered either to said owner or his agent for such building or improvement, to be used in said building or improvement, or at the place where said building or improve-

ment was being constructed, for the purpose of being used in construction or for the purpose of being employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed forms or form work where concrete, cement or like material is used, in whole or in part.

And, provided further, that in case of the construction of a number of buildings under contract between the same parties, it shall be sufficient in order to establish such lien for material, if it be shown that such material was in good faith delivered at one of the said buildings for the purpose of being used in the construction of any one or all of such buildings, or delivered to the owner or his agent for such buildings, to be used therein; and such lien for such material shall attach to all of said buildings, together with the land upon which the same are being constructed, the same as in a single building or improvement. And, provided further, that in the event the contract relates to two or more buildings on two or more lots or tracts of land, then all of said buildings and lots or tracts of land may be included in one statement of claim for a lien.

If payment shall not be made to the contractor having a lien by virtue of this act of any amount due when the same becomes due, then such contractor may bring suit to enforce his lien by bill or petition in any court of competent chancery<sup>76a</sup> jurisdiction in the county where the improvement is located, and in the event that the contract relates to two or more buildings or two or more lots or tracts of

<sup>76a</sup>The suit is substantially a chancery proceeding, especially so far as the parties are concerned. *McGraw v. Bayard*, 96 Ill. 146. The proceedings in general follow the rules of chancery practice. *Hamilton v. Dunn*, 22 Ill. 259; *Lomax v. Dore*, 45 Ill. 379; *Clarke v. Boyle*, 51 Ill. 104. Intervening pe-

titions are to be treated as separate suits and the several amounts allowed as liens can not be added together to make up the jurisdictional amount necessary to authorize an appeal to the Supreme Court. *Davis v. Upham*, 191 Ill. 372, 61 N. E. 76.



land, then all of said buildings and lots or tracts of land may be included in one bill or petition. Any two or more persons having liens on the same property may join in bringing such suit, setting forth their respective rights in their bill or petition; all lien claimants not made parties thereto may upon application become defendants and enforce their liens by answer to the bill or petition in the nature of an intervening petition, and the same shall be taken as a crossbill against all the parties to such suit; and the said bill or petition shall not thereafter be dismissed as to any such lien claimant, or as to the owner or owners of the premises without the consent of such lien claimant. The complainant or petitioner, and all defendants to such bill or petition may contest each other's right without any formal issue of record made up between them other than that [shown] upon the original bill or petition, as well with respect to the amount due as to the right to the benefit of the lien claim; provided, that if by such contest by codefendants any lien claimants be taken by surprise the court may, in its discretion, as to such claim, grant a continuance. The court may render judgment against any party summoned and failing to appear, as in other cases of default. Such suit shall be commenced or answered [answer] filed within two years after<sup>77</sup> the completion of the contract, or completion of the extra or additional work, or furnishing of extra or additional material thereunder.

No incumbrance upon land, created before or after the making of the contract, under the provisions of this act, shall operate upon the building erected, or materials furnished under a lien in favor of the person having done work or furnished material shall have been satisfied, and upon questions arising between incumbrancers and lien creditors,

<sup>77</sup> This limitation as to time applies to owners as well as to incumbrancers and creditors. *Joseph N. Eisendrath Co. v. Gebhardt*, 222

Ill. 113, 78 N. E. 22; *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, 81 N. E. 714.

all previous incumbrances shall be preferred to the extent of the value of the land at the time of making of the contract, and the lien creditor shall be preferred to the value of the improvements erected on said premises, and the court shall ascertain by jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest.<sup>78</sup> All incumbrances, whether by mortgage, judgment or otherwise, charged and shown to be fraudulent, in respect to creditors, may be set aside by the court, and the premises freed and discharged from such fraudulent incumbrance.

Whatever right or estate such owner had in the land at the time of making the contract may be sold in the same manner as other sales of real estate are made under decrees in chancery. If any part of the premises can be separated from the residue, and sold without damage to the

<sup>78</sup> Langford v. Mackay, 12 Bradw. (Ill.) 223; Phoenix Mut. L. Ins. Co. v. Batchen, 6 Bradw. (Ill.) 621. Upon a sale of the property to enforce the mechanic's lien in such case, the proceeds of the sale represent and stand in place of the land and the building, and the parties have the same proportionate share in the proceeds that they had in the property before it was sold. Bradley v. Simpson, 93 Ill. 93. If the proceeds will not pay both the mortgage and the lien, the mortgagee is entitled to such a share as the value of the property before the improvements were put upon the land bears to the total value of the property after the improvements were made. North Presbyterian Church v. Jevne, 32 Ill. 214, 220, 83 Am. Dec. 261; Gaty v. Casey, 15 Ill. 189; Smith v. Moore, 26 Ill. 392; Raymond v.

Ewing, 26 Ill. 329; Croskey v. Northwestern Mfg. Co., 48 Ill. 481; Howett v. Selby, 54 Ill. 151; Topping v. Brown, 63 Ill. 348; Bradley v. Simpson, 93 Ill. 93. For rule of adjustment and application of proceeds of sale as between prior incumbrancer and holder of mechanic's lien, see Howett v. Selby, 54 Ill. 151; Croskey v. Northwestern Mfg. Co., 48 Ill. 481; Dingleline v. Hershman, 53 Ill. 280; Clark v. Moore, 64 Ill. 273. This provision has no application where one who has a bond for a deed builds upon the land. The vendor is not a prior incumbrancer. He is not obliged to part with his title until he receives full payment of his purchase-money. Hickox v. Greenwood, 94 Ill. 266. It has no application when the mortgage has been foreclosed. Tracy v. Rogers, 69 Ill. 662.

whole, and if the value thereof is sufficient to satisfy all the claims proved in the clause, the court may order a sale of that part. The court shall ascertain the amount due each lien creditors and shall direct the application of the proceeds of sale to be made to each in proportion to their several amounts, according to the provisions of this act, but the claims of all persons for labor as provided under this mechanics' lien law, shall be first paid. If, upon making sale under this act of any or all premises, the proceeds of such sale shall not be sufficient to pay all claims of all parties, according to their rights, the decree shall be credited by the amount of said sale and execution may issue in favor of any creditor whose claims is [are] not satisfied for the balance due as upon a deficiency decree in the foreclosure of a mortgage in chancery, and such deficiency decree shall be a lien upon all real estate and other property of the party against whom it is entered to the same extent and under the same limitations as a judgment at law; and in case of excess of sales over the amount of the decree, such excess be paid to the owner of the land, or to the person who may be entitled to the same, under the direction of the court. Upon all sales, under this act, the right of redemption shall exist in favor of the same persons, and may be made in the same manner as is or may be provided for redemption of real estate from sales under judgments and execution at law.<sup>79</sup>

Every mechanic, workman or other person<sup>80</sup> who shall

<sup>79</sup> As to redemption, see *Freibroth v. Mann*, 70 Ill. 523; *Strawn v. O'Hara*, 86 Ill. 53; *Knight v. Begole*, 56 Ill. 122.

<sup>80</sup> The original statute did not give a lien to subcontractors. *Dawson v. Harrington*, 12 Ill. 300. The Act of 1869 extends the lien to subcontractors, but not to subcontractors of a subcontractor.

*Smith Bridge Co. v. Louisville &c. R. Co.*, 72 Ill. 506; *Newhall v. Kastens*, 70 Ill. 156; *Rothgerber v. Dupuy*, 64 Ill. 452. But where a court of equity has jurisdiction of the fund, the owner may file a bill of interpleader against laborers and second subcontractors to have them settle their claims to funds in the owner's hands.

furnish any materials, apparatus, machinery or fixtures, or furnish or perform services or labor for the contractor, or shall furnish any material to be employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed form or form work where concrete, cement or like material is used in whole or in part, shall be known under this act as a subcontractor, and shall have a lien for the value thereof, with interest on such amount from the date the same is due, from the same time, on the same property as provided for the contractor, and, also, as against the creditors and assignees, and personal and legal representatives of the contractor, on the material, fixtures, apparatus or machinery furnished, and on the moneys or other consideration due or to become due from the owner under the original contract. If the legal effect of any contract between the owner and contractor is that no lien or claim may be filed or maintained by any one, such provision shall be binding; but the only admissible evidence thereof as against a subcontractor or material-man, shall be proof of actual notice thereof to him before any labor or material is furnished by him; or proof that a duly written and signed stipulation or agreement to that effect has been filed in the office of the recorder of deeds of the county or counties when the house, building or other improvement is situated, prior to the commencement of the work upon such house, building or other improvement, or within ten days after the execution of the principal contract or not less than ten days prior to the contract of the subcontractor or material-man. And the recorder of deeds shall record the same at length in the order of time of its reception in books provided by him for that

Newhall v. Kastens, 70 Ill. 156. A subcontractor's lien covers extra work when this is in pursuance of the original contract. Brown v. Lowell, 79 Ill. 484. As to the liens of subcontractors on bonds and warrants payable for public buildings, see Spalding Lumber Co. v. Brown, 171 Ill. 487, 49 N. E. 725.

purpose, and the recorder of deeds shall index the same, in the name of the contractor and in the name of the owner, in books kept for that purpose, and also in the tract or abstract book of the tract, lot, or parcel of land, upon which said house, building or other improvement is located, and said recorder of deeds shall receive therefor a fee, such as is provided for the recording of instruments in his office.

In no case, except as hereinafter provided, shall the owner be compelled to pay a greater sum for or on account of the completion of such house, building or other improvement than the price or sum stipulated in said original contract or agreement,<sup>81</sup> unless payment be made to the contractor or to his order, in violation of the rights and interests of the persons intended to be benefited by this act: provided, if it shall appear to the court that the owner and contractor fraudulently, and for the purpose of defrauding subcontractors fixed an unreasonably low price in their original contract for the erection or repairing of such house, building or other improvement, then the court shall ascertain how much of a difference exists between a fair price for labor and material used in said house, building or other improvement, and the sum named in said original contract, and said difference shall be considered a part of the contract and be subject

<sup>81</sup> Douglas v. McCord, 12 Bradw. (Ill.) 278. The owner having funds is liable to action by subcontractor. Culver v. Fleming, 61 Ill. 498. Under Hurd's Rev. Stats. 1899, p. 1112, § 28 [Hurd's Rev. Stats. 1913, p. 1567, § 41] the owner is not to be held liable to any subcontractor whose name is omitted from the statement provided by § 5 of that act. Miller v. People's Lumber Co., 98 Ill. App. 468. A statute was held unconstitutional which attempted to give a subcontractor or material-

man a right to a lien where the original contractor has waived his right to a lien before the labor was performed or the materials furnished. Kelly v. Johnson, 251 Ill. 135, 95 N. E. 1068. Where the right to a lien has expired, it can not be revived by putting up a screen without the knowledge of the owner and after the subcontractor's contract had been completed and payment thereunder demanded. Schaller-Hoerr Co. v. Gentile, 153 Ill. App. 458.

to a lien. But where the contractor's statement shows the amount to be paid to the subcontractor, or party furnishing material, or the subcontractor's statement shows the amount to become due for material; or notice is given to the owner, and thereafter such subcontract shall be performed, or material to the value of the amount named in such statements or notice, shall be prepared for use and delivery, or delivered without written protest on the part of the owner previous to such performance or delivery, or preparation for delivery, then, and in any of such cases, such subcontractor, or party furnishing or preparing material, regardless of the price named in the original contract, shall have a lien therefor to the extent of the amount named in such statements or notice. Also, in case of default or abandonment by the contractor, the subcontractor or party furnishing material, shall have and may enforce his lien to the same extent and in the same manner that the contractor may under conditions that arise as provided for in this act, and shall have and may exercise the same rights as are provided for the contractor.

Subcontractors, or party furnishing labor or materials, may at any time after making his contract with the contractor, and shall within sixty (60) days after the completion thereof, or, if extra or additional work or material is delivered thereafter, within sixty (60) days after the date of completion of such extra or additional work or final delivery of such extra or additional material, cause a written notice<sup>82</sup> of his claim and the amount due or to become due thereunder, to be personally served on the owner or his

<sup>82</sup> As to notice, see *Butler v. Gain*, 128 Ill. 23, 21 N. E. 350; *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *Havighorst v. Lindberg*, 67 Ill. 463; *Morehouse v. Moulding*, 74 Ill. 322; *Carney v. Tully*, 74 Ill. 375. A notice addressed to the husband when his

wife was the owner is not sufficient, though the husband is the agent of his wife. *Legnard v. Armstrong*, 18 Bradw. (Ill.) 549. A subcontractor's notice must state when the payment was due. *Keefe v. Minehan*, 93 Ill. App. 586.

agent or architect, or the superintendent having charge of the building or improvement. Provided, such notice shall not be necessary when the sworn statement of the contractor or subcontractor provided for herein shall serve to give the owner notice of the amount due and to whom due, but where such statement is incorrect as to the amount, the subcontractor or material-man named shall be protected to the extent of the amount named therein as due or to become due to him. (Statutory form of notice follows.)

When the owner or his agent is notified as herein provided for, he shall retain from any money due or to become due the contractor, an amount sufficient to pay all demands<sup>83</sup> that are or will become, due such subcontractor, tradesman, material-man, mechanic, or workman of whose claim he is notified, and shall pay over the same to the parties entitled thereto.

**§ 1200. Indiana.**<sup>84</sup>—Contractors, subcontractors, mechanics, journeymen, laborers, and all persons performing labor or furnishing materials or machinery for erecting, altering, repairing or removing any house, mill, manufactory or other building, bridge, reservoir, system of waterworks or other structure, or for constructing, altering or repairing or removing of any sidewalk, walk, stile, well, drain, drainage ditch, sewer or cistern may have a lien separately or jointly upon the house, mill, factory or other building, bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, drainage ditch, sewer or cistern which they may have erected, altered, repaired or removed, or for which they may have furnished materials or machinery of any description, and, on the interest of the owner of the lot or parcel of land on which it stands or with which it is connected to the extent of the value of any labor done, or material

<sup>83</sup> See, as to such statement, *Butler v. Gain*, 128 Ill. 23, 21 N. E. 350.  
<sup>84</sup> Burns' Ann. Stats. 1914, §§ 8295-8297, 8299, 8302.

furnished or either;<sup>85</sup> and all claims for wages for mechanics and laborers employed in or about any shop, mill, wareroom, storeroom, manufactory or structure, bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, drainage ditch or cistern, shall be a first lien upon all the machinery, tools, stock of material, work finished or unfinished located in or about such shop, mill, wareroom, storeroom, manufactory, or other building; bridge, reservoir, system of waterworks, or other structure, sidewalk, walk, stile, well, drain, drainage ditch, sewer or cistern or used in the business thereof; and should the person, firm or corporation be in failing circumstances, the above mentioned claims shall be preferred debts, whether claim or notice of lien has been filed or not.<sup>86</sup>

<sup>85</sup> Miners and others working in or about coal mines have a lien, which is paramount over all other liens except the lien of the state for taxes. Burns' Ann. Stats. 1914, § 8596. The mechanics' lien law will be liberally construed in favor of one bringing himself within its provisions. *Potter Mfg. Co. v. Meyer*, 171 Ind. 513, 86 N. E. 837; *Indianapolis Northern Trac. Co. v. Brennan*, 174 Ind. 1, 87 N. E. 215. The title of "an act concerning liens of mechanics, laborers and material-men," is not broad enough to include contractors or subcontractors. *Todd v. Howell*, 47 Ind. App. 665, 95 N. E. 279; *Korbly v. Loomis*, 172 Ind. 352, 88 N. E. 698; *Halstead v. Stahl*, 47 Ind. App. 600, 94 N. E. 1056. The right to a lien does not depend on a contract with the owner. The lien exists when the labor is done or the materials are furnished and used in an improvement authorized by the owner. *Johnson v.*

*Spencer*, 49 Ind. App. 166, 96 N. E. 1041. See also, *Topp v. Standard Metal Co.*, 47 Ind. App. 483, 94 N. E. 891. A material-man's lien relates to the date when he began to furnish the materials. *Lloyd v. Arney*, 43 Ind. App. 450, 87 N. E. 989. If an owner's agent, being authorized to do so, contracts for placing a furnace in a house a lien will attach to the property for labor done and materials furnished in constructing it. *Beach v. Huntsman*, 42 Ind. App. 205, 85 N. E. 523.

<sup>86</sup> "Above-mentioned claims" refers to claims for wages and not to claims for materials. *National Supply Co. v. Stranahan*, 161 Ind. 602, 69 N. E. 447; *McElwaine v. Hosey*, 135 Ind. 481, 35 N. E. 272; *Jenkes v. Jenkes*, 145 Ind. 624, 44 N. E. 632; *Sulzer-Vogt Machine Co. v. Rushville Water Co.*, 160 Ind. 202, 65 N. E. 583, overruling *Goodbub v. Hornung*, 127 Ind. 181, 26 N. E. 770. This does not



The entire land upon which any such building, erection or other improvement is situated, including that portion not covered therewith, shall be subject to lien to the extent of all the right, title and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or material furnished; and where the owner has only a leasehold interest, or the land is incumbered by mortgage. the lien, so far as concerns the buildings erected by said lienholder, is not impaired by forfeiture of the lease for rent or foreclosure of mortgage; but the same may be sold to satisfy the lien and [be] removed within ninety [days] after the sale by the purchaser.

Any person wishing to acquire such lien upon any property, whether his claim be due or not, shall file in the recorder's office of the county, at any time within sixty days after performing such labor or furnishing such materials, or machinery as above described,<sup>87</sup> notice of his intention to be connected with,<sup>88</sup> or to which it may be removed. Any description

change the rule requiring all liens to be enforced within one year. *Smith v. Tate*, 30 Ind. App. 367, 66 N. E. 88.

<sup>87</sup> *Thomas v. Kiblinger*, 77 Ind. 85; *Hamilton v. Naylor*, 72 Ind. 171; *Lawton v. Case*, 73 Ind. 60.

<sup>88</sup> The description must be sufficient to identify the land. The notice is not invalidated by claiming more land than ought to be sold to discharge the lien. *White v. Stanton*, 111 Ind. 540, 13 N. E. 48; *Crawfordsville v. Johnson*, 51 Ind. 397; *Irwin v. Crawfordsville*, 72 Ind. 111. If the notice is so uncertain as to afford no clue to a definite and correct description, no lien can be acquired under it. *White v. Stanton*, 111 Ind. 540, 13 N. E. 48. A claim for too large an amount, when made without fraudulent intent, does not impair the lien.

*Harrington v. Dollman*, 64 Ind. 255. A notice of lien given under this section need not state that the claimant notified the owner of his intention to furnish the materials as prescribed, but in a suit it must be alleged and proved that such notice was given. *Adams v. Shaffer*, 132 Ind. 331, 31 N. E. 1108; *Adams v. Buhler*, 131 Ind. 66, 30 N. E. 883. The lien is acquired by filing the notice, and not by its record. *Wilson v. Hopkins*, 51 Ind. 231; *Adams v. Buhler*, 131 Ind. 66, 30 N. E. 883. As to the notice in general, and what it should contain, see *Simonds v. Buford*, 18 Ind. 176; *Wade v. Reitz*, 18 Ind. 307; *Gilman v. Gard*, 29 Ind. 291; *Lindley v. Cross*, 31 Ind. 106, 99 Am. Dec. 610; *Schneider v. Kolthoff*, 59 Ind. 568.

hold a lien upon such property for the amount of his claim, specifically setting forth the amount claimed, and giving a substantial description of such lot or land on which the house, mill, manufactory or other buildings, bridge, reservoir, system of waterworks or other structure may stand or be con- of the lot or land in a notice of lien will be sufficient, if from such description or any reference therein, the lot or land can be identified.<sup>89</sup>

Any subcontractor, journeyman or laborer employed in erecting, altering, repairing or removing any house, mill, manufactory or other building, or bridge, reservoir, system of waterworks, or other structure, or in furnishing any material or machinery therefor, may give to the owner thereof, or, if said owner is absent, to his agent notice in writing particularly setting forth the amount of his claim and services rendered, for which his employer is indebted to him, and that he holds the owner responsible for the same,<sup>90</sup> and

<sup>89</sup> *Windfall Natural Gas Mining and Oil Co. v. Roe*, 41 Ind. App. 687, 84 N. E. 996.

<sup>90</sup> The purpose of this notice is to enable the owner to take such steps for his protection as he might deem necessary. This purpose would be defeated if the notice might be delayed until after the material was not only delivered but actually used. In our opinion, when the material is, like brick, of such a nature that it may be used as fast as delivered, if notice is delayed until it has in fact been worked into and become a part of the structure, it is too late. *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598, per *Mitchel, J.* But it was held that the lien did attach to that portion delivered before and used after the notice, *Coffey, J.*, dissenting, holding that no lien could attach to any portion delivered before notice. *Quaack v. Schmid*, 131 Ind. 185, 30 N. E. 514; *Hubbard v. Moore*, 132 Ind. 178, 31 N. E. 534. Where a contractor made an assignment for the benefit of his creditors, before material-men had given notice that they claimed a lien, the contractor's creditors had a claim superior to that of the material-men. *Kulp v. Chamberlain*, 4 Ind. App. 560, 31 N. E. 376. A verbal notification is sufficient. *Newhouse v. Morgan*, 127 Ind. 436, 26 N. E. 158; *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598; *Quaack v. Schmid*, 131 Ind. 185, 30 N. E. 514; *Vinton v. Builders' & Manufacturers' Assn.*, 109 Ind. 351, 9 N. E.

the owner shall be liable for such claim, but not to exceed the amount which may be due, and may thereafter become due, from him to the employer, which may be recovered in an action<sup>91</sup> whenever an amount equal to such claim, over other claims having priority, shall be due from such owner to the employer and any such subcontractor, journeyman or laborer, by giving notice as above provided setting forth the amount of labor he has engaged to perform, or of materials or machinery he has engaged to furnish in erecting, altering, repairing or removing of any of the buildings or other structure[s] above described, shall have the same rights and remedies against such owner for the amount of such labor performed, or materials or machinery furnished, after said notice is given as are above secured and provided, (for those) who serve notice after the labor is performed or the materials or machinery furnished. And whenever an action is brought against an owner, in pursuance of the provisions of this section, all subcontractors, journeymen and laborers who have performed labor or furnished materials or machinery, and given notice as herein required, may become parties to such action; and if, upon final judgment against such owner the amount recovered and collected shall not be

177. But the fact that a subcontractor informed the owner in a conversation that he was furnishing materials for the building is not sufficient to create a lien for materials theretofore furnished. *Caylor v. Thorn*, 125 Ind. 201, 25 N. E. 217. The notice must convey to the owner information that the material-man intends to hold a lien for his claim. *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598; *Albrecht v. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157; *Newhouse v. Morgan*, 127 Ind. 436, 26 N. E.

158; *Quaack v. Schmid*, 131 Ind. 185, 30 N. E. 514.

<sup>91</sup> The personal liability can not be fixed upon one not an owner, though he be personally liable with such owner to the contractor. *Crawford v. Powell*, 101 Ind. 421. See *Hill v. Braden*, 54 Ind. 72. By this provision the subcontractor has a remedy by action in addition to his lien upon the property. *Crawford v. Crockett*, 55 Ind. 220; *Colter v. Frese*, 45 Ind. 96. As to notice to fix liability upon a city, see *Crawfordsville v. Irwin*, 46 Ind. 438.

sufficient to pay said claimants in full, the same shall be divided among them *pro rata*.

Any person having such lien may enforce the same by filing his complaint in the circuit or superior court of the county where the real estate or property on which the lien is so taken is situate, at any time within one year from the time when said notice has been received for record<sup>92</sup> by the recorder of the county; or, if a credit be given, from the expiration of the credit, and if said lien shall not be enforced within the time prescribed herein, the same shall be null and void. If said lien be foreclosed as herein provided, the court rendering judgment shall order the sale to be made,<sup>93</sup> and the officers making the sale shall sell the property without relief whatever from valuation or appraisement laws.

§ 1201. Iowa.<sup>94</sup>—Every person who shall do any labor upon, or furnish any materials, machinery or fixtures for, any building, erection or other improvement upon land, including those engaged in the construction or repair of any work of internal improvement, and those engaged in grading any land or lot,<sup>95</sup> by virtue of any contract with the owner, his agent, trustee, contractor, or subcontractor, upon complying with the provisions of this statute, shall have for his labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated, or upon the land or lot so graded, to secure the payment for such labor done or material, machinery or fixtures furnished.

The entire land upon which any such building, erection or

App. 560, 31 N. E. 376.

<sup>92</sup> The lien may be released by giving bond. Burns' Ann. Stats. 1914, § 8304.

<sup>94</sup> Code 1897, §§ 3089, 3090, 3092-3095, 3098, 3099, as amended by Laws 1913, p. 285.

<sup>95</sup> As to liens upon railroads, see ch. XL., post.

other improvement is situated, including that portion not covered therewith, shall be subject to all liens created by this statute to the extent of the interest therein of the person for whose benefit such labor was done or things furnished; and when such interest is only a leasehold the forfeiture of such lease for the nonpayment of rent, or for non-compliance with any of the other conditions therein, shall not forfeit or impair such liens upon such improvements, but the same may be sold to satisfy such liens, and be moved away by the purchaser within thirty days after the sale thereof.

Every person, whether contractor or subcontractor, who wishes to avail himself of the provisions of this statute, shall file with the clerk of the district court of the county in which the building, erection or other improvement to be charged with the lien is situated a verified statement or account of the demand due him, after allowing all credits, setting forth the time when such material was furnished or labor performed, and when completed, and containing a correct description of the property to be charged with the lien, which statement or account must be filed by a principal contractor within ninety days, and by a subcontractor within thirty days, from the date on which the last of the material shall have been furnished or the last of the labor was performed; but a failure to file the same within said periods shall not defeat the lien, except against purchasers or incumbrances in good faith, without notice,<sup>96</sup> whose rights accrued after the

<sup>96</sup> Neilson v. Iowa Eastern R. Co., 51 Iowa 184; Bissell v. Lewis, 56 Iowa 231, 9 N. W. 177; Kidd v. Wilson, 23 Iowa 464; Taylor v. Burlington &c. R. Co., 4 Dill. (U. S.) 570, 576, Fed. Cas. No. 13783. Not entitled to lien against intervening purchaser or incumbrancer. Weston v. Dunlap, 50 Iowa 183; Noel v. Temple, 12

Iowa 276. An incumbrancer acquiring a lien upon the property, within the ninety days, takes subject to the mechanic's lien, though no statement of it has been previously filed. Evans v. Tripp, 35 Iowa 371; Lamb v. Hanneman, 40 Iowa 41; Curtis v. Broadwell, 66 Iowa 662, 24 N. W. 265; Gilbert v. Tharp, 72 Iowa

thirty or ninety days, as the case may be, and before any claim for the lien was filed; but where a lien is claimed upon a railway, the subcontractor shall have sixty days from the last day of the month in which such labor was done or material furnished within which to file his claim therefor.

No owner of any building or structure upon which a subcontractor's mechanic's lien may be filed under the provisions of the above paragraph shall be liable to an action by the original contractor for compensation for work done or materials, machinery or fixtures furnished for any building, structure or other improvement upon land until the expiration of thirty days from the completion of said building, structure or improvement, unless the original contractor shall furnish to the owner of said building, structure or improvement receipts and waivers of claims for mechanics' liens, signed by all persons who performed any labor or furnished any material, machinery or fixtures for said building, structure or improvement, provided there be such persons, or unless the original contractor shall furnish to the owner a good and sufficient bond to be approved by said owner, conditioned that said owner shall be held harmless from any loss which he may sustain by reason of the filing of subcontractor's mechanics' liens. Should the owner pay to the original contractor any part of the contract price of such building, structure or improvement before the lapse of the thirty days allowed by law for the filing of subcontractor's mechanics' liens, he will still be liable to said subcontractor for the full value of any material, machinery or fixtures furnished, or labor performed, upon said building, structure or improvement, provided said subcontractor file

714, 32 N. W. 24. As to effect of knowledge on part of mortgagee of the existence of a mechanic's lien, when the mechanic has not filed his statement until after the expiration of ninety days, see *Hoskins v. Carter*, 66 Iowa 638, 24 N. W. 249.

his mechanic's lien within the time provided by law for the filing of subcontractor's mechanics' liens.<sup>97</sup>

A subcontractor may, at any time after the expiration of said thirty days, file his claim for a lien with the clerk of the district court, and give written notice thereof to the owner, or his agent or trustee, and from and after the service of such notice his lien shall have the same force and effect, and be prosecuted or vacated by bond, as if filed within the thirty days, but shall be enforced against the property or upon the bond, if given by the owner, only to the extent of the balance due from the owner to the contractor at the time of the service of such notice upon him, his agent or trustee;<sup>98</sup> but if in such case the bond is given by the contractor, or person contracting with the subcontractor filing the claim for a lien, such bond shall be enforced to the full extent of the amount found due the subcontractor.<sup>99</sup>

<sup>97</sup> The lien of a subcontractor may be discharged by bond. Code 1897, § 3093. Failure of subcontractor to serve written notice on the owner that a lien is filed defeats his lien. *Merritt v. Hopkins*, 96 Iowa 652, 65 N. W. 1015.

<sup>98</sup> *Steele v. McBurney*, 96 Iowa 449, 65 N. W. 332; *Thompson v. Spencer*, 95 Iowa 265, 63 N. W. 695. For the owner to give notes to a subcontractor does not make him a principal contractor and extend the time for filing the lien beyond the statutory thirty days. *Missouri River Lumber Co. v. Finance Co.*, 93 Iowa 640, 61 N. W. 913.

<sup>99</sup> A subcontractor who has an open unliquidated account against the principal contractor can not bring an action against the owner of the building, and establish a mechanic's lien upon the proper-

ty, without adjudicating the claim against the contractor, who is the person principally liable. The contractor must be made a party to the suit, and a judgment obtained against him. *Vreeland v. Ellsworth*, 71 Iowa 347, 32 N. W. 374; *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105 Iowa 264, 74 N. W. 905; *Beach v. Wakefield*, 107 Iowa 567, 76 N. W. 638, 78 N. W. 197. An owner is not liable for payments made to the contractor with knowledge of the unpaid claims of the subcontractor when the latter does not file his claim till after such payments are made and after the lapse of thirty days. *Empire Portland Cement Co. v. Payne*, 128 Iowa 730, 105 N. W. 331. A subcontractor's notice filed after the lapse of thirty days is prior to the claim of another subcontractor who

The mechanic's lien shall take priority as follows:—

1. As between persons claiming mechanics' liens upon the same property, according to the order of the filing of the statements and accounts therefor;

2. They shall take priority of all garnishments of the owner for the contract debts whether made prior or subsequent to the commencement of the furnishing of the material or performance of the labor, without regard to the date of filing the claim for such lien.

3. They shall be preferred to all other liens and incumbrances which may attach to or upon such buildings, erections, or other improvements, and to the land upon which they are situated, made subsequently to the commencement of said buildings, erections, or other improvements; but the rights of purchasers, incumbrancers, and other persons who acquire interests in good faith and for a valuable consideration and without notice, after the expiration of the time for filing claims for liens, shall be prior to the claims of all contractors of subcontractors who have not, at the date such rights and interests were acquired, filed their claims for such liens.<sup>1</sup>

4. The liens for material or work aforesaid, including those for additions, repairs and betterments, shall attach to the buildings, erections or improvements for which they were furnished or done, in preference to any prior lien, incumbrance or mortgage upon the land upon which such erection, building or improvement belongs, or is erected or put.<sup>2</sup> If such material was furnished or labor performed

subsequently filed a notice within the thirty day period. *Lindsay & Co. v. Zoecler*, 128 Iowa 558, 104 N. W. 802.

<sup>1</sup> See *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa 25, 65 N. W. 1017, as to who is an innocent purchaser.

<sup>2</sup> The mechanic's lien upon the

building has priority over the vendor's lien. *Stockwell v. Carpenter*, 27 Iowa 119. Under a prior statute a lien for repairs did not attach to the building in preference to prior incumbrances. *Equitable Life Ins. Co. v. Slye*, 45 Iowa 615. See *Getchell v. Allen*, 34 Iowa 559; *O'Brien v.*



in the erection or construction of an original and independent building, erection or other improvement commenced since the attaching or execution of such prior lien, incumbrance or mortgage, the court may, in its discretion, order and direct such building, erection or improvement to be sold separately under execution, and the purchaser may remove the same in such reasonable time as the court may fix.<sup>3</sup> But if the court shall find that such building should not be sold separately it shall take an account of and ascertain the separate values of the land, and the erection, building or proceeds of such sale so as to secure to the prior mortgage or other lien priority upon the land, and to the mechanic's lien priority upon the building, erection or other improve-

Pettis, 42 Iowa 293; *Bear v. Burlington C. R. & M. R. Co.*, 48 Iowa 619; *Taylor v. Burlington &c. R. Co.*, 4 Dill. (U. S.) 570, 579, Fed. Cas. No. 13783. This provision has no application where the mortgage has already been foreclosed. *Shepardson v. Johnson*, 60 Iowa 239, 14 N. W. 302.

<sup>3</sup> If the nature of the improvement be such that it can not be removed, the lien must be postponed to the prior incumbrance upon the land. *Conrad v. Starr*, 50 Iowa 470. If there is no prior incumbrance, it is the right of the owner to have the whole property, the land as well as the buildings, sold together, so that he can redeem. *Early v. Burt*, 68 Iowa 716, 28 N. W. 35. A new dwelling house was built upon a farm which was already subject to a mortgage. A lien was claimed for materials used in the dwelling house. It appeared that

this was securely built on a stone foundation, and covered a cellar suitable for its purpose. It appeared also that the land was not worth enough to pay both the lien claim and the mortgage, though it did not appear what the land and improvement together were worth. It was held the court properly used its discretion in refusing to order the separate sale and removal of the dwelling for the satisfaction of the lien. The mortgagee having filed a cross-petition for the foreclosure of the mortgage, the court properly decreed the mortgage to be a first lien on the whole property, and ordered a foreclosure sale. *Miller v. Seal*, 71 Iowa 392, 32 N. W. 391. See also, *German Bank v. Schloth*, 59 Iowa 316, 13 N. W. 314; *Curtis v. Broadwell*, 66 Iowa 662, 24 N. W. 265.

ment.<sup>4</sup> If the material furnished or labor performed was for additions to, repairs of, or betterments upon buildings, erections or other improvements, the court shall take an account of the values before such material was furnished or labor performed, and the enhanced value caused by such additions, repairs or betterments, and, upon the sale of the premises, distribute the proceeds of such sale so as to secure to the prior mortgagee or lienholder priority upon the land and improvements as they existed prior to the attaching of the mechanic's lien, and to the mechanic's lienholder priority upon the enhanced value caused by such additions, repairs or betterments. In case the premises do not sell for more than sufficient to pay off the prior mortgage or other lien, the proceeds shall be applied on the prior mortgage or other liens.<sup>5</sup>

Any person having filed a claim for a lien may at once bring an action to enforce the same, or upon any bond given in lieu thereof, in the district or superior court of the county wherein the property is situated.<sup>6</sup> Upon the written demand of the owner, his agent or contractor,

<sup>4</sup> As to the inconsistency between this and the preceding provision, see *Miller v. Seal*, 71 Iowa 392, 32 N. W. 391. Where it is erroneous to decree a sale of land and buildings together, and a division of the proceeds, see *Brodt v. Rohkar*, 48 Iowa 36, 38; *First Nat. Bank v. Elmore*, 52 Iowa 541, 3 N. W. 547. If the entire proceeds be only sufficient to pay the prior incumbrance, there can of course be no distribution. *German Bank v. Schloth*, 59 Iowa 316, 13 N. W. 314; *Curtis v. Broadwell*, 66 Iowa 662, 24 N. W. 265.

<sup>5</sup> As to what constitutes "improvements" and not "repairs,"

see *National Life Ins. Co. v. Ayres*, 111 Iowa 200, 82 N. W. 607. See also, *Potter v. Conley*, 83 Kan. 676, 112 Pac. 608.

<sup>6</sup> The suit was formerly a proceeding at law, as distinguished from an equitable one. *State v. Eads*, 15 Iowa 114, 83 Am. Dec. 399. Though there was but one form of action for the enforcement of private rights in this state, called a civil action, the proceedings were of two kinds, ordinary and equitable. That to enforce a lien was of the former kind. *Brodt v. Rohker*, 48 Iowa 36. Now, by statute, the proceeding is equitable. Code 1897, § 3429.

served on the person claiming the lien, requiring him to commence action to enforce such lien, such action shall be commenced within thirty days thereafter, or the lien shall be forfeited, and all benefits derived therefrom.

§ 1202. **Kansas.**<sup>7</sup>—Any person who shall under contract<sup>8</sup> with the owner of any tract or piece of land, or with a trustee, agent, husband or wife of such owner, perform labor or furnish material for the erection, alteration or repair of any building, improvement or structure thereon, or shall furnish material or perform labor in putting up of any fixtures or machinery in, or attachment to, any such building, structure or improvement; or who shall plant any trees, vines, plants or hedge, in or upon said land, or shall build, alter or repair, or shall furnish labor or material for building, altering or repairing, any fence or foot-walk in or upon said land, or any sidewalk in any street abutting said land, shall have a lien upon the whole of said piece or tract of land, the buildings and appurtenances, in the manner herein provided, for the amount due to him for such labor, material, fixtures, or machinery.

Such liens shall be preferred to all other liens or incumbrances which may attach to or upon such lands, buildings, or improvements, or either of them, subsequent to the commencement of such building, the furnishing or putting up of such fixtures or machinery, the planting of trees, vines, plants, or hedges, the building of such fence, foot-walks, or

<sup>7</sup> Gen. Stats. 1909, §§ 6244, 6246, 6248, 6251. This statute provides that a bond be given, and in such case no lien can attach and any lien which is filed is discharged. *Risse v. Planing Mill Co.*, 55 Kans. 518, 40 Pac. 904. The lessee is deemed the agent of the owner in making improvements author-

ized in the lease contract. *Potter v. Conley*, 83 Kan. 676, 112 Pac. 608.

<sup>8</sup> The contract need not be in writing. *O'Keef v. Seip*, 17 Kans. 131. The lien dates from the time of making the contract. *Mitchell v. Penfield*, 8 Kans. 186.

sidewalks, or the making of any such repairs or improvements.<sup>9</sup>

Any person who shall furnish any such material or perform such labor under a subcontract with the contractor, or as an artisan or day-laborer in the employ of such contractor, may obtain a lien upon such land from the same time, in the same manner, and to the same extent as the original contractor, for the amount due him for such material and labor; and any artisan or day-laborer in the employ of such subcontractor may obtain a lien upon such land from the same time, in the same manner, and to the same extent as the subcontractor, for the amount due him for such material and labor, by filing with the clerk of the district court of the county in which the land is situated within sixty days after the date upon which material was last furnished or labor last performed under such subcontract a statement verified by affidavit, setting forth the amount due from the contractor to the claimant, and the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property upon which a lien is claimed, and by serving a notice in writing of the filing of such lien upon the owner of the land,<sup>10</sup> provided, that if with due diligence the owner can not be found in the county where the land is situated, the claimant, after filing an affidavit setting forth such facts, may serve a copy of such statement upon the occupant of the land, or if the land be unoccupied, may post such copy in a conspicuous place upon the land or any building thereon. Immediately upon the filing of such statement the clerk of said court shall enter a record of the same in the docket provided for in this

<sup>9</sup> The preference here given is not confined solely to subsequent liens or mortgages, but also embraces conveyances. *Warden v. Sabins*, 36 Kans. 165, 12 Pac. 520;

*Fleming v. Bumgarner*, 29 Ind. 424; *Kellenberger v. Boyer*, 37 Ind. 188.

<sup>10</sup> *Clough v. McDonald*, 18 Kans. 114. If the subcontractor

act and in the manner herein specified: provided, that the owner of any land affected by such lien shall not thereby become liable to any claimant for any greater amount than he contracted to pay the original contractor; but the risk of all payments made to the original contractor shall be upon such owner until the expiration of the sixty days hereinbefore specified;<sup>11</sup> and no owner shall be liable to an action by such contractor until the expiration of said sixty days, and such owner may pay such subcontractor the amount due him from such contractor for such labor and material, and the amount so paid shall be held and deemed a payment of said amount to the original contractor. The district clerk shall be entitled to a fee of fifty cents in each case for entering the statements, provided for in this act, and the costs of filing and entering such statement shall be recovered as part of the costs of enforcing such liens.

Any person claiming a lien shall file in the office of the clerk of the district court as aforesaid of the county in which the land is situated a statement setting forth the amount claimed, and the items thereof, as nearly as practicable,<sup>12</sup> the name of the owner,<sup>13</sup> the name of the contractor, the name of the claimant, and a description of the property subject to the lien, verified by affidavit,<sup>14</sup> provided, that

finishes his part of the work before the whole building or other improvement is completed, he has sixty days from the latter date within which to file his lien. *Clough v. McDonald*, 18 Kans. 114.

<sup>11</sup> *Delahay v. Goldie*, 17 Kans. 263; *Clough v. McDonald*, 18 Kans. 114; *Shellabarger v. Thayer*, 15 Kans. 619. The owner can not be compelled to pay anything to any person during the sixty days. If at the expiration

of that time the contract price will pay all claims, he should pay them; but if it will not pay all, then he should divide it among all lienholders proportionately. *Clough v. McDonald*, 18 Kans. 114.

<sup>12</sup> See *O'Keefe v. Seip*, 17 Kans. 131.

<sup>13</sup> What is a sufficient statement of owner's name. *Deatherage v. Woods*, 37 Kans. 59, 14 Pac. 474.

<sup>14</sup> See ch. xxxv.

if any promissory note bearing a lawful rate of interest shall have been taken for any such labor or material, it shall be sufficient to file a copy of such note, with a sworn statement that said note, or any part thereof, was given for such labor or material used in the construction of such building or improvement, and if the whole of such note shall have been given for such labor or material, the lien shall be for the whole of the principal and interest of said note; but if a part of said note only shall have been given for such labor or material, then the lien shall be for a corresponding amount only, with interest at the rate specified in said note.

Such statement shall be filed within four months after the date upon which material was last furnished<sup>15</sup> or labor last performed under contract as aforesaid; and if the claim be for the planting of any trees, vines, plants, or hedge, such statement shall be filed within four months from such planting. Immediately upon the receipt of such statement the clerk of the district court shall enter a record of the same in a book kept for that purpose, to be called the mechanics' lien docket, which docket shall be ruled off into separate columns, with headings as follows: "When filed," "Name of owner," "Name of claimant," "Amount claimed," "Description of property," and "Remarks," and the clerks [clerk] shall make the property entry in each column.

Such lien may be enforced by civil action in the district court of the county in which the land is situated, which action shall be brought within one year from the time of the filing of said lien with the clerk of said court; and in

<sup>15</sup> A statement filed before the completion of the building is premature. *Catlin v. Douglas*, 33 Fed. 569; *Seaton v. Chamberlain*, 32 Kans. 239, 4 Pac. 89. After the four months are past the material-man can not revive his

right to a lien by selling to the owner a little paint and a brush and by charging the price thereof to the owner's old account. *Badger Lumber Co. v. Parker*, 85 Kans. 134, 116 Pac. 242.

case a promissory note is given, no lien shall be enforced thereon unless action be commenced within one year from the maturity of the said note.<sup>16</sup> The practice, pleadings, and proceedings shall be in conformity with the rules prescribed by the Code of Civil Procedure, so far as the same are applicable.<sup>17</sup>

The real estate or other property shall be ordered to be sold as in other cases of sales of real estate, such sale to be without prejudice to the rights of any prior incumbrancer, owner or other person not a party to the action.

Any person, corporation, or copartnership who shall under contract, express or implied, with the owner of any leasehold for oil and gas purposes,<sup>18</sup> or the owner of any gas pipe-line or oil pipe-line, or with the trustee or agent of such owner, who shall perform labor or furnish material, machinery and oil-well supplies used in the digging, drilling, torpedoing, completing, operating or repairing of any oil or gas well, or who shall furnish any oil-well supplies or perform any labor in constructing or putting together any of the machinery used in drilling, torpedoing, operating, completing or repairing of any gas well, shall have a lien upon the whole of such leasehold or oil pipe-line or gas pipe-line, or lease for oil and gas purposes, the building and appurtenances, and upon the material and supplies

<sup>16</sup> Board of Education v. Scoville, 13 Kans. 17, 27. See also, Hobbs v. Spencer, 49 Kans. 769, 31 Pac. 702. Although under the code mortgagees and all other incumbrancers are to be made parties to a suit to foreclose a lien, yet failure to comply with the provision does not give one not made a party the right to invoke the statutory provision of one year. Thomas v. Hodge, 58 Kans. 166.

<sup>17</sup> Under these provisions, if

the action to enforce the lien be prematurely brought and judgment rendered, such judgment is not a bar to another action brought within proper time against the same parties to foreclose the same lien, though the second action be brought more than one year after the building was completed, such proceeding being in accordance with the code. Seaton v. Hixon, 35 Kans. 663, 12 Pac. 22.

<sup>18</sup> Gen. Stats. 1909, §§ 3924, 3925.

so furnished, and upon said oil and gas well for which they were furnished, and upon all the other oil wells, fixtures and appliances used in the operating for oil and gas purposes upon the leasehold for which said material and supplies were furnished and labor performed. Such lien shall be preferred to all other liens or incumbrances which may attach to or upon said leasehold for gas and oil purposes and upon any oil pipe-line or gas pipe-line, or such oil and gas wells and the material and machinery so furnished and the leasehold for oil and gas purposes and the fixtures and appliances thereon subsequent to the commencement of or the furnishing or putting up of any such machinery or supplies.

Any person, copartnership or corporation who shall furnish such machinery or supplies to a subcontractor under a contractor, or any person who shall perform such labor under a subcontractor with a contractor, or who as an artisan or day laborer in the employ of such contractor, and who shall perform any such labor, may obtain a lien upon said leasehold for oil and gas purposes or any gas pipe-line or any oil pipe-line from the same tank and in the same manner and to the same extent as the original contractor for the amount due him for such labor, as provided in the above paragraph.

§ 1203. **Kentucky.**<sup>19</sup>—A person who performs labor or furnishes materials in the erection, altering or repairing a house, building or other structure, or for any fixture or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or for the improvement in any manner, of real

<sup>19</sup> Stats. 1909, §§ 2463, 2464, 2466, 2468, 2470, 2477, as amended by Acts 1912, p. 389. Where a county pays lien claims though there is nothing due the contractor, a surety on the contractor's bond is

liable, because the county was bound to pay the claim though it did not owe the contractor. *Allen County v. United States Fidelity & Co.*, 122 Ky. 825, 93 S. W. 44.



estate by contract with, or by the written consent of, the owner, contractor, subcontractor, architect, or authorized agent, shall have a lien thereon,<sup>20</sup> and upon the land upon which said improvements shall have been made or on any interest such owner has in the same<sup>21</sup> to secure the amount thereof with costs; and said lien on the land or improvements shall be superior to any mortgage or incumbrance created subsequent to the beginning of the labor or the furnishing of the materials; and said lien, if asserted as hereinafter provided, shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials; provided that no person who has not contracted directly with the owner or his agent shall acquire a lien under this section unless he shall notify in writing the owner of the property to be held liable or his authorized agent, within thirty-five days after the last item of said material or labor is furnished, of his intention to hold said property liable, and the amount for which he will claim a lien; and provided that such lien shall not take precedence of a mortgage or other contract, lien or bona fide conveyance for value without notice, duly recorded or lodged for record according to law, unless person claiming such prior lien shall before the recording of such mortgage or other contract, lien or conveyance, have filed in the clerk's office of the county court of the county wherein he shall have performed labor or furnished materials, as afore-

<sup>20</sup> The lien commences with the work, and continues to enlarge with its progress. *Caldwell Institute v. Young*, 2 Duv. (Ky.) 582, *Nazareth Institute v. Lowe*, 1 B. Mon. (Ky.) 257. One furnishing material to a contractor on his credit alone, not knowing the particular job or building in which it is to be used, can not have a mechanic's

lien under Carroll's Ky. Stats. 1909, § 2463, which authorizes a lien to one furnishing material for a building. *Connor v. Mason*, 143 Ky. 635, 137 S. W. 235.

<sup>21</sup> Only the interest of the employer is covered by the lien. *Caldwell Institute v. Young*, 2 Duv. (Ky.) 582; *Fetter v. Wilson*, 12 B. Mon. (Ky.) 90.

said, a statement showing that he has performed or furnished, or that he expects to furnish such labor or materials, and the amount in full thereof and his lien shall not as against the holder of said mortgage, or other contract, lien or other conveyance, exceed the amount of the lien claimed or expected to be claimed as set forth in such statement. The statement aforesaid shall in other respects be in the form of the tenor prescribed below. The liens provided for herein shall in no case be for a greater amount in the aggregate than the contract price of the original contractor, and should the aggregate amount of the liens exceed the price agreed upon between the original contractor and the owner, then there shall be a pro rata distribution of the original contract price among said lienholders.

It shall be sufficient proof of the notice required herein that such notice was mailed to the last known address of the owner of the property upon which lien is claimed, or to his duly authorized agent within the county within which the property to be held liable is located.

If the owner claims by executory contract, and if, for any cause, such contract shall be rescinded or set aside, the lien aforesaid shall follow the property into the hands of the person to whom the same may come, or with whom it may remain by reason of such rescission, to the extent only that the actual value of the property may be enhanced by the improvements so placed upon it.

If the labor be performed or the materials furnished by contract with the lessee of real estate for a term of years, and if, before the expiration of the term by lapse of time the lessee's interest therein shall, from any cause, become forfeited to the lessor, or shall be surrendered to him, and if the lessor shall refuse to pay for the same, the person performing the work or furnishing the materials shall have the right to remove the same from the leased premises, if it can be done without material injury to any previous improvement on said leased premises.

The liens herein provided for shall be dissolved unless the claimant, within [six months] after he ceases to labor or furnish materials as aforesaid, files in the office of the clerk of the county court of the county in which such building or improvement is situated, a statement of the amount due him, with all just credits and set-offs known to him, together with a description of the property intended to be covered by the lien, sufficiently accurate to identify it, and the name of the owner, if known, and whether the materials were furnished, or the labor performed, by contract with the owner, or with a contractor or subcontractor, which shall be subscribed and sworn to by the person claiming the lien, or by some one in his behalf.

The liens herein declared shall be deemed as having been dissolved, unless an action shall have been brought to enforce the same within twelve months<sup>22</sup> from the day of filing the account in the clerk's office, as herein required.

Actions to enforce liens herein declared shall be by equitable proceedings, and conducted as other proceedings in equity in similar cases, except as otherwise provided for by statute.<sup>23</sup>

If the lienholder complies with statutory requirements as to filing statement, enforcement, etc., within the time fixed the liens herein provided for shall be valid and effectual against any creditor of, or bona fide or other purchaser<sup>24</sup> from, the owner of said property.

<sup>22</sup> *Hardin v. Marble*, 13 Bush (Ky.) 58. The notice and statement must allege the name of the owner if known and whether the materials were furnished or the labor done by contract with such owner or with the contractor or subcontractor, and a notice will be held bad when it states that materials were furnished on the labor done under contract with the owner and the evidence

shows that they were furnished by contract with the contractor alone. *Tischendorf-Chreste Lumber Co. v. Hegan*, 134 Ky. 1, 119 S. W. 163.

<sup>23</sup> For provisions see remainder of this section.

<sup>24</sup> A mortgagee is a purchaser under a similar provision of the law of 1858, and the recording of the mortgage is notice to the mechanic. *Foushee v. Grigsby*, 12

§ 1204. *Louisiana*.<sup>25</sup>—Architects, undertakers, bricklayers, painters, master builders, contractors, subcontractors, journeymen, laborers, cartmen, and other workmen employed in constructing, rebuilding or repairing houses, buildings, or making other works, those who have supplied the owner, or other person employed by the owner, his agent or subcontractor, with material of any kind for the construction or repair of an edifice or other work, where such materials have been used in the erection or repair of such houses or other works, have a privilege on immovables.

The above named parties shall have a lien and privilege upon the building, improvement, or other work erected, and upon the lot of ground not exceeding one acre upon which the building, improvement or other work shall be erected;<sup>26</sup> provided, that such lot of ground belongs to the persons having such building, improvement, or other work erected; and if such building, improvement or other work is caused to be erected by a lessee of the lot of ground, in that case the privilege shall exist only against the lease and shall not affect the owner.

To preserve their privilege, they must record with the recorder of mortgages, in the parish where the property is

Bush (Ky.) 75; Gere v. Cushing, 5 Bush (Ky.) 304. If materials be furnished after the commencement of a suit against the owner of the property, of which the material-man had notice, he will be postponed to the creditor. Jones v. Jeffres, 11 Bush (Ky.) 636.

<sup>25</sup> Rev. Code 1900, §§ 3249, 3272, 3273; Rev. Stats. 1869, § 2880.

<sup>26</sup> The act of 1894 (Statute 180 requiring contractors to give security to workmen and mechanics for work performed by them) repeals only inconsistent prior statutes. Vordenbaumen v. Bartlett, 105 La. 752, 30 So. 219;

People's &c. Mill Co. v. Benoit, 117 La. 999, 42 S. W. 480. One who furnishes materials and builds a jail for a parish has a lien on the jail. McKnight v. Parish of Grant, 30 La. Ann. 361, 31 Am. Rep. 226. One who builds a church has a lien on the church. Jones v. Mount Zion, 30 La. Ann. 711. One who constructs a building on a lot owned by two joint owners, upon a contract made with one of them, is entitled to a privilege on the interest of such last named owner and on the whole building. Johnson v. Weinstock, 31 La. Ann. 698.

situated, the act containing the bargains they have made,<sup>27</sup> or a detailed statement of the amount due, attested under the oath of the party doing or having the work done, or acknowledgment of what is due to them by the debtor. Privileges are valid against third persons from the date of recording the act or evidence of indebtedness, as provided by law. The privileges herein mentioned are concurrent.<sup>28</sup>

Every mechanic, workman or other person doing or performing any work toward the erection, construction or finishing of any building in this state, erected under a contract between the owner and builder, or other person, whether such work shall be performed as journeyman, laborer, cartman, subcontractor or otherwise, and whose demands for work and labor done and performed toward the erection of such building have not been paid and satisfied, may deliver

<sup>27</sup> The recording of notes given in payment of the materials, after they have been furnished, does not answer the purposes of the law. *Cox's Succession*, 32 La. Ann. 1035. The recording of an attested account is not equivalent to service upon the proper party of an attested account. It does not convey constructive notice. *Consolidated Engineering Co. v. Crowley*, 105 La. 615, 30 So. 222. As to time for recording claim when contract is not in writing, see *Brasher v. Alexandria Coöperage Co.*, 50 La. Ann. 587, 23 So. 540.

<sup>28</sup> See *Jamison v. Barelli*, 20 La. Ann. 452, 454; *Haughery v. Thiberge*, 24 La. Ann. 442, 443. As to priority, see art. 3267 of Rev. Civ. Code 1900, and *Lenel's Succession*, 34 La. Ann. 868. The privilege of a builder, or furnisher of materials, ranks any mortgage in existence at the time the build-

er's contract was made, even though he neglects to record his privilege until after the building has been constructed. *Johnson v. Weinstock*, 31 La. Ann. 698. As to conflicting privileges, see art. 3268 of Civ. Code 1900, and *Lenel's Succession*, 34 La. Ann. 868. To preserve his privilege, one who furnishes lumber for a house must record the detailed statement. Showing merely the total amount charged with payments and credits it not sufficient. *Shreveport Nat. Bank v. Maples*, 119 La. 41, 43 So. 905. A subcontractor may look to the contractor, his debtor, for payment even though the contractor has assigned his right to payment under the contract. The subcontractor is not bound to look to the surety on the contractor's bond. *Simpson v. City*, 109 La. 897, 33 So. 912.

to the owner of such building an attested account of the amount and value of the work and labor thus performed, and remaining unpaid,<sup>29</sup> and thereupon, such owner shall retain out of his subsequent payments to the contractor the amount of such work and labor, for the benefit of the person so performing the same.

Whenever any account of labor performed on a building erected under a contract as aforesaid, shall be placed in the hands of the owner or his authorized agent, it shall be his duty to furnish his contractor with a copy of such papers, in order that, if there be any disagreement between such contractor and his creditor, they may, by amicable adjustment, between themselves or by arbitration, ascertain the true sum due; and if the contractor shall not, within ten days after the receipt of such paper, give the owner written notice that he intends to dispute the claim, or if, in ten days after giving such notice, he shall refuse or neglect to have the matter adjusted, as aforesaid, he shall be considered as assenting to the demand, and the owner shall pay the same when it becomes due.

If any such contractor shall dispute the claim of his journeyman or other person for work or labor performed, and if the matter can not be adjusted amicably between them-

<sup>29</sup> See *Stewart v. Christy*, 15 La. Ann. 325. To avoid personal liability to the subcontractor, the owner must require a bond from the contractor conditioned for the payment of laborers and materialmen. A bond conditioned for the faithful performance of the building contract does not relieve the owner from personal liability. *L'Hote Lumber Co. v. Dugue*, 115 La. 609, 39 So. 803; *Hughes v. Smith*, 114 La. 297, 38 So. 175. See *Wellman v. Smith*, 114 La. 228, 38 So. 151. This bond should be

signed by the surety before the work begins and within one week of the making of the contract. A surety who signs later, however, is liable to the owner. *Lichten-tag v. Feitel*, 113 La. 931, 37 So. 880. The owner can not sue the surety on such bond, where the owner has himself paid a subcontractor out of money due the contractor, which still remains in the owner's hands. *Neith Lodge v. Vordenbaumen*, 111 La. 213, 35 So. 524.

selves, it shall be submitted, on the agreement of both parties, to the arbitrament of three disinterested persons,<sup>30</sup> one to be chosen by each of the parties, and one by the two thus chosen; and the decision, in writing, of such three persons, or any two of them, shall be final and conclusive in the case submitted.

Whenever the amount due shall be adjusted and ascertained as above provided, and if the contractor shall not, within ten days after it is so adjusted and ascertained, pay the sum due to his creditor, with the costs incurred, the owner shall pay the same out of the funds as provided;<sup>31</sup> and which amount due may be recovered from the owner by the creditor of the contractor, in an action for money had and received to the use of the creditor, and shall be entitled to the same privileges as the contractor, to whose rights the said creditor shall have been subrogated, and to the extent in value of any balance due by the owner to his contractor, under the contract with him at the time of the notice first given as aforesaid, or subsequently accruing to such contractor under the same, if such amount shall be less than the sum due from said contractor to his creditor.

§ 1205. **Maine.**<sup>32</sup>—Whoever performs labor or furnishes labor or materials, in erecting, altering, moving or repairing a house, building or appurtenances, or in constructing, altering, or repairing a wharf, or pier, or any building thereon, by virtue of a contract with or by consent of the owner, has a lien thereon, and on the land on which it stands and on any interest that such owner has in the same, to secure payment thereof, with costs. If the owner of the building has no legal interest in the land on which the building is erect-

<sup>30</sup> The submission must be in writing. *Baxter v. Sisters of Charity*, 15 La. Ann. 686.

<sup>31</sup> See *Baxter v. Sisters of Charity*, 15 La. Ann. 686.

<sup>32</sup> Rev. Stats. 1903, ch. 93, §§ 29-33, as amended by Laws 1905, ch. 110.

ed, or to which it is moved, the lien attaches to the building, and may be enforced as hereinafter provided,<sup>33</sup> and if the owner of such land or building so contracting is a minor or married woman, such lien shall exist, and such minority or coverture shall not bar a recovery in any proceeding brought to enforce it.

If the labor or materials were not furnished by a contract with the owner of the property affected, the owner may prevent such lien for labor or materials not then performed or furnished by giving written notice to the person performing or furnishing the same, that he will not be responsible therefor.

The claimant, within sixty days after he ceases to labor or furnish materials as aforesaid, must file in the office of the clerk of the town in which such building is situated, a true statement of the amount due him, with all just credits given, together with a description of the property<sup>34</sup> intended to be covered by the lien; sufficiently accurate to identify it, and the names of the owners, if known, which shall be subscribed and sworn to by the person claiming the lien,

<sup>33</sup> An execution issued on a judgment recovered may be levied on the building, in the same manner as executions are levied generally on personal property. *Phillips v. Brown*, 74 Maine 549. One may have a lien for iron columns placed in position in a building being erected even though such columns are removed by the owner's direction. *Fletcher-Crowell Co. v. Chevalier*, 108 Maine 435, 81 Atl. 578.

<sup>34</sup> Failure to give notice within forty days or to file suit within ninety days forfeits the lien. *Foss v. Desjardins*, 98 Maine 539, 57 Atl. 881. See also *Dole v. Bangor Auditorium Assn.*, 94 Maine

532, 48 Atl. 115. A material-man's lien is perfected by the filing and recording his statement of lien in the town clerk's office. *Whitham v. Wing*, 108 Maine 364, 81 Atl. 100. The statement must be subscribed by the claimant. A bill with his name at the top, though in his own hand, is not a compliance with the statute. *Strattan v. Shoenbar (Maine)* 10 Atl. 446. The statute makes no distinction between a contractor and a subcontractor, as regards the "statement of the amount due him, with all just credits given." *Wescott v. Bunker*, 83 Maine 499, 22 Atl. 388.



or by some one in his behalf, and recorded in a book kept for that purpose, by said clerk who is entitled to the same fees therefor as for recording mortgages, but this section shall not apply where the labor or materials are furnished by a contract with the owner of the property affected. No inaccuracy in such statement relating to said property, if the same can be reasonably recognized, or in stating the amount due for labor or materials, invalidates the proceedings, unless it appears that the person making it wilfully claims more than his due.

Suit to enforce the lien must be commenced within ninety days after the last labor is performed or materials furnished.<sup>35</sup>

§ 1206. **Maryland.**<sup>36</sup>—Every building erected and every building repaired, rebuilt or improved to the extent of one-fourth its value in Baltimore city and in any of the counties shall be subject to a lien for the payment of all debts contracted for work done for about the same; and in the counties, except Baltimore county, every such building shall also be subject to a lien for the payment of all debts contracted for materials furnished for or about the same. In Baltimore county nothing in this article (except as hereinafter provided<sup>37</sup>) shall entitle any person, firm or corporation to the benefit of such lien upon any such building for materials furnished for or about the same,<sup>38</sup> unless the con-

<sup>35</sup> The lien is lost by including in the judgment a claim for which no right of lien exists. *Johnson v. Pike*, 35 Maine 291; *Lambard v. Pike*, 33 Maine 141; *Bicknell v. Trickey*, 34 Maine 273.

<sup>36</sup> Pub. Gen. Laws 1904, Art. 63, §§ 1-35. See Act 1898, ch. 502. Under this act, which gives a lien for labor alone, a contractor agreeing to furnish models and cut marble is entitled to a lien for the labor

of cutting. *Evans Marble Co. v. International Trust Co.*, 101 Md. 210, 60 Atl. 667, 109 Am. St. 568.

<sup>37</sup> This section shall not affect or impair liens existing in Baltimore county on April 11, 1902, under pre-existing laws.

<sup>38</sup> Every machine, wharf, and bridge erected, constructed, or repaired is also subject to such lien. Pub. Gen. Laws 1904, Art. 63, § 22. But there is no lien for machin-

tract for furnishing such material shall have been made directly with the owner of such building or his agent.

In all cases in which a building shall be commenced and not finished, the lien shall attach thereto to the extent of the work done or materials furnished.

The said lien shall extend to the ground covered by such building and to so much other ground immediately adjacent thereto and belonging in like manner to the owner of such building as may be necessary for the ordinary and useful purposes of such building, the quantity and boundaries whereof shall be designated in the following manner—

The owner of any lot or farm who may be desirous of erecting any building or of contracting with any person for the erection thereof may define in writing the boundaries of the lot or land or curtilage appurtenant to such building previously to the commencement thereof and file the same with the clerk of the circuit court for the county, or of the superior court of Baltimore city, as the case may be, for record, and such designation of boundaries shall be obligatory upon all persons concerned.<sup>39</sup>

If the contract for furnishing such work or materials, or both, shall have been made with any architect or builder or any other person except the owner of the lot on which the building may be erected, or his agent, the person so

ery furnished for the manufacture of the material used for a bridge. *Basshor v. Baltimore & Ohio R. Co.*, 65 Md. 99, 3 Atl. 285. No antecedent express contract with the owner need be shown as the foundation of the lien. It arises from doing work or furnishing materials for a building. *German Luth. Church v. Heise*, 44 Md. 453; *Sodini v. Winter*, 32 Md. 130; *Franklin F. Ins. Co. v. Coates*, 14 Md. 285; *Treusch v.*

*Shryock*, 51 Md. 162. Laws of 1910, ch. 52, § 1, applying only to Baltimore city, gives a lien only for work performed and a subcontractor under a contract to furnish labor and materials is not entitled to a lien. *Dunn v. Brager*, 116 Md. 242, 81 Atl. 516.

<sup>39</sup> In default of such designation, owner may apply to court to define lot. Court may stay proceedings to enforce the lien until the boundaries are designated.

doing the work or furnishing materials, or both, shall not be entitled to a lien unless, within sixty days after furnishing the same, he or his agent shall give notice in writing to such owner or agent, if resident within the city or county, of his intention to claim such lien.<sup>40</sup> The owner, having received such notice, may retain from the cost of such building the amount which he may ascertain to be due to the party giving such notice; and in case any lien be laid by the party giving such notice and he also laid by the contractor or builder, the said contractor or builder shall receive only the difference between the amount due him and that due the person giving the notice.

Any person furnishing work or materials, or both, and complying with the provisions of this article, shall be entitled to the lien hereby given without regard to the amount of his claim.

The lien shall be preferred to all mortgages, judgments, liens and incumbrances which attach upon the said building or the grounds covered thereby subsequently to the commencement thereof; and all the mortgages and liens other than liens which have attached thereto prior to the commencement of the said building and which by the laws

<sup>40</sup> Provision is made for filing and posting notice if service can not be made. Pub. Gen. Laws 1904, Art. 63, § 12. See as to the notice generally, *Kenly v. Sisters of Charity*, 63 Md. 306; *Hess v. Poultney*, 10 Md. 257. The notice must be served on the owner or his agent personally; or if this be impracticable, it may be placed on the building. *Kenly v. Sisters of Charity*, 63 Md. 306. But to make the latter sufficient, it must be shown affirmatively that personal notice was impracticable. The claimant can not elect between these modes of service. The no-

tice can not be amended after the expiration of the sixty days. *Kenly v. Sisters of Charity*, 63 Md. 306; *Hill v. Kaufman*, 98 Md. 247, 56 Atl. 783; *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575. The notice must be signed by the claimant; but if his attorney signs it by his authority, it is sufficient. *Treusch v. Shryock*, 51 Md. 162. As to husband's agency, see *Conway v. Crook*, 66 Md. 290, 7 Atl. 402. Personal notice must be served on a married woman before a lien can be enforced against her real estate. *Frazee v. Frazee*, 79 Md. 27, 28 Atl. 1105.

of this state are required to be recorded shall be postponed to said lien, unless recorded prior to the commencement of said building.<sup>41</sup>

Each person entitled to such lien shall file a claim or statement of his demand in the office of the clerk of the circuit court for the county or the superior court of Baltimore city, as the case may be, and such claim or statement shall be redelivered by the clerk to the party, filing the same after it has been recorded as provided by statute. Every such claim shall set forth:<sup>42</sup> first, the name of the party claimant and of the owner or reputed owner of the building,<sup>43</sup> and also of the contractor or architect, or builder, when the contract was made by the claimant with such contractor, architect or builder; second, the amount or sum claimed to be due and the nature or kind of work or the kind and amount of materials furnished and the time when the materials were furnished or the work done;<sup>44</sup> thirdly, the locality of the building and the number and size of the stories of the same, or such other matters of description as may be necessary to identify the same.<sup>45</sup>

<sup>41</sup> Provision is made for ascertaining priorities where a building is sold under legal process. Pub. Gen. Laws 1904, Art. 63, § 16. Mortgages and other liens attaching subsequently to the commencement of a building are postponed in favor of the mechanic's lien, whether for work done or materials furnished, and whether the work be done or the materials be furnished before or after the attaching of such mortgages or other liens. *Rosenthal v. Maryland Brick Co.*, 61 Md. 590.

<sup>42</sup> As to the claim in general, see *Treusch v. Shryock*, 51 Md. 162.

<sup>43</sup> The claim must explicitly and expressly set out the name of

the owner. It is not sufficient to do this by implication or parenthetically. *Reindollar v. Flickinger*, 59 Md. 469.

<sup>44</sup> See *Wilson v. Merryman*, 48 Md. 328. An accidental error in regard to the time will not impair the lien if the proof supplies the correct date, and shows this to be within the time allowed for filing the lien. *Treusch v. Shryock*, 55 Md. 330, 51 Md. 162.

<sup>45</sup> When a claim is filed by a contractor, persons to whom he is indebted for labor or materials may have the benefit of such lien, and may apply by petition to be paid out of the moneys to be received. Pub. Gen. Laws 1904, Art. 63, § 20.

Every such debt shall be a lien until after the expiration of six months after the work has been finished or the materials furnished, although no claim has been filed therefor, but no longer, unless a claim shall be filed at or before the expiration of that period.<sup>46</sup>

The proceeding to enforce the lien is by bill in equity<sup>47</sup> or by scire facias. When it is by a bill in equity, the court shall decree a sale and appoint a trustee to make sale thereof and shall apportion the proceeds of such sale among the persons entitled to liens according to their respective rights. If the proceeding is by scire facias, the scire facias shall recite the filing of the claim with the name of the owner of the property to be affected by the lien, the name of the claimant and the amount of the claim and the date of filing the same, with the usual clause of scire facias to the persons to be affected by such writ.<sup>48</sup> Every judgment rendered on a scire facias under this article may be enforced by execution, or otherwise, as other judgments.

§ 1207. **Massachusetts.**<sup>49</sup>—A person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration, repair or removal of a building or structure upon land, by virtue of an agreement<sup>50</sup> with or by consent of the owner of such building or structure, or of any person having authority from or rightfully acting for such owner in procuring or furnishing such labor or materials, shall, subject to the pro-

<sup>46</sup> See *Treusch v. Shryock*, 51 Md. 162; *Heath v. Tyler*, 44 Md. 312.

<sup>47</sup> See *Watts v. Whittington*, 48 Md. 353.

<sup>48</sup> See *Winder v. Caldwell*, 14 How. (U. S.) 434, 14 L. ed. 487; *Thomas v. Turner*, 16 Md. 105; *Baker v. Winter*, 15 Md. 1; *Wilson v. Merryman*, 48 Md. 328.

<sup>49</sup> Rev. Laws 1902, ch. 197, §§ 1-6.

<sup>50</sup> The agreement need not be in writing. *Whitford v. Newell*, 2 Allen (Mass.) 424. The laborer's right to a lien is not affected by the contract between the contractor and owner. *Bowen v. Phinney*, 162 Mass. 593, 39 N. E. 283, 44 Am. St. 391.

visions hereinafter mentioned, have a lien upon such building or structure and upon the interest of the owner thereof in the lot of land upon which the same is situated to secure the payment of the debt so due to him, and of the costs of enforcing such lien.

If such agreement is for labor performed or furnished and for materials furnished under an entire contract and for an entire price, a lien for the labor alone may be enforced, if the value of such labor can be distinctly shown; but it shall not be enforced for an amount greater than the contract price.<sup>51</sup>

The lien shall not attach for materials unless the person who furnishes them, before so doing, gives notice in writing to the owner of the property to be affected by the lien, if such owner is not the purchaser of such materials, that he intends to claim such lien.<sup>52</sup>

If the owner of a building or structure which is in process

<sup>51</sup> Prior to Stat. 1872, ch. 318, under an entire contract, in which the price of the labor and of the material is not apportioned, there could be no lien for the labor where there was none for the material. *Morrison v. Minot*, 5 Allen (Mass.) 403; *Graves v. Bemis*, 8 Allen (Mass.) 573; *Clark v. Kingsley*, 8 Allen (Mass.) 543; *Mulrey v. Barrow*, 11 Allen (Mass.) 152; *Felton v. Minot*, 7 Allen (Mass.) 412; *Whitney v. Joslin*, 108 Mass. 103; *Gogin v. Walsh*, 124 Mass. 516. Under the present statute, if there is no lien for the materials furnished, there can be no lien for the labor alone, unless the worth of this can be distinctly shown. *Smith v. Emerson*, 126 Mass. 169. The petition must set forth the entire price agreed upon

for the entire contract. *Gogin v. Walsh*, 124 Mass. 516.

<sup>52</sup> *Robbins v. Blevins*, 109 Mass. 219. There is no occasion for such notice when the owner has himself entered into an agreement for the furnishing of the materials. *Whitford v. Newell*, 2 Allen (Mass.) 424. The requirement for notice can not be waived by the landowner. *Richards v. O'Brien*, 173 Mass. 332, 53 N. E. 858. Where a claim is partly for labor and partly for materials no lien can be claimed for any part unless the notice required by statute is given. *McDowell v. Rockwood*, 182 Mass. 150, 65 N. E. 65. As to cases where the contractor acquires the title while the materials are being furnished, see *Anderson v. Berg*, 174 Mass. 404, 54 N. E. 877; *Courtemanche v.*

of erection, alteration, repair or removal is a person other than the party by whom or in whose behalf a contract for labor and materials has been made, he may prevent the attaching of a lien for labor not then performed, or for materials not then furnished, by giving notice in writing<sup>53</sup> to the person who performs or furnishes such labor or furnishes such materials, that he will not be responsible therefor.

The lien shall not avail against a mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed.

The lien shall be dissolved unless the person claiming it, within thirty days after he ceased to labor on or to furnish labor or materials for the building or structure, files in the registry of deeds for the county or district in which it is situated a statement, signed and sworn to by him or a person in his behalf, giving a just and true account of the amount due him, with all just credits, a description of the property intended to be covered by the lien, sufficiently accurate for identification and the name of the owner<sup>54</sup> or owners of such property, if known. If a lien is claimed for labor only performed or furnished under an entire contract which includes both labor and materials at an entire price, the contract price, the number of days of labor performed or furnished and the value of the same shall also be stated.<sup>55</sup>

Blackstone Val. St. R. Co., 170 Mass. 50, 48 N. E. 937, 64 Am. St. 275. A subcontractor, who has failed to give notice to the owner of his intention to claim a lien for materials furnished, has no right to a lien upon the ground that his employer has broken his contract and absconded. *Gogen v. Walsh*, 124 Mass. 516.

<sup>53</sup> An oral notice will not have this effect. *Shaw v. Thompson*, 105 Mass. 345.

<sup>54</sup> It is not necessary that the certificate should aver that the amount therein set forth is "a statement of a just and true account of the amount due, with all just credits." *Gilbert v. Fowler*, 116 Mass. 375.

<sup>55</sup> Under this provision a statement which contains two items, as follows: "Labor of myself, between September 1, 1889, and May 1, 1890;" and "Labor laying 1,100 yards concreting, at 25 cents per

The statement shall not be invalid or insufficient solely by reason of an inaccuracy in stating or failing to state the contract price, the number of days of labor performed or furnished, and the value of the same, if it is shown that there was no intention to mislead and that the parties entitled to notice of the statement were not in fact misled thereby.

The lien is enforced by petition and order of sale.<sup>56</sup>

§ 1208. **Michigan.**<sup>57</sup>—Every person who shall, in pursuance of any contract, express or implied, written or unwritten, existing between himself as contractor, and the owner, part owner or lessee of any interest in real estate, build, alter, improve, repair, erect, ornament or put in, or who shall furnish any labor or materials in or for building, altering, improving, repairing, erecting, ornamenting or putting in any house, building, machinery, wharf or structure, or who shall excavate or build in whole, or in part, any

yard, in the last part of August, 1890, and ending August 30, 1890," is insufficient, because the number of days' labor performed does not appear. *Ellinwood v. Worcester*, 154 Mass. 590, 28 N. E. 1053. Under this provision, also, a statement which avers that the labor was furnished under a contract, "the contract price being three dollars per square for excavation, and two dollars and fifty cents per perch for laying the stone, cement to be furnished by me," and which states the number of days' labor furnished, and the value of the labor, is insufficient, as it does not show the contract price of the entire work. *Hurley v. Lally*, 151 Mass. 129, 23 N. E. 834.

<sup>56</sup> Rev. Laws 1902, ch. 197, §§ 9-17. As to the petition and form

and service of precept, see Rev. Laws 1902, ch. 197, §§ 9-13, as amended by Supp. 1908, p. 1411. As to dissolution of liens by bond see Rev. Laws 1902, ch. 197, §§ 28-30, as amended by Supp. 1908, p. 1412. When a contractor abandons his contract for the construction of a building without a good excuse, he can not enforce a lien. *Rochford v. Rochford*, 192 Mass. 231, 78 N. E. 454.

<sup>57</sup> Howell's Stats. 1912, §§ 13766-13771, 13773-13775, 13779, 13780. Act No. 199, Public Acts 1893, as amended by Act No. 143, Pub. Acts 1897, has been held constitutional. *Smalley v. Gearing*, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797.



foundation, cellar or basement for any such house, building, structure or wharf, or shall build or repair any sidewalks, or shall furnish any materials therefor, and every person who shall be subcontractor, laborer, or material-man, perform any labor for or furnish materials to such original or principal contractor, or any subcontractor, in carrying forward or completing any such contract, shall have a lien therefor upon such house, building, machinery, wharf, walk or walks, foundation, cellar or basement, and other structures, and its appurtenances, and also upon the entire interest of such owner, part owner or lessee in and to the lot or piece of land, not exceeding one quarter-section of land, or if in any incorporated city or village, not exceeding the lot or lots upon or around or in front of which such improvement is made, to the extent of the right, title and interest of such owner, part owner or lessee at the time work was commenced or materials were begun to be furnished by the contractor under the original contract, or by the subcontractor who furnishes or is furnished with any labor or material in the performance or execution of such subcontract and also the extent of any subsequent acquired interest of any such owner, part owner or lessee, and in case of the construction of a number of buildings, foundations, cellars, basements, or walks under one contract upon, around or in front of, the same lot or contiguous lots for the same owner, part owner or lessee, of any interest in real estate upon which said buildings are situated, or upon, around or in front of which said walk or walks are built or repaired, such lien for such material or labor so furnished, shall attach to all of said buildings, foundations, cellars, basements, walk or walks, together with the land upon, around or in front of which the same are being constructed, the same as hereinbefore provided in case of a single building, foundation, cellar, basement, walk or improvement; provided, that any person, firm or corporation furnishing material or performing labor of any kind entering into the

construction of such building, structure, foundation, cellar, basement, or walk, shall within thirty days after furnishing the first of such material or performing the first of such labor to any contractor or subcontractor, serve on the owner, part owner or lessee of the premises, or his agent a notice, which notice shall be such as will inform the owner, part owner or lessee of the premises, or his agent, of the nature of the materials furnished, or labor performed, or to be performed, and a description of the premises where furnished, if such owner, part owner or lessee reside in, or has a known agent in the county in charge of such structure, improvement, foundations, cellars, basements, walk or walks.<sup>57a</sup>

Such notice, however, shall be sufficient if served at any time subsequent to said thirty days, but before the original contractor shall make out and give to the owner, part owner or lessee or his agent, a statement under oath of the number and names of every subcontractor or laborer in his employ, and of every person, firm or corporation, furnishing materials, giving the amount, if anything, which is due or to become due on them, or any of them, for work done or materials furnished as hereinafter required.

The owner, part owner or lessee shall not be liable to the subcontractor, material-men or laborers, for any greater amount than he contracted to pay the original contractor, and shall be entitled to recoup any damages which he may sustain by reason of any failure or omission in the performance of such contract, but the risk of all payments made to the original contractor, after he shall have received the notice above mentioned, or before the contractor shall have furnished him with a statement, as hereinbefore provided, shall be upon the owner, part owner or lessee, until the expiration of sixty days, within which claims for lien may be filed as hereinafter provided, and no payment made to any con-

<sup>57a</sup> The statutory form of notice follows at this point.

tractor before the expiration of said sixty days shall defeat any lien of any subcontractor, material-man or laborer, unless such payment has been distributed among the subcontractors, material-men or laborers, or if distributed in part only, then to the extent of such distributions.<sup>58</sup>

In case the title to such lands upon which improvements are made is held by husband and wife jointly, or in case the lands upon which such improvements are made are held and occupied as a homestead, the lien given by this act shall attach to such lands and improvements, if the improvements be made in pursuance of a contract in writing signed by both the husband and wife.

Any person furnishing services or materials for the erection of a new building or structure upon land to which the person contracting for such erection has no legal title, shall have a lien therefor upon such buildings [building] or structure; and the forfeiture or surrender of any title or claim of title held by such contracting person to such land shall not defeat the lien upon such building or structure of such person furnishing services or materials as aforesaid. In case the property covered by the lien is held by the vendee in a land contract, and he surrenders or forfeits his rights thereunder, the person or persons holding such liens may be subrogated to the rights of such vendee, as his rights existed immediately before such surrender or forfeiture, by performing the covenants contained in such contract within thirty days after such forfeiture or surrender is made.

The owner, part owner or lessee may at any time retain

<sup>58</sup> In computing the cost of a building in order to pro rate the contract price among lien claimants, payments made by the owner without requiring the statement mentioned in Stats. 1912, § 13769, and actually paid to laborers and material-men, are to be considered. *Godfrey Lumber*

*Co. v. Cole*, 151 Mich. 280, 114 N. W. 1018. See *Kotcher v. Perrin*, 149 Mich. 690, 13 N. W. 284. If a person who contracts for the repair or erection of a building has no title to land, the lien can attach only to the building and not to the land. *Sheldon v. Bremer*, 166 Mich. 578, 132 N. W. 117.

from any moneys due or to become due to the original contractor, an amount sufficient to pay all demands owing or unpaid to any subcontractor, material-man or laborer, who has filed and served the notice in manner and form as provided above. The original contractor shall, whenever any payment of money shall become due from the owner, part owner or lessee, or whenever he desires to draw any money from the owner, part owner or lessee on such contract, make out and give to the owner, part owner or lessee, or his agent, a statement under oath of the number and names of every subcontractor or laborer in his employ, and of every person furnishing materials, giving the amount, if anything, which is due or to become due to them or any of them for work done or materials furnished, and the owner, part owner or lessee, or his agent, may retain out of any money then due or to become due to the contractor, an amount sufficient to pay all demands that are due or to become due to such subcontractors, laborers and material-men, as shown by the contractor's statement, and pay the same to them according to their respective rights; and all payments so made shall, as between such owner, part owner, or lessee, and such contractor, be considered the same as if paid to such original contractor. Until the statement<sup>59</sup> provided for in this paragraph is made, in manner and form as herein provided, the contractor shall have no right of action or lien against the owner, part owner or lessee on account of such contract, and any payments made by the owner, part owner or lessee, before such statement is made, or without retaining sufficient money, if that amount be due or is to become

<sup>59</sup> The statement must be filed even though the rights of third parties are not involved. *Kerr-Murray Mfg. Co. v. Kalamazoo Heat &c. Co.*, 124 Mich. 111, 82 N. W. 801. See also *Walker v. Syms*, 118 Mich. 183, 76 N. W. 320. Until this statement is filed the contrac-

tor has no right to enforce his claim by lien; *Martin v. Warren*, 109 Mich. 584, 47 N. W. 897. Or by action; *Barnard v. McLeod*, 114 Mich. 73, 72 N. W. 74. See *Sterner v. Haas*, 108 Mich. 488, 66 N. W. 348.

due, to pay the subcontractors, laborers or material-men, as shown by the statement, shall be considered illegal and made in violation of the rights of the persons intended to be benefited by this act, and the rights of such subcontractors, laborers and material-men to a lien shall not be affected thereby. If neither such owner, part owner, lessee nor his agent can be found within the county, then it shall not be necessary for the contractor to make and deliver such statement as a prerequisite to the institution of proceedings under this act or other suit or proceeding. In order that the owner, part owner, or lessee may be protected, he may at any time during the progress of the work demand in writing of the contractor, the statement herein provided for, which shall be made by the contractor and given to the owner, part owner or lessee, or his agent, and if such contractor fail to furnish such statement within five days after demand made, he shall be liable to such owner, part owner, or lessee, each time he so refuses or neglects to comply with such demand, in the sum of one hundred dollars, and also for all actual damages occasioned by such neglect or refusal, to be recovered in an action on the case or in any other appropriate proceeding.

Every person, or his agent or attorney, whether contractor, subcontractor, material-man or laborer, who wishes to avail himself of the provisions of this statute, shall make and file in the office of the register of deeds, in the county or counties in which said real estate, house, building, structure or improvement to be charged with the lien is situated, a just and true statement or account of the demand due him, over and above all legal set-offs, setting forth the time when such materials were furnished or labor performed, and for whom, and containing a correct description of the property to be charged with the lien, and the name of the owner, part owner, or lessee, if known, which statement shall be verified by affidavit. Such verified statement or account shall be filed within sixty days from the date on which the last of

the materials shall have been furnished or the last of the labor shall have been performed by the person claiming the lien.<sup>60</sup>

The register of deeds shall indorse upon every statement or account, the date of its filing, and make an abstract thereof in a book to be kept by him for that purpose, and properly indexed, containing the date of its filing, the name of the person claiming the lien, the amount of the lien, the name of the person against whom the lien is filed, and a description of the property to be charged with the same, and such filing shall have the same effect as to notice as against subsequent purchasers or incumbrancers as the recording of a mortgage. The register of deeds shall receive the sum of seventy-five cents as his fees for the filing of such statement or account, and all subsequent papers filed with him relating to such lien.

Every person filing such statement or account as above provided for, excepting those persons contracting or dealing directly with the owner, part owner or lessee of such premises shall, within ten days after the filing thereof, serve on the owner, part owner or lessee of such premises, if he can be found within the county, or in case of his absence from the county, on his agent<sup>61</sup> having in charge of such premises within the county wherein the property is sit-

<sup>60</sup> Here follows the statutory form of statement.

<sup>61</sup> Service on the wife of the owner, he being absent, is service on the owner's "agent having in charge such premises." *J. E. Grelick Co. v. Rogers*, 144 Mich. 313, 107 N. W. 885. Failure to serve this notice does not relieve the owner when he pays contractor in full without requiring notice from him as provided by statute. *Blitz v. Fields*, 115 Mich. 675, 74 N. W. 186. For construction of word

"due" see *Smalley v. Ashland Brown-Stone Co.*, 114 Mich. 104, 72 N. W. 29. Failure to file statement with register is not necessarily fatal. *Smalley v. Northwestern Terra Cotta Co.*, 113 Mich. 141, 71 N. W. 466. When landowner signs an acceptance of service of lien claim in lieu of posting, he is estopped from objecting that the statutory service was not made. *Monat v. Fisher*, 104 Mich. 262, 62 N. W. 338.

uated, a copy of such statement or claim; but if neither of such persons can be found within the county where such premises are situated, then such copy shall be served by posting in some conspicuous place on said premises within five days after the same might have been served personally, could the principal or agent, as aforesaid, have been found. Proof of such service and the date and manner thereof shall be made by the affidavit of such person serving or posting the same, which proof of such service shall be filed in the office of the register of deeds [for] such county before any subsequent proceedings shall be taken for the enforcement of such lien.<sup>62</sup>

Each person claiming a lien as aforesaid shall, from time to time, whenever required by such owner, part owner or lessee, or his agent, and within five days from demand thereof, furnish such person demanding the same, a written statement of the amount of work and materials furnished to date of statement, and then unpaid, as nearly as can then be ascertained, under penalty of a forfeiture of his lien.<sup>63</sup>

The several liens herein provided for shall continue for one year after such statement or account is filed in the office of the register of deeds, and no longer unless proceedings are begun to enforce the same as hereinafter provided, and such liens shall take priority as follows: 1. As between persons claiming liens under this statute, the several liens upon

<sup>62</sup> See, as to this provision, *Roberts v. Miller*, 32 Mich. 289; *Comstock v. McEvoy*, 52 Mich. 324, 17 N. W. 931. The order of filing statement and making claim of lien is immaterial, so long as both are done before the time for asserting a lien expires. *Holliday v. Mathewson*, 146 Mich. 336, 109 N. W. 669. In determining whether a lien attaches, the statute will be strictly construed, but after a lien attaches a liberal con-

struction will prevail. *Godfrey Lumber Co. v. Kline*, 167 Mich. 629, 133 N. W. 528; *Smalley v. Northwestern Terra-Cotta Co.*, 113 Mich. 141, 71 N. W. 466.

<sup>63</sup> Failure to furnish this statement forfeits the lien. *Frohlich v. Beecher*, 139 Mich. 278, 102 N. W. 736; *Dittmer v. Bath*, 117 Mich. 571, 76 N. W. 89; *Wiltzie v. Harvey*, 114 Mich. 131, 72 N. W. 134.

the same property attaching by reason of work, labor or materials furnished in carrying forward or completing the same building or buildings, machinery, structure or improvement, shall be deemed simultaneous mortgages. 2. They shall take priority to all garnishments for the contract debt made prior or subsequent to the commencement of the furnishing of the materials or performance of the labor without regard to the date of filing the claims for lien. 3. They shall be preferred to all other titles, liens or incumbrances which may attach to or upon such building, machinery, structure or improvement, or to or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of said building or buildings, erection, structure or improvement. 4. The liens for such labor or materials furnished, including those for additions, repairs and betterments, shall attach to the buildings, machinery, erection, structure or improvement for which they are furnished or done, subject to any prior recorded title, claim, lien, incumbrance, or mortgage to or upon the land upon which such building or buildings, machinery, erection, structure or improvement belongs or is put.

Any person holding a lien for such labor or materials furnished upon any premises, subject to any prior recorded lien, incumbrance or mortgage, may pay off any such prior lien, incumbrance or mortgage, and shall thereupon be subrogated to all the rights of the prior holder of such lien, incumbrance or mortgage.

Proceedings to enforce such lien shall be by bill in chancery, under oath, and notice of *lis pendens* filed for record in the office of the register of deeds shall have the effect to continue such lien pending such proceedings.

Upon final decree the court may order a sale of the buildings or machinery separate, or the lands, buildings, machinery, structure or improvements, together, by a circuit court commissioner or receiver, or may order the property



into the hands of a receiver to be leased or rented from time to time under the direction of the court until the liens shall be discharged, or make such other order or disposition of the premises as justice may require. If upon the coming in and confirmation of the final report any portion of the liens shall still be unpaid, the court may enter personal decree for the same against the party who may be personally liable therefor, and execution shall issue for the same as upon other personal decrees rendered by the court.

If any part of the premises can be separated from the residue and sold without damage to the whole, and if the value thereof shall be sufficient to satisfy all the claims proved in the case, the court may order a sale of that part, if it shall appear to be most for the interest of all the parties concerned.

§ 1209. **Minnesota.**<sup>64</sup>—Whoever contributes to the improvement of real estate by performing labor, or furnishing skill, material, or machinery, for any of the purposes herein-after stated, whether under a contract with the owner of such real estate or at the instance of any agent, trustee, contractor or subcontractor of such owner, shall have a lien upon said improvement, and upon the land on which it is situated or to which it may be removed, for the price or value of such contribution; that is to say, for the erection, alteration, repair or removal of any building, fixtures, bridge, wharf, fence or other structure thereon, or for grading, filling in or excavating the same, or for digging or repairing any ditch, drain, well, fountain, cistern, reservoir or vault thereon, or for laying, altering, or repairing any sidewalk, curb, gutter, paving, sewer, pipe or conduit in or upon the same or in or upon the adjoining half of any highway, street, or alley upon which the same abuts.

If the contribution be made under a contract with the

<sup>64</sup> Gen. Stats. 1913, §§ 7020-7033.

owner and for an agreed price, the lien as against him shall be for the sum so agreed upon; otherwise, and in all cases as against others than the owner, it shall be for the reasonable value of the work done, and of the skill, material and machinery furnished. It shall extend to all the interest and title of the owner in and to the premises improved, not exceeding forty acres in area if situated outside the limits of an incorporated city or village, and not exceeding one acre if within such limits.

All such liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other incumbrance not then of record, unless the lienholder had actual notice thereof. As against a bona fide purchaser, mortgagee or incumbrancer without notice, however, no lien shall attach prior to the actual and visible beginning of the improvement on the ground, but a person having a contract for the furnishing of labor, skill, material or machinery for such improvement, may file for record with the register of deeds of the county within which the premises are situated, a brief statement of the nature of such contract, which statement shall be notice of his lien for the contract price or value of all contributions to such improvement thereafter made by him or at his instance.

Whenever land is sold under an executory contract requiring the vendee to improve the same, and such contract is forfeited or surrendered after liens have attached by reason of such improvements, the title of the vendor shall be subject thereto; but he shall not be personally liable if the contract was made in good faith. When improvements are made by one person upon the land of another, all persons interested therein otherwise than as bona fide prior incumbrancers or lienors shall be deemed to have authorized such improvements, in so far as to subject their interests to liens therefor. But any person who has not authorized the same

may protect his interest from such liens by serving upon the persons doing work or otherwise contributing to such improvement, within five days after knowledge therefor, written notice that the improvement is not being made at his instance, or by posting like notice, and keeping the same posted, in a conspicuous place on the premises; provided, that as against a lessor no lien is given for repairs made by or at the instance of his lessee.

The owner may withhold from his contractor so much of the contract price as may be necessary to meet the demands of all persons, other than such contractor, having a lien upon the premises for labor, skill, or material furnished for the improvement, and for which the contractor is liable; and he may pay and discharge all such liens and deduct the cost thereof from such contract price. Any such person having a lien under the contractor, may serve upon the owner, at any time, a notice of his claim. The owner, within fifteen days after the completion of the contract, may require any person having a lien hereunder, by written request therefor, to furnish to him an itemized and verified account of his lien claim, the amount thereof, and his name and address, and no action or other proceeding shall be commenced for the enforcement of such lien until ten days after such statement is so furnished. The word "owner" as used in this section shall include any person interested in the premises otherwise than as a lienor thereunder.

The lien shall cease at the end of ninety days after doing the last of such work, or furnishing the last item of such skill, material, or machinery, unless within such period a statement of the claim therefor be filed for record with the register of deeds of the county in which the improved premises are situated.<sup>65</sup> Such statement shall be made by or at the instance of the lien claimant, be verified by the oath of

<sup>65</sup> The subsequent withdrawal of the original verified account, so recorded, will not impair or affect the validity of the lien. *Paul v. Nample*, 44 Minn. 453, 47 N. W. 51.

some person shown by such verification to have knowledge of the facts stated, and shall set forth: 1. A notice of intention to claim and hold a lien, and the amount thereof. 2. That such amount is due and owing to the claimant for labor performed, or for skill, material or machinery furnished, and for what improvement the same was done or applied. 3. The names of the claimant and of the person for or to whom performed or furnished. 4. The dates when the first and last items of the claimant's contribution to the improvements were made. 5. A description of the premises to be charged, identifying the same with reasonable certainty. 6. The name of the owner thereof at the time of making such statement, according to the best information then had.<sup>66</sup>

Such liens may be enforced by action in the district court of the county in which the improved premises or some part thereof are situated, which action shall be begun and conducted in the same manner as actions for the foreclosure of mortgages upon real estate, except as otherwise provided.

At the beginning of the action the plaintiff shall file for record with the register of deeds of the county in which it is brought, a notice of the pendency thereof, embracing therein a copy of the summons, omitting the caption. After such filing, no other action shall be commenced for the enforcement of any lien arising from the improvement described, but all such lienholders shall intervene in the original action by answer.<sup>67</sup> Any such lienholder not named as a defendant may nevertheless answer the complaint and be admitted as a party. If more than one action shall be

<sup>66</sup> Under a former and similar statute, it was held that the provision concerning the statement did not imperatively require the lien statement filed to set forth the name of the owner of the property "at the time of making said statement." It was held suffi-

cient that the ownership at the time of the making of the contract and the furnishing of the material was set forth. *Finlayson v. Biebighauser*, 51 Minn. 202, 53 N. W. 362.

<sup>67</sup> See Gen. Stats. 1913, § 7029.

commenced in good faith, all shall be consolidated and tried as one, under such order of the court as may best protect the rights of all parties concerned. But no lien shall be enforced in any case unless the holder thereof shall assert the same, either by complaint or answer, within one year after the date of the last item of his claim as set forth in the recorded lien statement; nor shall any person be bound by the judgment in such action unless he is made a party thereto within a year.

The judgment shall direct a sale of the real estate or other property for the satisfaction of all liens charged thereon, and the manner of such sale, subject to the rights of all persons which are paramount to such liens or any of them. It shall require the officer making such sale to pay over and distribute the proceeds of the sale, after deducting all lawful charges and expenses, to and among the lienors to the amount of their respective claims, if there is sufficient therefor; and if there is not sufficient then to divide and distribute the same among the several lienors in proportion to the amount due to each, and without priority among themselves. If the estate sold be a leasehold having not more than two years to run, or be the interest of a vendee under an executory contract of sale the conditions whereof are to be performed within the same period, no redemption shall be allowed; in all other cases the right of redemption shall be the same as upon execution sales. But no sale shall be deemed complete until reported to and confirmed by the court.

§ 1210. Mississippi.<sup>68</sup>—Every house, building or structure of any kind, and any fixed machinery, gearing or other fixture that may or may not be used or connected therewith, and every boat or other water craft, railroad or railroad

<sup>68</sup> Code 1906, §§ 3058, 3062, 3068, 3069. Laborers on railroads having been given the same rights as other mechanics, they took them subject to the same obligations. *Herrin v. Warren*, 61 Miss. 509.

embankment erected, constructed, altered or repaired shall be liable for the debt contracted and owing for labor done or materials furnished about the erection, construction, alteration or repair thereof; and such debt shall be a lien thereon from the time of making the contract. If such house, building, structure, or fixture be in a city, town or village, the lien shall extend to and cover the entire lot of land on which it stands and the entire curtilage thereto belonging; or, if not in a city, town or village, the lien shall extend to and cover one acre of land on which the same may stand, if there be so much, to be selected by the holder of the lien. If the structure be a railroad or railroad embankment, the lien shall extend to and cover the entire road-bed and right of way, depots and other buildings used or connected therewith. Such lien shall take effect as to purchasers or incumbrancers for a valuable consideration, without notice thereof, only from the time of commencing suit to enforce the lien, or from the time of filing the contract under which the lien arose, in the office of the clerk of the chancery court.<sup>69</sup>

Such lien shall exist only in favor of the person employed, or with whom the contract is made, to perform such labor or furnish such materials, and his assigns, by the owner, his agent, representative, guardian or tenant.<sup>70</sup>

<sup>69</sup> A mortgage executed and recorded before the filing of the contract takes precedence. But if the mortgage be not recorded, or if the acknowledgment be defective so that it is not entitled to record, the lien has priority. *Buntyn v. Shippers' Compress Co.*, 63 Miss. 94. The lien is superior to subsequent incumbrances. *Ivey v. White*, 50 Miss. 142; *Otley v. Haviland*, 36 Miss. 19, 37; *McLaughlin v. Green*, 48 Miss. 175. When there is a prior

incumbrance upon the land, the lien operates on the buildings and not on the land. *Buchanan v. Smith*, 43 Miss. 90; *Ivey v. White*, 50 Miss. 142; *McAllister v. Clifton*, 51 Miss. 257.

<sup>70</sup> When the work has been done by contract, the laborers can never impose upon the owner any higher duty or further payment than he by his contract has imposed upon himself. *Herrin v. Warren*, 61 Miss. 509.

If such house, building, structure, or fixture be erected, constructed, altered, or repaired at the instance of a tenant, guardian or other person not the owner of the land, only the house, building, structure, or fixture, and the estate of the tenant or such other person, in the land, shall be subject to such lien, unless the same be done by the written consent of the owner.<sup>71</sup>

When the contract by virtue of which the house, building, structure, fixture, boat, water craft, railroad, or railroad embankment may be erected, constructed, altered, or repaired, shall be in writing, it may be acknowledged and recorded as deeds and other instruments. If the contract relate to a house, building, structure, or fixture, it shall be filed for record in the office of the clerk of the chancery court of the county in which the land on which it stands is situated; if the contract relate to a railroad or railroad embankment, it shall be filed for record in the office of the clerk of the chancery court of each county in which the work is to be done; if the contract relate to a boat or water craft, it shall be filed for record in the office of the clerk of the chancery court of the county in which the work is done.

Any person entitled to and desiring to have the benefit of such lien shall commence his suit in the circuit court of the county in which the property or some part thereof is situated, if the principal of his demand exceeds two hundred dollars, within twelve months next after the time when the money due and claimed by the suit became due and payable, and not after;<sup>72</sup> and the suit shall be commenced by petition describing with reasonable certainty the property

<sup>71</sup> The purchaser requires a good title to the buildings, even as against third persons having no notice of the lien or of the sale thereunder. The purchaser may enter and remove the buildings, but he must not delay unreasonably to do so. *Priebatsch*

*v. Third Baptist Church*, 66 Miss. 345, 6 So. 237.

<sup>72</sup> See *Hursey v. Hassam*, 45 Miss. 133; *Dinkins v. Bowers*, 49 Miss. 219. Where there has been a continuous delivery of materials, the statute begins to run against the lien from the delivery

upon which the lien is averred to exist, and setting out the nature of the contract and indebtedness, and the amount thereof; and the plaintiff shall file therewith in all cases, except where the whole work or materials, or both, were furnished in pursuance of a written contract for an aggregate price, a bill of particulars exhibiting the amount and kind of labor performed, and of materials furnished and the prices at which and times when the same were performed and furnished; and such suits shall be docketed and conducted as other suits in said court, and may be tried at the first term.

When the judgment shall be against the house, building, structure, or fixture and land, or against the same without the land, or against a boat, water craft, railroad, or railroad embankment, a special writ of execution shall issue to make the amount recovered by sale of the property, which shall be described therein; and when both a general and special judgment shall be given, both writs may be issued, either separately or combined in one, or may be issued after the return of the other for the whole or the residue, as the case may require.

If such special writ of execution be for the sale of a house, building, structure, or fixture and the land, or for the sale of the same without the land, the officer shall levy on, advertise, sell, and convey the same as in other cases of land levied on for debt; and if the sale be of the house, building, structure, or fixtures alone, and the same shall have been erected or constructed and put on the land subsequently to a former incumbrance on the land, the purchaser shall ac-

of the last lot. *O'Leary v. Burns*, 53 Miss. 171. If a petition be brought within the 6 months limited by statute, and it be found that it embraces more property than the plaintiff claimed a lien upon, an amended petition reduc-

ing the quantity may be filed after the 6 months; but an amended petition filed after that time, which for the first time made a claim of lien, would be too late. *O'Leary v. Burns*, 53 Miss. 171.



quire the same free from such former incumbrance, and his purchase shall authorize him to enter and remove such house, building, structure, or fixture from the land with reasonable dispatch;<sup>73</sup> but if the house, building, structure or fixture so sold, or sold with the land, shall have been simply altered or repaired subsequently to a former incumbrance on the land, the purchaser shall acquire the same subject to such incumbrance, unless the incumbrancer consented in writing to the alteration or repairs, in which case the house, building, structure, or fixtures so altered or repaired shall be sold free from such incumbrance, and with the right in the purchaser to enter and remove the same. If the land be sold also, the purchaser shall acquire such estate therein as the owner or builder, as the case may be, had at the time the lien to enforce which the sale is made attached thereon, or at any time afterwards, subject to prior incumbrances; but buildings, structures, or fixtures erected or constructed and put on the land subsequently to prior incumbrances shall pass to the purchaser as if the sale were of such buildings, structures, or fixtures alone.

§ 1211. *Missouri.*<sup>74</sup>—Every mechanic or other person who shall do or perform any work or labor upon, or furnish any material, fixtures, engine, boiler or machinery for, any building, erection or improvements upon land, or for repairing the same,<sup>75</sup> under or by virtue of any contract with

<sup>73</sup>The right to remove the building is lost by a delay of two years. *Priebatsch v. Third Baptist Church*, 66 Miss. 345, 6 So. 237.

<sup>74</sup>Rev. Stats. 1909, §§ 8212-8217, 8219, 8220, 8223, 8225, 8226 8228, 8231, 8235 as amended by Laws 1911, p. 312.

<sup>75</sup>The statute gives a lien for work done and materials furnished in the repair of a building, as well as for erecting a new build-

ing. *Reilly v. Hudson*, 62 Mo. 383; *Allen v. Frumet M. & S. Co.*, 73 Mo. 688, 692; *Page v. Bettes*, 17 Mo. App. 366. The mechanic's lien statute being remedied will be liberally construed. *Joplin Sash and Door Works v. Shade*, 137 Mo. App. 20, 118 S. W. 1196. See also *McQuinn v. Federated M. & Milling Co.*, 160 Mo. App. 28, 141 S. W. 467. Where land is held by a husband and wife as

the owner or proprietor thereof, or his agent, trustee, contractor or subcontractor, upon complying with the provisions herein contained, shall have for his work or labor done, or materials, fixtures, engine, boiler or machinery furnished, a lien upon such building, erection or improvements, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre;<sup>76</sup> or if such building, erection or improvements be upon any lot of land in any town, city or village, then such lien shall be upon such building, erection or improvements, and the lot or land upon which the same are situated, to secure the payment for such work or labor done, or materials, fixtures, engine, boiler, or machinery furnished as aforesaid.

Every mechanic or other person who shall do or perform any work or labor upon, or furnish any material for, any sidewalk in front or alongside of any lot of land in any town, city or village, under or by virtue of any contract with the owner or proprietor of such lot of land, or his agent, trustee, contractor or subcontractor, upon complying with the provisions of this article, shall have for his work or labor done or material furnished a lien upon such lot of land.

The entire land, to the extent aforesaid, upon which any such building, erection or improvement is situated, or in front or alongside of which such sidewalk shall have been built, including as well that part of said land which is not

grantees each is an owner within the mechanic's lien law and may by contract subject his or her interest to a lien for improvements. *Independence Sash, Door & Lumber Co. v. Bradfield*, 153 Mo. App. 527, 134 S. W. 118. Material furnished must be used in a building to entitle the seller to a lien. *United States Water Co. v. Sunny Slope Realty Co.*, 152 Mo. App.

300, 133 S. W. 371; *Nold v. Ozenberger*, 152 Mo. App. 439, 133 S. W. 349. See also *E. R. Darlington Lumber Co. v. Westlake Const. Co.*, 161 Mo. App. 723, 141 S. W. 931.

<sup>76</sup> The one acre limitation seems not to apply in cities, towns and villages. *Oster v. Rabeneau*, 46 Mo. 595, 598; *Holland v. McCarty*, 24 Mo. App. 82.

covered with such building, erection or other improvement as that part thereof which is covered with the same, shall be subject to all liens created by this article, to the extent, and only to the extent, of all the right, title and interest owned therein by the owner or proprietor of such building, erection or improvement, and for whose immediate use or benefit the labor was done or the things furnished.

The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements for which they were furnished or the work was done, in preference to any prior lien or incumbrance or mortgage upon the land upon which said buildings, erections, improvements or machinery have been erected or put; and any person enforcing such lien may have such buildings, erections or improvements sold under execution, and the purchaser may remove the same within a reasonable time thereafter.<sup>77</sup>

Every building, erection, improvement and plant erected, constructed, reconstructed, altered or repaired and all materials, fixtures, engines, boilers, pumps, belting, pulleys, shafting, machinery and other personal property furnished, repaired or placed on licensed or leased lots or lands shall, regardless of whether or not the owner of the license or lease has the right thereunder to remove the same or other personal property from such licensed or leased premises during or at the end of the term thereof, be held for the debt contracted for on account of the same and also the licensed interest or leasehold term for such lot and land on which

<sup>77</sup>The judgment enforcing a lien against a building may be executed by removal, although this may result in the destruction of the building, as in case it is built of brick, and it is impracticable to remove it bodily. *Ambrose Mfg. Co. v. Gapen*, 22 Mo. App. 397. It rests with the purchaser to remove the building as a whole, or

to take it down, and remove and use the materials. *Ambrose Mfg. Co. v. Gapen*, 22 Mo. App. 397. A lien for materials furnished or labor performed can not be held unless furnished and performed under a contract with the owner. *McQuinn v. Federated M. & Milling Co.*, 160 Mo. App. 28, 141 S. W. 467.

the same is placed, repaired or erected; and every mechanic, person or corporation who shall do or perform any work or labor upon or furnish, place or repair any building, plant, improvement, erection, material, fixture, engine, boiler, pump, belting, pulley, shafting, machinery or other personal property upon either licensed or leased lots or lands under or by virtue of any contract or account with the owner or proprietor of the license or lease or with his or its agent, trustee, contractor or subcontractor, upon complying with the provisions of this article, shall have for his work or labor done or building, erection, improvement or plant erected, constructed, reconstructed, altered or repaired, or material, fixture, engine, boiler, pump, belting, pulley, shafting, machinery or other personal property furnished, placed or repaired, a lien upon such building, plant, improvement, erection and also upon such materials, fixtures, engines, boilers, pumps, belting, pulleys, shafting, machinery and such other personal property, and also upon the license or lease on such lots or lands to the full extent of the number of acres or lots held under such license or lease by the owner thereof, and regardless of whether or not the owner of such license or lease has the right thereunder to remove either during or at the end of the term thereof such building, plant, improvement, erection, materials, fixtures, engines, boilers, pumps, belting, pulleys, shafting or machinery or other personal property thereon; and in case the licensee or lessee shall have forfeited his license or lease, the purchaser of the buildings, plants, erections, improvements, materials, fixtures, engines, boilers, pumps, belting, pulleys, shafting, machinery or other personal property and licensed interest or leasehold term or so much thereof as remains unexpired under the provisions of this article shall be held to be the assignee of such licensed interest or leasehold term and as such shall be entitled to pay to the licensor or lessor all arrears of rents or other money, interest, and costs due under said license or lease, unless the

licenser or lessor shall have regained possession of the licensed or leasehold land, or obtained judgment for the possession thereof on account of the noncompliance by the licensee or lessee with the terms of the license or lease prior to the commencement of the buildings, erections, plants, or improvements erected, constructed, reconstructed, altered or repaired or prior to the time the materials, fixtures, engines, boilers, pumps, belting, pulleys, shaftings, machinery or other personal property is furnished, repaired or placed thereon, in which case the purchaser of the buildings, erections, plants, improvements, materials, fixtures, engines, boilers, pumps, belting, pulleys, shafting, machinery or other personal property shall have the right to remove the same within sixty days after the purchase thereof, and the owner of the ground shall receive the rent due to him payable out of the proceeds of the sale, according to the terms of the license or lease, down to the time of removing the buildings, erections, plants, improvements, materials, fixtures, engines, boilers, pumps, belting, pulleys, shafting, machinery or other personal property.

It shall be the duty of every original contractor within six months, and every journeyman and day-laborer within sixty days,<sup>78</sup> and every other person seeking to obtain the benefit of the provisions of this article within four months, after the indebtedness shall have accrued, to file with the clerk of the circuit court of the proper county a just and true account of the demand due him or them, after all just credits have been given, which is to be a lien upon such buildings or other improvements, and a true description of the property, or so near as to identify the same, upon which the lien is intended to apply, with the name of the owner or contractor, or both, if known to the person filing the lien, which shall, in all cases, be verified by oath of himself or some credible person for him.

<sup>78</sup> Acts 1885, p. 195.

The lien for work and materials as aforesaid shall be preferred to all other encumbrances which may be attached to or upon such buildings, bridges or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements.

The pleadings, practice, process and other proceedings in cases arising under this article, shall be the same as in ordinary civil actions and proceedings in circuit courts, except as herein otherwise provided. The petition, among other things, shall allege the facts necessary for securing a lien, and shall contain a description of the property charged therewith.

The court shall ascertain, by a fair trial in the usual way, the amount of the indebtedness for which the lien is prosecuted, and may render judgment therefor in any sum not exceeding the amount claimed in the demand filed with the lien, together with interest and costs, although the creditor may have unintentionally failed to enter in his account filed the full amount of credits to which the debtor may be entitled.

When the debtor has not been served with summons according to law, and has not appeared, but has been lawfully notified by publication, the judgment, if for the plaintiff, shall be that he recover the amount of the indebtedness found to be due, and costs of suit, to be levied of the property charged with the lien therefor, which said property shall be correctly described in said judgment.<sup>79</sup>

When the debtor has been served with summons according to law, or appears to the action without service, the judgment, if for the plaintiff, shall be against such debtor,

<sup>79</sup> Notice of suit by publication should state the amount due and on what account, and a notice which fails to do this is not sufficient to support a lien judgment. *McKelvey v. Wonderly*, 26 Mo. App. 631. Where no personal

service is had upon the contractor who joined as defendant, no judgment can be rendered against him. *Bombeck v. Devorss*, 19 Mo. App. 38; *Schulenburg v. Werner*, 6 Mo. App. 292.

as in ordinary cases, with the addition that if no sufficient property of the debtor can be found to satisfy such judgment and costs of suit, then the residue thereof be levied as provided in the next preceding paragraph.<sup>80</sup>

All actions shall be commenced within ninety days after filing the lien, and prosecuted without unnecessary delay to final judgment;<sup>81</sup> and no lien shall continue to exist, by virtue of the provisions of this article, for more than ninety days after the lien shall be filed, unless within that time an action shall be instituted thereon, as hereinbefore prescribed.

Every person, except the original contractor, who may wish to avail himself of the benefit of the provisions of this article, shall give ten days' notice before the filing of the lien, as herein required, to the owner, owners or agent, or either of them, that he holds a claim against such building or improvement, setting forth the amount and from whom the same is due.<sup>82</sup> Such notice may be served by any

<sup>80</sup> A judgment charging the premises with a lien can not be rendered except as an incident to a personal judgment on some one standing with him in a contract relation. *Steinkamper v. McManus*, 26 Mo. App. 51. What is not a personal judgment. *Sullivan v. Sanders*, 9 Mo. App. 75. When conclusive against contractor. *Krey v. Hussmann*, 21 Mo. App. 343.

<sup>81</sup> A mechanic's lien can not be established without a finding by the jury that the plaintiff is entitled to the lien. *Brooks v. Blackwell*, 76 Mo. 309; *Williams v. Porter*, 51 Mo. 441; *Hall v. Johnson*, 57 Mo. 521.

<sup>82</sup> The notice must be in writing. *Miller v. Hoffman*, 26 Mo. App. 199. It must be signed by the claimant or his agent. *Town-*

*er v. Remick*, 19 Mo. App. 205. A substantial compliance with the statute is sufficient. *Towner v. Remick*, 19 Mo. App. 205. The notice must apprise the owner who the claimant is. *Miller v. Hoffman*, 26 Mo. App. 199. The owner to be notified is the person who was the legal owner when the contract was made or the materials were furnished. *Brown v. Wright*, 25 Mo. App. 54; *Koenig v. Boehme*, 14 Mo. App. 593. If there be more than one owner, the notice should be served upon all. *Towner v. Remick*, 19 Mo. App. 205. The owner's absence from the state will not excuse a failure to serve the notice. *Hewitt v. Truitt*, 23 Mo. App. 443; *Doyle v. Truitt*, 23 Mo. App. 448. The mode of service is immaterial, provided it sufficiently ap-

officer authorized by law to serve process in civil actions, or by any person who would be a competent witness. When served by an officer, his official return indorsed thereon shall be proof thereof, and when served by any other person, the fact of such service shall be verified by affidavit of the person so serving.

The liens for work and labor done or things furnished, as specified in this article, shall be upon an equal footing, without reference to the date of filing the account or lien; and in all cases where a sale shall be ordered and the property sold, which may be described in any account or lien, the proceeds arising from such sale, when not sufficient to discharge in full all the liens against the same without reference to the date of filing the account or lien, shall be paid pro rata on the respective liens: provided, such account or liens shall have been filed and suit brought as provided by this article.

§ 1212. **Montana.**<sup>83</sup>—Every mechanic, miner, machinist, architect, foreman, engineer, builder, lumberman, artisan, workman, laborer, and any person performing any work and labor upon, or furnishing any material, machinery or fixture for any building, structure, bridge, flume, canal, ditch, aqueduct, mining claim, quartz lode, tunnel, city or town lot, farm, ranch, fence, railroad, telegraph, telephone, electric light, gas or waterworks or plant, or any improvements,

pears that the owner did, in fact, receive the notice at least ten days prior to the time of filing the lien. *Miller v. Hoffman*, 26 Mo. App. 199; *Hassett v. Rust*, 64 Mo. 325. It can not be served by leaving the original or a copy with a servant at the owner's residence. *Ryan v. Kelly*, 9 Mo. App. 396. Who is a sufficient agent of the owner for service of the notices, see *Johnson v. Barnes & Co.*

*Bldg. Co.*, 23 Mo. App. 546; *Schulenburg v. Werner*, 6 Mo. App. 292; *Anderson v. Volmer*, 83 Mo. 403; *Henry v. Bunker*, 22 Mo. App. 650. The burden is on the lien claimant to prove the existence of the agency. *Anderson v. Volmer*, 83 Mo. 403.

<sup>83</sup> Code (Civ. Proc.) 1895, §§ 2130, 2131, 2133, 2135, 2139, as amended by Laws 1901, p. 162.



upon complying with the provisions herein contained, for his work or labor done, or material, machinery or fixtures furnished, has a lien upon the property upon which the work or labor is done, or material furnished.

Every person wishing to avail himself of the benefits of this act, must file with the county clerk of the county in which the property or premises mentioned in the preceding paragraph is situated, and within ninety days after the material or machinery aforesaid has been furnished, or the work or labor performed, a just and true account<sup>84</sup> of the amount due him, after allowing all credits, and containing a correct description of the property to be charged with such lien, verified by affidavit, but any error or mistake in the account or description does not affect the validity of the lien, if the property can be identified by the description, which paper containing the account, description and affidavit is deemed the lien; and where there is an open account between the parties for labor, material or machinery, such lien may be filed within ninety days after the date of the last item in such account, and include all items and charges contained therein, for material or machinery furnished for, or work performed on, the property on which the lien is claimed.

The lien extends to the lot or land upon which any such building, improvement, or structure to the extent of one acre if outside of any town or city, or within any town or city, then to the extent of the whole lot or lots upon which the same is situated, if the land belonged to the person who caused said building to be constructed, altered or repaired: but if such person owned less than a fee simple estate in

<sup>84</sup> As to sufficiency of account, and what account is "just and true," see *Smith v. Sherman Min. Co.*, 12 Mont. 524, 31 Pac. 72. The description of the property required does not demand a designation of the boundaries of a min-

ing claim, so as to ascertain the extent included in the lien, if the property "may be identified" merely by name. *Smith v. Sherman Min. Co.*, 12 Mont. 524, 31 Pac. 72.

such land, then only his interest therein is subject to such lien; all liens for any work or labor done or materials furnished upon the same premises, which shall be filed within thirty days after the filing of the first lien on such premises, shall entitle the holders thereof to share equally pro rata, according to the amount of their respective liens in the proceeds arising from the sale of such premises upon the foreclosure of such liens. If, after the expiration of thirty days, other liens are filed against such premises, then all liens filed within sixty days after the filing of such subsequent lien are liens of the second class, and share pro rata in any proceeds arising from the sale of the said premises which may remain after all liens of the first class have been paid. The liens for work or labor done, or material furnished, as herein specified, shall be prior to and have precedence over any mortgage, incumbrance, or other lien made subsequent to the commencement of work on any contract for the erection of such building, structure, or other improvement.<sup>85</sup>

The liens attach to the buildings, structures, or improvements for which they were furnished, or the work was done in preference to any prior lien, incumbrance or mortgage upon the land upon which said buildings, structures, or improvements are erected; and any person enforcing such lien may sell the same under execution, and the purchaser may remove the property sold within a reasonable time thereafter.

All actions under this statute must be commenced within twelve months from the filing of the lien.<sup>86</sup>

<sup>85</sup> *Davis v. Alvord*, 94 U. S. 545, 24 L. ed. 283; *Davis v. Bilsland*, 18 Wall. (U. S.) 659, 661, 21 L. ed. 969; *Alvord v. Hendrie*, 2 Mont. 115. To secure and perfect a mechanic's lien one must substantially follow the steps prescribed

by the statute. *Wertz v. Lamb*, 43 Mont. 477, 117 Pac. 89.

<sup>86</sup> The suit is an equitable proceeding. *Davis v. Alvord*, 94 U. S. 545, 24 L. ed. 283; *Mochen v. Sullivan*, 1 Mont. 470. And see *Alvord v. Hendrie*, 2 Mont. 115.

§ 1213. **Nebraska.**<sup>87</sup>—Any persons who shall perform any labor, or furnish any material or machinery or fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, for the erection, improvement, reparation or removal of any house, mill, or manufactory, or building or appurtenance, by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, mill, manufactory, building, or appurtenance and the lot of land upon which the same shall stand.

Any person or subcontractor who shall perform any labor for, or furnish any material or machinery or fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, for any of the purposes above mentioned, to the contractor or any subcontractor who shall desire to secure a lien may file a sworn statement of the amount due him or them from such contractor or subcontractor, for such labor or material, machinery or fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, together with a description of the land upon which the same were done or used, within sixty days from the performing of such labor or furnishing such material, machinery or fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, with the register of deeds of the county wherein said land is situated, and if the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due for such labor or material, machinery and fix-

<sup>87</sup> Ann. Stats. 1911, §§ 7100-7103, 7105, 7106, 7113, as amended by Laws 1913, p. 253. A subcontractor who has paid laborers and mechanics is not within the terms of Ann. Stats. 1911, 7117, which se-

cures to laborers working on public buildings the right to resort to the bond of the contractor. *Fidelity &c. Co. v. Parkingson*, 68 Neb. 319, 94 N. W. 120.

tures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, on such lot or lots and the improvements thereon, from the same time and in the same manner as such original contractor, and the risk of all payments made to the original contractor shall be upon the owner until the expiration of the sixty days hereinbefore specified. And no owner shall be liable to any action by the contractor until the expiration of said sixty days,<sup>88</sup> and such owner may pay such subcontractor or person the amount due him from such contractor for such labor and material, machinery and fixtures, including gas and electric apparatus and lighting fixtures, whether detachable or undetachable, and the amount so paid shall be held and deemed a payment of such amount to the original contractor. And in cases when a dispute arises between the contractor and his journeymen, or other persons, for work done or material furnished, the owner may retain the amount claimed by said subcontractor, or journeyman, or laborer until the dispute has been settled by arbitration or otherwise. Said sworn statement or claim of lien shall be by such register of deeds recorded in the same manner as other liens herein provided for, and such lien shall remain in force for the same length of time as other liens herein provided for.

<sup>88</sup> Payments made by the owner to the original contractor, within the sixty days from the furnishing materials or performing labor, are at the risk of the owner. Such payment does not absolve the owner from liability to materialmen and mechanics. *Ballou v. Black*, 21 Nebr. 131, 31 N. W. 673; 17 Nebr. 389, 23 N. W. 3; *Foster v. Dohle*, 17 Nebr. 631, 24 N. W. 208; *Marrener v. Paxton*, 17 Nebr. 634, 24 N. W. 209. The contractor can not maintain a suit against

the owner until after the expiration of the sixty days within which the subcontractor may file such statement. *Millsap v. Ball*, 30 Nebr. 728, 46 N. W. 1125. A subcontractor can not extend time for filing a lien by giving material to the owner of the building, nor by furnishing new materials to take the place of defective material theretofore furnished to the contractor. *Ashford v. Iowa & Minnesota Lumber Co.*, 81 Nebr. 561, 116 N. W. 272.

Any person entitled to a lien hereunder shall make an account in writing of the items of labor, skill, machinery or material furnished, or either of them, as the case may be, and after making oath thereto shall, within four months of the time of performing such labor and skill, or furnishing such machinery or material, file the same in the office of the register of deeds of the county,<sup>89</sup> in which such labor, skill and materials shall have been furnished, which account so made and filed shall be recorded in a separate book to be provided by the register of deeds for that purpose, and shall from the commencement of such labor or the furnishing such materials for two years after the filing of such lien operate as a lien on the several descriptions of such structures and buildings and the lots on which they stand as above mentioned.<sup>90</sup> When any labor has been done or materials furnished as provided on a written contract, the same or a copy thereof shall be filed with the account herein required.<sup>91</sup>

And if any promissory note shall have been taken for any such labor or materials it shall be sufficient, to secure the lien above provided for to file in the office of the register of deeds a copy of such note within the time aforesaid,

<sup>89</sup> Prior to the filing of such affidavit, the mechanic or purchaser of material has no such interest in the real estate as would require a relinquishment in writing under the statute of frauds. *White Lake Lumber Co. v. Stone*, 19 Nebr. 402, 27 N. W. 395. If the building is erected under an entire contract for a specific sum, the claimant need not file an account with items, but may make a single item of the entire work. *Doolittle v. Plenz*, 16 Nebr. 153, 20 N. W. 116.

<sup>90</sup> The word "commencement"

qualifies both "labor" and "furnishing," and the material-man's lien dates from the time of the first delivery. *Courtney v. Insurance Co.*, 49 Fed. 309, 1 C. C. A. 249.

<sup>91</sup> If the claimant is prevented from filing the written contract, or a copy of it, by the wrongful act of the party for whom the labor was performed, the claimant does not thereby lose his lien, and parol evidence of the contents of such contract may be given. *McCormick v. Lawton*, 3 Nebr. 449.

together with a sworn statement that the sum for which said note was given, or any part thereof, is due for labor and material used for the purpose hereinbefore mentioned, giving in such statement the items of such labor and material, and such lien shall be for the amount so shown to be due for such labor and material, with interest at the rate specified in said note,<sup>92</sup> provided nothing herein contained shall be taken to prevent the ascertainment by proceeding at law, or otherwise, of the amount actually due for such labor and material and such lien shall be for no larger sum than the amount actually due therefor.

Every person holding any lien hereunder may proceed to obtain a judgment for the amount of his account thereon by civil action. And when any suit or suits shall be commenced on such accounts within the time of such lien, the lien shall continue until such suit be finally determined and satisfied.

If the person or persons who may erect, as owner or owners, any building described in the first paragraph of this section, be not, at the suspension or completion of the same, possessed of a legal but equitable title, to the ground on which the same is erected (if the same be a fixture), and the fact of such defect of title be made to appear to the court before any judgment or judgments hereunder may have been obtained, or if the same be returned by any legal officer to whom any execution hereunder shall be directed, in either case the court shall direct the officer, who has returned or is authorized by law to serve such executions, to rent or lease such buildings until the rents or issues thereof shall pay and satisfy the several liens on which judgments may be had against the same; provided, this law shall not be so construed as to interfere with prior bona fide

<sup>92</sup> As to the sufficiency of the sworn statement, see *Knutzen v. Hanson*, 28 Nebr. 591, 44 N. W. 1065.

liens, on grounds on which such buildings shall be erected as a fixture.

In other cases of judgment or judgments obtained in favor of any lienholder or lienholders, if the property bound by such lien will not sell on execution as provided by law in other cases, having been once duly offered, the court before whom such judgment or judgments may be obtained may direct the officer aforesaid to lease the same in the same manner and for the same purpose pointed out in the preceding paragraph, and the officer giving such lease shall therein require the payment to be made to him or his successors in office, which said successor or successors shall have the same power and perform the same duties therein as the maker of the lease should or could do; and in cases where the money may be collected by said officer on a lease made, it, hereunder, shall be his duty to forthwith pay the same into the court where the judgment or judgments were obtained, which money shall be distributed to the several lienholders interested in said judgment, in proportion to their several demands.

Any person who shall hold a lien hereunder may, in addition to the remedy herein provided for, proceed by a petition in chancery as in other cases of liens against the owner or owners of, and all other persons interested, either as lienholders or otherwise, in any such house, mill, or manufactory, or other building or appurtenance, in the first paragraph of this section, and the lot or lots of land on which the same shall stand, and obtain such final decree therein for the rent or sale thereof, as justice and equity may require, anything in this statute to the contrary notwithstanding.<sup>93</sup>

<sup>93</sup> As to pleadings in such action, see *Hassett v. Curtis*, 20 Nebr. 162, 29 N. W. 295. In foreclosing a lien relief will not be denied plaintiff because of a slight

failure to comply with his contract, where there has been substantial compliance. *Hahn v. Bonacum*, 76 Nebr. 837, 107 N. W. 1001, judgment modified, 109 N.

§ 1214. **Nevada.**<sup>94</sup>—Every person performing labor upon, or furnishing material of the value of five dollars or more, to be used in the construction, alteration or repair of any building or other superstructure, railroad, tramway, toll road, canal, water ditch, flume, aqueduct or reservoir, building, bridge, fence or any other structure, has a lien upon the same for the work or labor done, or material furnished by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent; and all miners, laborers and others who work or labor to the amount of five dollars or more in or upon any mine, or upon any shaft, tunnel adit, or other excavation, designed or used for the purpose of prospecting, draining or working any such mine, and all persons who shall furnish any timber or other material, of the value of five dollars or more, to be used in or about any such mine, whether done or furnished at the instance of the owner of such mine or his agent, shall have, and may each respectively claim and hold, a lien upon such mine for the amount and value of the work or labor so performed or material furnished; and every contractor, subcontractor, architect, builder or other persons, having charge or control of any mining claim, or any part thereof, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purposes of this act.

The liens herein provided for are preferred to any lien, mortgage or other incumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage or other incumbrance of which the lienholder had no notice

W. 368. See also *McGowan v. Gate City Malt Co.*, 89 Nebr. 10, 130 N. W. 965. <sup>94</sup> Rev. Laws 1912, Arts. 2213, 2216, 2217, 2220, 2223, 2224, 2227.



and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished. (Every mortgage or incumbrance imposed upon, or conveyance made of, property affected by the liens herein provided for between the time when the building, improvement, structure or work thereon was commenced, or the materials thereof were commenced to be furnished, and the expiration of the time herein fixed in which liens therefor may be filed whatever the terms of payment may be, shall be subordinate and subject to the liens in full herein authorized, regardless of the date of filing of said liens.)

It shall be the duty of the owner of any building, improvement or structure, aforementioned, upon or after the completion thereof, or of any alteration or repair thereof, to file or cause to be filed with the county recorder of the county where the same or some part thereof is situated, an affidavit, under the oath of himself or of some other person conversant with the facts, stating that such building, improvement or structure, or the alteration or repair thereof, as the case may be, has been completed, giving the date of such completion, and a description of the same sufficient for identification. If any such affidavit be filed before the building, improvement or structure, or the alteration or repair hereof, as **the case may be**, has in fact been completed, such filing shall be void and a mere nullity, and the time within which any claim of lien as hereinafter provided shall be filed, shall not commence to run until after such building, improvement or structure, or the alteration or repair thereof, as the case may be, has in fact been completed, and a valid and legal affidavit thereafter been filed. Every person claiming the benefit of this act shall, not earlier than ten days after the completion of his contract, or the delivery of material by him, or the performance of his labor, as the case may be, and not later than fifty days after filing

of the owner or other person as aforesaid of the affidavit hereinbefore provided for, or within fifty days after the performance of any labor in a mining claim, file for record with the county recorder of the county where the property or some part thereof is situate, a claim containing a statement of his demand after deducting all just credits and offsets,<sup>95</sup> with the name of the owner or reputed owner if known, also the name of the person by whom he was employed or to whom he furnished the material, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien sufficient for identification, which claim must be verified by the oath of himself or some other person.<sup>96</sup>

No lien herein provided for binds any building, mining claim, improvement or structure, for a longer period than six months after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit: provided, nevertheless, that if there are other claims outstanding against the property, no time or credit shall be given upon the lien after the expiration of the six months in which proceedings are required to be commenced which will tend to delay or postpone the collection of other claims or incumbrances against the property; but no lien continues in force for a longer

<sup>95</sup> It is not necessary to give the items of the account. The amount of the demand with its nature and character are enough. *Lonkey v. Wells*, 16 Nev. 71. Under a previous statute, on which the present statute is founded, it was held that subcontractors and material-men had liens regardless of payment made by the owner on the principal contract prior to the time within which the law required the notice of claim to be

filed. *Hunter v. Truckee Lodge*, 14 Nev. 24; *Lonkey v. Cook*, 15 Nev. 58. A lien can only exist when perfected as directed by the statute, but the lien statute must be construed liberally and substantial compliance with the law is all that is required. *Tonopah Lumber Co. v. Nevada Amusement Co.*, 30 Nev. 445, 97 Pac. 636.

<sup>96</sup> For further provisions concerning trial, see Rev. Laws 1912, Art. 2217.

time that two years from the time the work is completed by any agreement to give credit.

In every case in which different liens are asserted against any property, the court, in the judgment, must declare the rank of each lien, or class of liens, which shall be in the following order, viz.: First. Labor. Second. All persons other than the original contractors and subcontractors. Third. The subcontractors. Fourth. The original contractors. And the proceeds of the sale of the property must be applied to each lien, or class or liens, in the order of its rank.

Any number of persons claiming liens may join in the same action; and when separate actions are commenced the court may consolidate them. The court may also allow, as part of the costs, the moneys paid for filing and recording the lien. The remedy is by sale.<sup>97</sup>

§ 1215. **New Hampshire.**<sup>98</sup>—If any person shall, by himself or others, perform labor or furnish materials to the amount of fifteen dollars or more, for erecting or repairing a house or other building or appurtenances, or for building any dam, canal, sluiceway or bridge, other than for a municipality, by virtue of a contract with the owner thereof, he shall have a lien on any materials so furnished, and on said house or other building or appurtenances, or dam, canal, sluiceway or bridge, and on any right of the owner of the

<sup>97</sup> Rev. Laws 1912, Art. 2227.

<sup>98</sup> Pub. Stats. Sess. Laws 1901. ch. 141, §§ 10, 13, 15-17, as amended by Laws 1911, p. 118, and Laws 1913, p. 566. If a contractor is prevented from completing the building he has agreed to construct or repair by the failure of the owner to make payment according to the contract, the contractor may sue and enforce his lien. *Roehm v. Horst*, 178 U. S. 1,

44 L. ed. 953, 20 Sup. Ct. 780; *Hobbs v. Head & Dowst Co.*, 184 Fed. 409, 106 C. C. A. 519; 185 Fed. 1006, 107 C. C. A. 663. Under the statute giving a laborer a lien "upon the kiln containing such brick" for labor performed in making brick, the lien attaches to all the kilns upon which any part of the labor was performed. *La-voie v. Burke*, 69 N. H. 144, 38 Atl. 723.

lot of land on which the house, building or appurtenances, or dam, canal, sluiceway or bridge stands.

Such lien shall continue for ninety days after the services are performed or the materials or supplies are furnished, unless payment therefor is previously made, and shall take precedence of all prior claims except liens on account of taxes.

If a person shall for himself or others perform labor or furnish materials to the amount of fifteen dollars, or more, for any of the purposes above specified, by virtue of a contract with an agent, contractor or subcontractor of the owner, he shall have the same lien as above provided, provided he gives notice in writing to the owner or to the person having charge of the property that he should claim such lien before performing the labor or furnishing the materials for which it is claimed,<sup>99</sup> or providing said notice is given after the labor is performed or the material is furnished said lien shall be valid to the extent of the amount due or that may be due the contractor, agent or subcontractor of the owner. The account required under the following paragraph may also be given at the time the notice of the claim of lien is given.

Any person giving notice as provided shall, as often as once in thirty days, furnish to the owner or person having charge of the property on which the lien is claimed, an account in writing of the labor performed or materials furnished during the thirty days; and the owner or person in charge shall retain a sufficient sum of money to pay such claim, and shall not be liable to the agent, contractor or subcontractor, therefor unless the agent, contractor or subcontractor shall first pay it.<sup>1</sup>

<sup>99</sup>A subcontractor who neglects to give notice in writing to the owner that he claims a lien can acquire no lien. *Eastman v. Newman*, 59 N. H. 581.

<sup>1</sup>A subcontractor who has given due notice that he will claim a lien under the statute is not required to furnish at the end of each period of thirty days, an ac-

Any such lien may be secured by attachment of the property upon which it exists at any time while the lien continues, the writ and return thereon distinctly expressing that purpose; and such attachment shall have precedence of all other attachments made after such lien accrued, unless founded on a prior lien.<sup>2</sup>

§ 1216. **New Jersey.**<sup>3</sup>—Every building hereafter erected or built within this state shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such build-

count in writing of the labor and materials for which he has been previously paid by the contractor. *Lawson v. Kimball*, 68 N. H. 549, 38 Atl. 380.

<sup>2</sup> If the lienholder without any fraudulent intent obtains a judgment for a claim for a small amount for which he had no right of lien, the judgment should be vacated and a new judgment entered for the proper amount. The lien is not forfeited by reason of such error. *Cheshire Provident Inst. v. Stone*, 52 N. H. 365. If the amount had been fraudulently included in the judgment, the whole judgment would have been vitiated, and subsequent liens would take priority. Per *Smith, J.* The judgment is in rem. *Sly v. Pattee*, 58 N. H. 102. For labor performed and materials furnished under an entire contract, the attachment may be made within ninety days from the time the last work was performed or the last materials furnished. *Pike v.*

*Scott*, 60 N. H. 469; *Calef v. Brinley*, 58 N. H. 90. It is not necessary to allege in the suit brought to secure the lien, that the materials were furnished by virtue of a contract with the owner. It is enough if it appear from the writ and return that the purpose is to secure and preserve the plaintiff's lien. *Pike v. Scott*, 60 N. H. 469.

<sup>3</sup> *Comp. Stats.* 1910, pp. 3291, 3293, 3294, 3299, 3300, 3301, 3303, 3305. The lien extends to legal estates and interests only, and does not embrace equitable estates or interests. *Dalrymple v. Ramsey*, 45 N. J. Eq. 494, 18 Atl. 105. A mechanic's lien can be claimed in favor of a person supplying materials to a subcontractor. Where no notice is filed the lien is not restricted to the principal contractor and those who contract directly with him. *Gardner v. New York Cent. R. Co.*, 72 N. J. L. 257, 62 Atl. 416.

ing, and on the land whereon it stands, including the lot or curtilage whereon the same is erected.<sup>4</sup>

Whenever any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract; provided, said contract, or a duplicate thereof, together with the specifications accompanying the same, or a copy or copies thereof, be filed in the office of the clerk of the county in which such building is situate,<sup>5</sup> before such

<sup>4</sup> A building is not subject to a lien for repairs unless the owner contracted the debt or in writing consented to its being contracted. *Murphy v. Hussa*, 70 N. J. L. 381, 57 Atl. 388. The lien extends to all docks, wharves, and piers erected upon any navigable river, and to the lots in front of the same, for work done or materials furnished for or about the erection or filling-in of the same. *Comp. Stats.* 1910, p. 3302, § 11. Otherwise before this amendment in 1871. *Coddington v. Hudson County Dry Dock Co.*, 31 N. J. L. 477. The curtilage or lot on which a building is erected, when not inclosed, shall be such tract as is usually known as a building lot, as laid down on any map made for the sale of it, or on file, or, if there be no map, such lot may be designated by the claimant; but in no case shall it exceed half an acre, or include any building not used or intended to be used with the building for which the lien is claimed. See, also, as to the extent of the curtilage, *Derrickson v. Edwards*, 29 N. J. L. 468, 80 Am. Dec. 220, which was decided before

the above provision was enacted in 1863. *James v. Van Horn*, 30 N. J. L. 353. The limitation of the curtilage to half an acre applies to the case when there has been no designation of the curtilage by the owner, and where the means of designation by map do not exist. *Gerard v. Birch*, 28 N. J. Eq. 317. The judgment as to the extent of the curtilage is conclusive in a collateral proceeding. *Gerard v. Birch*, 28 N. J. Eq. 317; *Jacobus v. Mutual Benefit L. Ins. Co.*, 27 N. J. Eq. 604. Repairs of the interior of a house are repairs within the meaning of the mechanics' lien law. *Grantwood Lumber, &c. Co. v. Abbott*, 80 N. J. L. 564, 78 Atl. 1046. Prior to 1883 the lien law did not apply to alterations of a building. *Combs v. Lippincott*, 35 N. J. L. 481; *Whitenack v. Noe*, 11 N. J. Eq. 321, 413.

<sup>5</sup> If the contract refers to specifications, these should be filed, if they are necessary to show what labor is to be performed, or what materials are to be furnished; but if the contract provides for doing all the work and furnishing all the

work done or materials furnished; provided further, that it shall not be necessary to file the plans for such building in

materials, it is not necessary to file the specifications. *Babbitt v. Condon*, 27 N. J. L. 154; *Ayres v. Revere*, 25 N. J. L. 474; *Budd v. Lucky*, 28 N. J. L. 484. See *English v. Warren*, 65 N. J. Eq. 30, 54 Atl. 860, holding specifications must be filed. See also, *Pimlott v. Hall*, 55 N. J. L. 192, 26 Atl. 694. If, after the completion of the building and the filing of the contract, the owner in good faith conveys the premises to the contractor, the lien is extinguished, and a material-man has no right of lien. *Scudder v. Harden*, 31 N. J. Eq. 503. Where a building is erected under a contract with the owner, it is erected by the owner. *Atlantic Coast Brew. Co. v. Donnelly*, 59 N. J. L. 48, 35 Atl. 647, *affd.* 59 N. J. L. 438, 36 Atl. 883. If the builder is to do all the work and furnish all the materials it is not necessary to file the specifications with the contract. *La Foucherie v. Knutzen*, 58 N. J. L. 234, 33 Atl. 203. The contract must be a real, not a fictitious one. *Young v. Wilson*, 44 N. J. L. 157. The filing of the written contract only protects the builders from liens for work or materials furnished to the contractor. If the owner orders materials or employs mechanics on his own account, a lien attaches for the same. *Mechanics' Mut. L. Assn. v. Albertson*, 23 N. J. Eq. 318. See further, as to effect of this provision, *Van Pelt v. Hartough*, 31 N. J. L. 331. The right of a laborer or material-man to sue the owner exists only in

those cases where the building is erected by contract which, or a duplicate of which, has been filed in the county clerk's office. *Summerman v. Knowles*, 33 N. J. L. 202. When the claim is disputed by the owner he should obtain a judgment upon it against the contractor before bringing suit against the owner. *Reeve v. Elmendorf*, 38 N. J. L. 125. The filing of a contract for the erection of a building, made by the owner in the name of an agent merely, and not disclosing the owner's name, will not protect the building from liens. *Willetts v. Earl*, 53 N. J. L. 270, 21 Atl. 327. If the owner makes a payment to the builder under his contract without procuring from him a verified release of liens, the building may be lienied by laborers and material-men. *Bruce v. Pearsall*, 59 N. J. L. 62, 34 Atl. 982. A release by part of the laborers and material-men is not a compliance with the law. *Magowan v. Stevenson*, 58 N. J. L. 31, 32 Atl. 1057, *affd.* 58 N. J. L. 408, 36 Atl. 128. A filed contract, although signed by a person other than the owner, will in the absence of fraud protect the property from small claims except those of the contractor. *Earle v. Willetts*, 56 N. J. L. 334, 29 Atl. 198. If the owner of the building abrogates the whole or part of the contract filed, and makes another instead, or enters into a further contract requiring additional work or materials, he places himself outside of the protection of the

said clerk's office, whether such plans are referred to in said contract or not.

Whenever any master workman or contractor shall, upon demand, refuse to pay any person who may have furnished him materials used in the erection of any such house or other building, or any subcontractor, journeyman or laborer employed by him in erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman, laborer, material-man or subcontractor to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them so

statute to the extent of the changes made. *Willetts v. Earl*, 53 N. J. L. 270, 21 Atl. 327. Under the provision of Laws 1890, p. 479, if the contract is duly filed, no lien except to the contractor can attach to the building; nor can a lien claim be legally filed for work done and materials furnished in the execution of such contract work, so long as the owner does not make a payment to the contractor without the releases required by the act. If the owner makes payment to the contractor without releases, then the laborer or materialman may pursue his remedy by filing his lien claim. The burden is on the laborer or materialman to show that payment has been made by the owner to the contractor, and then the owner, to bar the lien, must show that he has taken the releases. If no payment has been made, the remedy of the laborer or materialman is to give notice to the owner as provided. *Anderson Lumber Co. v. Friedlander*, 54 N. J. L. 375, 24 Atl. 434. For a full discussion of this right against funds in the

hands of the owner by stop-notice, and the rights of laborers and materialmen, see *McNab, &c., Mfg. Co. v. Paterson Bldg. Co.*, 71 N. J. Eq. 133, 63 Atl. 709. Subcontractors, such as plumbers, plasterers and painters, are not material-men and are not protected by a stop-notice upon the owner. *Beckhard v. Rudolph*, 68 N. J. Eq. 315, 59 Atl. 253, 68 N. J. Eq. 740, 63 Atl. 755. Notice, by force of the statute, works an assignment pro tanto of the debt due to the contractor. *Fehling v. Goings*, 67 N. J. Eq. 375, 58 Atl. 642. The sum claimed in the notice must be actually due at the time the notice is served. *Taylor v. Wahl*, 72 N. J. L. 10, 60 Atl. 63. When final payment matures it must be applied first to satisfy the stop notices previously served in the order of their priority, and any money then remaining is at the disposal of the contractor. Any stop-order thereafter served operates only on the moneys due at the time of such services. *Taylor v. Reed*, 68 N. J. L. 178, 52 Atl. 579.



demand<sup>6</sup>, specifying said amount as nearly as possible, and the owner or owners of such building shall thereupon be

<sup>6</sup> Under this act, two distinct remedies are afforded a laborer or material-man; one of which may be pursued where there is no contract, or a contract and no filing, and the other when there is such a contract and filing. The pursuit of the first remedy involves the taking of buildings; and when the buildings are those of a municipal corporation, a fundamental rule of public policy compels the courts to arrest the proceeding before the buildings are touched. The second remedy may be pursued without contravening any principle of public policy. It places no lien upon the public buildings, and does not affect them in the slightest degree. It merely works an assignment pro tanto of the debt due by the owner to the contractor. Each remedy is dependent upon the existence of a distinct state of facts. If one state of facts exists, the statute says the laborer or material-man may have his lien. If another state of facts exists, he may have his action against the owner. *Frank v. Hudson*, 39 N. J. L. 347, 350, per Reed, J. The persons intended to be benefited by the section are the persons who have the right to demand payment from that contractor with whom the owner has an account. This section does not afford a remedy for one who has sold and delivered materials used in a building by a subcontractor. *Carlisle v. Knapp*, 51 N. J. L. 329, 17 Atl. 633. A person to be entitled to the remedy given by this

section must, 1. Be a creditor whose debt was contracted for work done to the building erected by the contractor for the owner, or for material furnished for the building. 2. He must be a creditor whose debt is due. Before a workman or material-man can notify the owner of his claim, he must put the contractor in fault. 3. There must be a demand and refusal, and the demand must be for such an amount as the creditor is entitled to be paid at once. *Kirtland v. Moore*, 40 N. J. Eq. 106, 109, 2 Atl. 269; *Williams v. Bradford* (N. J.), 21 Atl. 331. In a case where the statutory requisites exist, notice, given according to the statute, works an assignment, pro tanto, to the workman or material-man, of the right of the contractor against the owner. *Carlisle v. Knapp*, 51 N. J. L. 329, 17 Atl. 633; *Wightman v. Brenner*, 26 N. J. Eq. 489. Upon notice given, the workman or material-man, to the extent of his demand, takes the place of the contractor. *Reeve v. Elmendorf*, 38 N. J. L. 125. But if, when the notice is served on the owner, there is nothing owing to the contractor and he is without right against the owner, the notice is without legal effect. *Craig v. Smith*, 37 N. J. L. 549. The test is whether a suit for the money demanded will lie by the contractor against the owner; if it will not, the owner is liable to a suit by the workman or material-man. *Reeve v. Elmendorf*, 38 N. J. L. 125; *Kirtland v. Moore*, 40 N. J. Eq. 106, 2

authorized to retain the amount so due and claimed by such journeyman, laborer, material-man or subcontractor out of the amount owing by him to them on the contract or that thereafter may become due from him or them on such contract for labor or materials used in the erection of such building, giving the master workman or contractor written notice of such notice and demand; and if the same be not paid or settled by said master workman or contractor, such owner or owners, on being satisfied of the correctness of said demand, shall pay the same, and the receipt of such journeyman, laborer, material-man or subcontractor for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts between him and such master

Atl. 269; *Craig v. Smith*, 37 N. J. L. 549. For obligation imposed by stop-notice, see *Kreutz v. Cramer*, 64 N. J. Eq. 648, 54 Atl. 535. The notice creates a lien on the debt, instead of a lien on the building. *Superintendent of Public Schools v. Heath*, 15 N. J. Eq. 22, 25. The notice gives a right of action against the owner. *Wightman v. Brenner*, 26 N. J. Eq. 489. It makes it the owner's duty to retain both moneys due and to grow due to the contractor. *Budd v. Trustees*, 51 N. J. L. 36, 16 Atl. 194; *Mayer v. Mutchler*, 50 N. J. L. 162, 13 Atl. 620. One serving notice on an owner has a right to payment in preference to the right of persons to whom the contractor has assigned such moneys before the notices were served. *Slingerland v. Binns*, 56 N. J. Eq. 413, 39 Atl. 712; *Binns v. Slingerland*, 55 N. J. Eq. 55, 36 Atl. 277. The workman or material-man also acquires a right to the debt due the contractor, which a court of equity may enforce by staying the collec-

tion of a judgment recovered by the contractor against the owner. *Wightman v. Brenner*, 26 N. J. Eq. 489. A notice by a firm of its claim, signed in the presence and by authority of the firm, though not individually by one of its members, is sufficient compliance with the statute. *Williams v. Bradford* (N. J.), 21 Atl. 331. The amount demanded must be the amount due. If the amount be exaggerated by including items for which no lien is given, the whole claim is impaired. *McPherson v. Walton*, 42 N. J. Eq. 282, 11 Atl. 21; *Reeve v. Elmendorf*, 38 N. J. L. 125. As the amount claimed is to be retained by the owner, it would be unjust to allow more to be claimed than is justly due. *Reeve v. Elmendorf*, 38 N. J. L. 125. A notice claiming more than is due is defective, and the claimant has no right to proceed under the statute against the owner for the amount due him by the contractor. *McPherson v. Walton*, 42 N. J. Eq. 282, 11 Atl. 21.

workman or contractor, or his representatives and assigns, as so much paid on account.<sup>7</sup>

If any building be erected by a tenant or other person than the owner of the land, then only the building and the estate of such tenant or other person so erecting such building shall be subject to the lien created by this act and the other provisions thereof, unless such building be erected by the consent of the owner of such lands in writing, which writing may be acknowledged or proved and recorded, as deeds are, and when so acknowledged or proved and recorded, the record thereof and copies of the same, duly certified, shall be evidence in like manner.

Any addition erected to a former building, and any fixed machinery or gearing,<sup>8</sup> or other fixtures for manufacturing purposes, shall be considered a building for the purposes of this act.<sup>9</sup>

<sup>7</sup> Comp. Stats. 1910, p. 3300, § 8.

<sup>8</sup> "Fixed machinery."—The purpose of the statute is to afford mechanics a lien upon machinery of which they can not have such possession as would give them a lien by the common law. The statutory lien is confined to "fixed machinery." With this purpose of the statute in view, it follows that, where machinery is of such a character that the common-law lien may be had upon it, doubts should not be so resolved as to hold the machinery to be also subject to lien under the statute. In other words, in such cases doubts should be resolved against the statutory lien. *Griggs v. Stone*, 51 N. J. L. 549, 18 Atl. 1094, per McGill, Ch.

<sup>9</sup> The words "fixtures for manufacturing purposes" are construed to include any building, erection, or construction, of whatever de-

scription, attached or annexed, or intended to be attached or annexed, to any land or tenement, and designed to be used in the building or repairing of vessels, whether the same be permanently attached to the freehold, or so built as to be removed from place to place and only temporarily attached to the land, and whether the same be intended and designed for use on land or water. Comp. Stats. 1910, p. 3300, § 8. Fixtures for manufacturing purposes, aside from this provision, are fixtures put into an existing building. Fixtures for agricultural purposes are not included; nor fixtures in building in which no manufactures are carried on. Under the original statute a dry dock was not a fixture. *Coddington v. Hudson County Dry Dock Co.*, 31 N. J. L. 477. A piazza is an addition with-

The lien extends to all buildings of whatever description erected or to be erected within this state and the lots or curtilages whereon the same are erected, for all debts contracted by the owners thereof, or by any other person with the consent of the owner or owners in writing, for work done or materials furnished in and for the repairing or alteration of any such building: provided, however, that said lien shall not be valid against a bona fide purchaser or mortgagee before said lien is filed in the office of the clerk of the county in which said lot or curtilage is situate; and provided further, that work done or materials furnished under contract in and for such repairs or alterations shall be liable to said contractor alone in manner above provided for.

Every person intending to claim a lien hereunder, shall within four months<sup>9a</sup> after the labor is performed or the materials furnished for which such lien is claimed, file his or her claim in the office of the clerk of the county where the building and land subject to such lien is situate, which claim shall contain:<sup>10</sup> 1. A description of the building and of the lot or curtilage upon which the lien is claimed, and of its situation sufficient to identify the same. 2. The name of the owner or owners of the land or of the estate therein on which the lien is claimed. 3. The name of the person who contracted the debt, or for whom, or at whose request the labor was performed or the materials furnished for which

in the meaning of the above provision. *Whitenack v. Noe*, 11 N. J. Eq. 321, 413. But folding doors are not. *Whitenack v. Noe*, 11 N. J. Eq. 321, 413.

<sup>9a</sup> The time was shortened from one year. The contractor could file a lien for his entire debt if any item was furnished within four months. *Downingtown Mfg. Co. v. Franklin Paper Mill*, 63 N. J. L. 32, 42 Atl. 765. The material-man is entitled to a lien where he

in good faith furnishes materials for a building and delivers the same to the owner or contractor, even though such materials are not used. *Bell v. Mecum*, 75 N. J. L. 547, 68 Atl. 149.

<sup>10</sup> As to the requirements to be observed in the claim filed, see *Edwards v. Derrickson*, 28 N. J. L. 39; *Williamson v. N. J. Southern R. Co.*, 28 N. J. Eq. 277; *Raymond v. Post*, 25 N. J. Eq. 447.

such lien is claimed, who shall be deemed the builder. 4. A bill of particulars exhibiting the amount and kind of labor performed, and of materials furnished, and the price at which and times when the same was performed and furnished,<sup>11</sup> and giving credit for all the payments made thereupon and the deductions that ought to be made therefrom, and exhibiting the balance justly due to such claimant, which statement, when the work or materials or both are furnished by contract, need not state the particulars of such labor or materials further than by stating, generally, that certain work therein stated was done by contract at a price mentioned; and such bill of particulars and statements shall be verified by the oath of the claimant or his agent in said matter, setting forth that the same is for labor done or materials furnished in the erection of, addition to, repair of, or alteration in or of the building in such claim described. at the times therein specified, and that the amount as claimed therein is justly due; and when such claim shall not be filed in the manner or within the time aforesaid, or if the bill of particulars shall contain any wilful or fraudulent misstatement of the matters above directed to be inserted therein, the building or lands shall be free from all lien for the matters in such claim.

No debt shall be a lien unless a lien claim is filed as hereinafter provided, within four months from the date of the last work done or material furnished, for which such debt is due; nor shall any lien be enforced unless the summons in the suit for that purpose shall be issued within four months from date of the last work done or materials furnished in such claim;<sup>12</sup> and the time of issuing such summons shall be indorsed on the claim by the clerk upon the

<sup>11</sup> The dates are material. A statement that the labor was performed or the materials furnished between two dates is insufficient.

*Associates v. Davison*, 29 N. J. L. 415.

<sup>12</sup> *Bement v. Trenton Locomotive Co.*, 31 N. J. L. 246, *affd.*, 32 N. J. L. 513.

sealing thereof,<sup>13</sup> and if no such entry be made within four months from such last date, or if such claimant shall fail to prosecute his claim diligently within one year from the date [of] issuing such summons, or such further time as the court may by order direct, such lien shall be discharged,<sup>14</sup> and all suits now pending where a claim has been filed and a summons issued within four months from the date of the last work done or materials furnished for which said debt is claimed shall be included within the provisions of this act; provided, that the time in which such lien may be enforced by summons may be extended for any further period, not exceeding four months, by a written agreement for that purpose, signed by said landowner and said claimant, and annexed to the said claim on file before such time herein limited therefor shall have expired, in which case the county clerk shall enter the word "Extended" in the margin of the lien docket opposite such claim, and any claimant, upon receiving written notice from the owner of the lands or building, requiring him to commence suit on such claim within thirty days from the receipt of such notice, shall only enforce such lien by suit to be commenced within said thirty days;<sup>15</sup> provided, further, that when any suit is brought in

<sup>13</sup> This provision is mandatory, and the lien is discharged by failure to comply with it. The powers of amendment conferred by the act do not enable them to restore the lien when it has been discharged by noncompliance with this mandate. *Wheeler v. Almond*, 46 N. J. L. 161.

<sup>14</sup> If the service of the summons was defective, a new summons may be issued more than a year from the date of the last work done or materials furnished. *Mutual Ben. L. Ins. Co. v. Rowand*, 26 N. J. Eq. 389, *affd.*, 27 N. J. Eq. 604.

<sup>15</sup> The lien is in no wise waived, merged, or impaired by the recovery of any judgment for the moneys due for such labor or materials; and such lien may be enforced by levy and sale under execution upon such judgment. *Laws 1898*, ch. 226, § 23. As to parties to suit, see *Laws 1905*, ch. 166, § 3. As to pleadings, see *Coddington v. Beebe*, 29 N. J. L. 550; *Washburn v. Burns*, 34 N. J. L. 18; *Cornell v. Matthews*, 27 N. J. L. 522; *Summerman v. Knowles*, 33 N. J. L. 202. As to practice, see *James v. Van Horn*, 39 N. J. L. 353; *Kline v. Cutter*, 34 N. J. Eq.

any district court on such lien claim, it shall be the duty of the plaintiff, or his attorney, to obtain from the clerk of such district court a certificate to the effect that a suit has been commenced in such district court on such lien claim, specifying the court where the suit is brought, the day and year when such suit was commenced, and the day and year when the summons is made returnable, which said certificate the plaintiff or his attorney shall present to the clerk of the county in which such lien claim is filed within four days after issuing of summons; it shall thereupon be the duty of the clerk of said county to indorse upon such lien claim that a suit has been commenced on the same, specifying the court where suit is brought, the day and year when summons was issued, and when same is made returnable.

§ 1217. **New Mexico.**<sup>16</sup>—Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, and every contractor, subcontractor, architect, builder or other person having charge of any mining, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act.<sup>17</sup>

329, revd., 35 N. J. L. 534; Hall v. Spaulding, 40 N. J. L. 166. See also, Laws 1898, ch. 226, § 23. As to amendment, see § 14 of the act; James v. Van Horn, 39 N. J. L. 353; Vreeland v. Bramhall, 39 N. J. L. 1; Vreeland v. Boyle, 37 N.

J. L. 346; Bartley v. Smith, 43 N. J. L. 321.

<sup>16</sup> Comp. Laws 1897, §§ 2217, 2219-2221, 2224, 2226, 2228.

<sup>17</sup> Any person who, at the request of the owner of any lot in any incorporated city or town,

The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien.

The liens herein provided for are preferred to any lien, mortgage or other incumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage or other incumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished.

Every original contractor, within ninety days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this act, must within sixty days after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property or some part thereof is situated, a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the

grades, fills in, or otherwise improves the same, or the street in front of or adjoining the same, has a lien upon such lot for his work done and materials fur-

nished. Comp. Laws 1897, § 2218. The lien law is construed liberally, being remedial in character. *Lyons v. Howard*, 16 N. Mex. 327, 117 Pac. 842.



person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person.

No lien herein provided for binds any building, mining claim, improvement or structure for a longer period than one year after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same, or, if a credit be given, then six months after the expiration of such credit, but no lien continues in force for a longer time than two years from the time the work is completed by any agreement to give credit.

Every building or other improvement hereinbefore mentioned constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect in some conspicuous place upon said land, or upon the building or other improvement situated thereon.

The judgment must declare the rank of each lien, or class of liens, which shall be in the following order, viz.: First. All persons other than the original contractor and subcontractor; Second. The subcontractors; Third. The original contractors.

The expenses incurred for repairs on an artesian well or reservoir, to prevent waste, where the owner refused after

notice to make such repairs, constitute a lien on the land where such well or reservoir is situated.<sup>18</sup>

The expense of spraying an orchard or nursery which is infested with insects, where the owner fails or refuses to abate the nuisance, becomes a lien on the property.<sup>19</sup>

§ 1218. **New York.**<sup>20</sup>—A contractor, subcontractor, laborer, or material-man, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, shall have a lien for the principal and interest of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as herein prescribed.

Such lien shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien. If an owner assigns his interest in such real property by a general assignment for the benefit of creditors, within thirty days prior to such filing the lien shall extend to the interest thus assigned. If any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge

<sup>18</sup> Laws 1912, p. 170.

<sup>19</sup> Laws 1912, pp. 102, 103.

<sup>20</sup> Birdseye C. & G. Consol. Laws 1909, pp. 3140-3208, §§ 3, 4, 9-11, 13, 17, 41, 58. For statute giving liens for work or materials under municipal contracts, see Birdseye, C. & G. Consol. Laws 1909, pp. 3158, 3174, 3182, 3185, 3193, 3196, 3200, 3208. A corporation may be entitled to such a lien for materials furnished as well as a natural person. *Gaskell v. Beard*, 58 Hun (N. Y.) 101, 11 N. Y. S. 399, 33 N. Y. St. 852. The right of

laborers and material-men to liens is regulated by the contract. *Upton v. United Engineering & Contracting Co.*, 72 Misc. (N. Y.) 541, 130 N. Y. S. 726. The term "improvement" includes alteration, repair or erection of a structure, and persons who labor or furnish materials for such a structure may claim liens. Laws 1897, p. 515, § 2. *Aetna Elevator Co. v. Deeves*, 56 Misc. (N. Y.) 565, 107 N. Y. S. 63; on rehearing, 57 Misc. (N. Y.) 632, 108 N. Y. S. 718.

thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed. If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract<sup>20a</sup> at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid,<sup>21</sup>

<sup>20a</sup> A statement of the terms of a contract pursuant to which an improvement of real property is being made, and of the amount due or to become due thereon, shall be furnished upon demand, by the owner, or his duly authorized agent, to a subcontractor, laborer or material-man performing labor for or furnishing materials to a contractor, his agent or subcontractor, under such contract. If, upon such demand the owner refuses or neglects to furnish such statement or falsely states the terms of such contract or the amount due or to become due thereon and a subcontractor, laborer or material-man has not been paid the amount of his claim against a contractor or subcontractor, under such contract, and a judgment has been obtained and execution issued against such contractor or subcontractor and returned wholly or partly unsatisfied, the owner shall be liable for the loss sustained by reason of such refusal, neglect or false statement, and the lien of such subcontractor, laborer or material-man, filed as prescribed, against

the real property improved for the labor performed or materials furnished after such demand, shall exist to the same extent and be enforced in the same manner as if such labor and materials had been directly performed for and furnished to such owner. Birdseye C. & G. Consol. Laws 1909, p. 3162, § 8.

<sup>21</sup> Any payment by the owner to a contractor upon a contract for the improvement of real property, made prior to the time when, by the terms of the contract, such payment becomes due, for the purpose of avoiding the provisions of this statute, shall be of no effect as against the lien of a subcontractor, laborer or material-man under such contract, created before such payment actually becomes due. A mortgage, lien or encumbrance made by an owner of real property, for the purpose of avoiding the provisions of this statute, with the knowledge or privity of the person in whose favor the mortgage, lien or encumbrance is created, shall be void and of no effect as against a claim on account of the improvement of

at the time of filing notices of such liens, except as herein-after provided.

The notice<sup>22</sup> of lien shall state: 1. The name and residence

such real property, existing at the time of the creation of such mortgage, lien or encumbrance. *Birdseye C. & G. Consol. Laws 1909*, p. 3161, § 7. Under the statute of 1885, from which the above section was revised, payments made in advance, though without fraud or collusion, can not be allowed. *Post v. Campbell*, 83 N. Y. 279; *Cheney v. Troy Hospital Assn.*, 65 N. Y. 282, 288. A payment made by collusion for the purpose of avoiding the provisions of the act, though not made in advance, is ineffectual against the lien. *Hofgesang v. Meyer*, 2 Abb. N. Cas. (N. Y.) 111. The owner is liable to a subcontractor to the extent of the price agreed to be paid on the contract, and remaining unpaid at the time of filing such lien. *Wright v. Roberts*, 43 Hun (N. Y.) 413, 6 N. Y. St. 769, *affd.* 62 Hun (N. Y.) 619, 16 N. Y. S. 818, 43 N. Y. St. 20; *Heckmann v. Pinkney*, 81 N. Y. 211. There can be no lien claimed for money loaned a contractor. *Uvalde Asphalt Pav. Co. v. New York*, 191 N. Y. 244, 84 N. E. 83. A builder gave to subcontractors an order on the owner for the balance due them. There was due from the owner this amount, payable within thirty days after the final completion of the work. The contract provided that, if any liens existed when any payment was due, double the amount of said liens could be retained from the payment. The owner did not accept

the order, and a few days later liens were filed. It was held that this order was an assignment of the builder's interest, and after notice the owner was bound to apply the fund to its payment, and the subsequent liens did not affect the owner with any further liability. *Lauer v. Dunn*, 115 N. Y. 405, 22 N. E. 270, *affg.* 52 Hun (N. Y.) 191, 5 N. Y. S. 161, 23 N. Y. St. 374. Payments made by the owner to third parties for work or materials which the contractor had failed to furnish, and which the owner was compelled to obtain on his own responsibility in order to complete the building, are not prohibited by the statute; and even though there be no formal abandonment of the contract, such payments do not subject the owner to liability to the person filing the notice of lien. It is only what the contractor earns under his contract that is reached by the lien. In such case, payments made to third parties may be treated as an admission of indebtedness of the owner to the contractor. The owner should be permitted to prove the circumstances under which the payments were made, and that the contractor was in default. *Rodbourn v. Seneca Lake Grape, &c. Co.*, 67 N. Y. 215, 217, *per Rapallo, J.*, *revg.* 5 Hun (N. Y.) 12. See, also, *Tooker v. Rinaldo*, 11 Hun (N. Y.) 154.

<sup>22</sup> As to sufficiency of notice, see *Moran v. Chase*, 52 N. Y. 346;

of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.

2. The name of the owner of the real property against whose interest thereon a lien is claimed, and the interest of the owner as far as known to the lienor.

3. The name of the person by whom the lienor was em-

Hauptman v. Catlin, 20 N. Y. 247; Ryan v. Klock, 36 Hun (N. Y.) 104; Riley v. Watson, 3 Hun (N. Y.) 568, 6 Thomp. & C. (N. Y.) 310; Smith v. Baily, 8 Daly (N. Y.) 128; Fogarty v. Wick, 8 Daly (N. Y.) 166. Before the filing of the notice of lien, the claimant is merely a creditor at common law with a claim which may become a lien upon the filing of the notice in due form. The lien attaches only from the time of filing such notice. Oates v. Haley, 1 Daly (N. Y.) 338; McAuley v. Mildrum, 1 Daly (N. Y.) 396; Livingston v. Mildrum, 19 N. Y. 440; Carman v. McIncrow, 13 N. Y. 70, 72, 12 E. D. Smith (N. Y.) 689. In Bates v. Salt Springs Nat. Bank, 157 N. Y. 322, 51 N. E. 1033, it was held that before notice filed, the contractor could assign money due on the contract in payment of a debt. This was forbidden by § 15 of the lien law. (See Birdseye's C. & G. Consol. Laws 1909, p. 3179, § 15 and Laws 1897, ch. 418, § 15.) But this section does not prevent an assignment by the contractor to one who has established a

lien on the premises of enough of the money due him to discharge the lien. Harvey v. Brewer, 178 N. Y. 5, 70 N. E. 73, affg. 82 App. Div. (N. Y.) 589, 81 N. Y. S. 846. One claiming a mechanic's lien must proceed as directed by the statute, but substantial compliance will be sufficient. Pearce v. Knapp, 71 Misc. (N. Y.) 324, 127 N. Y. S. 1100; Krauss v. Brunett, 73 Misc. (N. Y.) 428, 130 N. Y. S. 1086. The notice must state the time when the first item of work was done. Mahley v. German Bank, 174 N. Y. 499, 67 N. E. 117, revg. 66 App. Div. (N. Y.) 623, 72 N. Y. S. 1140. By Laws 1906, ch. 255 (Birdseye C. & G. Consol. Laws 1909, p. 3200, § 42), a lien for labor done or materials furnished for a public improvement may be enforced against the funds of the state or the municipal corporation for which such public improvement is constructed against the contractor or subcontractor liable for the debt, by a civil action, in the same court and in the same manner as a mechanic's lien on real property.

ployed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made.

4. The labor performed or to be performed, or materials furnished or to be furnished and the agreed price or value thereof.

5. The amount unpaid to the lienor for such labor or materials.

6. The time when the first and last items of work were performed and materials were furnished.

7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known. A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien.<sup>23</sup> The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

The notice of lien may be filed at any time during the progress of the work and the furnishing of the materials,<sup>24</sup> or within ninety days after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed

<sup>23</sup> The error may be cured by setting forth in the complaint the mistake, and averring the true owner. *Leigene v. Schwarzler*, 10 Daly (N. Y.) 547, 67 How. Pr. (N. Y.) 130.

<sup>24</sup> There is no provision which directly or inferentially requires the contract to be fully performed, as regards a lien for work and materials furnished and used by a contractor in the erection of the

building, if it be shown that, at the time the lien was filed, a sum of money had been earned by the contractor, according to the agreed price, which exceeded all payment theretofore made by the owner in amount sufficient to pay the claim for which the lien is filed. *Wright v. Roberts*, 43 Hun (N. Y.) 413, 6 N. Y. St. 769, *affd.* 62 Hun (N. Y.) 619, 16 N. Y. S. 818, 43 N. Y. St. 20.

or materials furnished. The notice of lien must be filed in the clerk's office of the county where the property is situated. If such property is situated in two or more counties, the notice of lien shall be filed in the office of the clerk of each of such counties. The county clerk of each county shall provide and keep a book to be called the "lien docket," which shall be suitably ruled in columns headed "owners," "lienors," "property," "amount," "time of filing," "proceedings had," in each of which he shall enter the particulars of the notice, properly belonging therein. The date, hour and minute of the filing of each notice of lien shall be entered in the proper column. The names of the owners shall be arranged in such book in alphabetical order. The validity of the lien and the right to file a notice thereof shall not be affected by the death of the owner before notice of the lien is filed.

At any time after filing the notice of lien, the lienor may serve a copy of such notice upon the owner, by delivering the same to him personally, or if the owner can not be found, to his agent or attorney, or by leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, or by registered letter addressed to his last known place of residence, or, if such owner has no such residence in such city or town, or can not be found, and he has no agent or attorney, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien. A failure to serve the notice does not otherwise affect the validity of such lien.<sup>25</sup>

<sup>25</sup> If the owner has paid the contractor in full before the filing of the lien, though the lien is filed within the time provided by

A lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, judgment or other claim against such property not recorded, docketed or filed at the time of filing the notice of such lien,<sup>26</sup> over advances made upon any mortgage or other incumbrance thereon after such filing; and over the claim of a creditor who has not furnished materials or performed labor upon such property, if such property has been assigned by the owner by a general assignment for the benefit of creditors, within thirty days before the filing of such notice. Such liens shall also have priority over advances made upon a contract by an owner for an improvement of real property which contains an option to the contractor, his successor or assigns to purchase the property, if such advances were made after the time when the labor began or the first item of material was furnished, as stated in the notice of lien. If several buildings are erected, altered or repaired, or several pieces or parcels of real property are im-

the statute, the owner is not liable. *Carman v. McInerow*, 13 N. Y. 70, 2 E. D. Smith (N. Y.) 689. Neither can there be any lien if the owner, before the filing of the lien, has paid the contractor, in pursuance of the contract, all that is due him, and he has made default and abandoned his contract. *Crane v. Genin*, 60 N. Y. 127; *Carman v. McInerow*, 13 N. Y. 70, 2 E. D. Smith (N. Y.) 689.

<sup>26</sup> A mechanic acquires no lien until he files the notice prescribed. Previous to that time he is a creditor at large, with a claim which may ripen into a lien. If, previous to his filing a lien, the owner conveys the premises to another, his right is wholly cut off and lost; and so, if the owner incumbers the premises by a mort-

gage to a bona fide creditor, his claim becomes subordinate to the mortgage. The mechanic's lien, if afterwards perfected by filing notice and prosecuting to judgment, attaches only to the equity of redemption. *Munger v. Curtis*, 42 Hun (N. Y.) 465, 4 N. Y. St. 847; *Payne v. Wilson*, 11 Hun (N. Y.) 302, 305, *affd.* 74 N. Y. 348, 355. The fact that the mortgagee knew at the time of taking his mortgage that a contractor had not been paid does not affect his priority obtained by the execution of the mortgage prior to the filing of the mechanic's notice of lien, in the absence of proof of collusion with the owner to defeat the contractor's claim and lien. *Munger v. Curtis*, 42 Hun (N. Y.) 465, 4 N. Y. St. 847.



proved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular building or premises where his labor is performed or his materials are used. Persons standing in equal degrees as colaborers or material-men, shall have priority according to the date of filing their respective liens; but in all cases laborers for daily or weekly wages shall have preference over all other claimants under this article, without reference to the time when such laborers shall have filed their notices of liens.

No lien herein specified shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record or in a court not of record, is filed<sup>27</sup> with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an order be granted within one year from the filing of such notice by a court of record, continuing such lien,<sup>28</sup> and

<sup>27</sup> If the action is in a court of record, a notice of the pendency of such action is filed with the clerk of the court of the county in which such notice is filed, containing the names of the parties to the action, the object of the action, and a description of the premises affected, and the time of filing the notice of lien. As to filing the notice of lis pendens, see *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674; *Bowes v. New York Christian Home*, 64 How. Pr. (N. Y.) 509; *Weyer v. Beach*, 79 N. Y. 409; *Danziger v. Simonson*, 21 J. & S. (N. Y.) 158, 116 N. Y. 329, 22 N.

E. 570; *McAllister v. Case*, 15 Daly (N. Y.) 299, 5 N. Y. S. 918, 24 N. Y. St. 52. If the proceedings are commenced within the year, and are pending at the end thereof, the lien continues until judgment. *Fox v. Kidd*, 77 N. Y. 489; *Haag v. Hillemeier*, 41 Hun (N. Y.) 390, 1 N. Y. St. 549. The time is not prolonged by obtaining a judgment against the owner within the year. *Freeman v. Cram*, 3 N. Y. 305. The day of filing the notice is to be excluded in computing the year. *Haden v. Buddensick*, 6 Daly (N. Y.) 3.

<sup>28</sup> The lien must be continued by order, notwithstanding pro-

such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order. No lien shall be continued by such order for more than one year from the granting thereof, but a new order and entry may be made in each successive year. If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time herein prescribed, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person.

A mechanic's lien on real property may be enforced against such property, and against a person liable for the debt upon which the lien is founded, by an action, by the lienor, his assignee or legal representative, in a court which

ceedings to foreclose a prior mortgage have been commenced, or even a judgment has been obtained for a sale of the premises. *Stone v. Smith*, 3 Daly (N. Y.) 213. If judgment is obtained within the year, no formal order to continue the lien is necessary. *Wright v. Roberts*, 55 Hun (N. Y.), 610, 8 N. Y. S. 745, 29 N. Y. St. 553. But this provision has no reference to a claim for surplus moneys arising on a sale upon a judgment in foreclosure which cuts off the lien, as in such a case the lien is gone, and the claim is reduced to a right to the avails. If the lienor has such a right at the time of sale and at the time

of making application for the surplus, no further order of court is necessary to preserve it. *Emigrant Industrial Sav. Bank v. Goldman*, 75 N. Y. 127. The order continuing the lien can not be granted after the year has elapsed. *Poerschke v. Kedenburg*, 6 Abb. Pr. (N. S.) (N. Y.) 172. The order may be made by any court having jurisdiction of the lien. *Darrow v. Morgan*, 65 N. Y. 333. The order continues the lien indefinitely until it is vacated, or the lien is disposed of in one of the other manners provided by the statute. *Bigelow v. Doying*, 49 Hun (N. Y.) 403, 13 N. Y. S. 362, 36 N. Y. St. 636.

has jurisdiction in an action founded on a contract for a sum of money equivalent to the amount of such debt.<sup>29</sup>

If upon the sale of the property under judgment in a court of record there is a deficiency of proceeds to pay the plaintiff's claim, judgment may be docketed for the deficiency against any person liable therefor, who shall be adjudged to pay the same in like manner and with like effect as in judgments for deficiency in foreclosure cases.

A statement of the terms of a contract pursuant to which an improvement of real property is being made, and of the amount due or to become due thereon, shall be furnished upon demand, by the owner, or his duly authorized agent, to a subcontractor, laborer or material-man performing labor for or furnishing materials to a contractor, his agent or subcontractor, under such contract if, upon such demand the owner refuses or neglects to furnish such statement or falsely states the terms of such contract or the amount due or to become due thereon, and a subcontractor, laborer or material-man has not been paid the amount of his claim against a contractor or subcontractor, under such contract, and a judgment has been obtained and execution issued against such contractor or subcontractor and returned wholly or partly unsatisfied, the owner shall be liable for the loss sustained by reason of such refusal, neglect or false statement, and the lien of such subcontractor, laborer or material-man, filed as prescribed, against the real property improved for the labor performed or materials furnished after such demand, shall exist to the same extent and be enforced in the same manner as if such labor and materials had been directly performed for and furnished to such owner.

It has been held that a bond in a mechanic's lien proceed-

<sup>29</sup> The proceedings are of an equitable nature, and the powers of the court may be adapted to the circumstances of each case. *Henderson v. Sturgis*, 1 Daly (N. Y.) 336, 338; *Doughty v. Devlin*, 1 E. D. Smith (N. Y.) 625; *Miller v. Moore*, 1 E. D. Smith (N. Y.) 739.

ing, conditioned for the payment of any judgment against the property, takes the place of the property and becomes the subject of the lien.<sup>30</sup>

A laborer or material-man has no preferential right to be paid out of the sums due the contractor, until he files his notice of lien.<sup>30a</sup>

**§ 1219. North Carolina.**<sup>31</sup>—Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building may be situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or materials furnished.<sup>32</sup> This section shall apply to the property of married women when it shall appear that such building was built or repaired on her land with her consent or procurement, and in such case she shall be deemed to have contracted for such improvements.

All claims against any real estate or interest therein, may be filed in the office of the superior court clerk in any county

<sup>30</sup> *Morton v. Tucker*, 145 N. Y. 244, 40 N. E. 3. The sureties on a bond to discharge a lien are not liable unless the lien is shown to have been valid. *Romanik v. Rapoport*, 148 App. Div. (N. Y.) 688, 132 N. Y. S. 892. See also, *In re Hedden Const. Co.*, 72 Misc. (N. Y.) 153, 129 N. Y. S. 827.

<sup>30a</sup> *Bates v. National Bank*, 157 N. Y. 322, 51 N. E. 1033, revg. 88 Hun (N. Y.) 236, 34 N. Y. S. 598, 68 N. Y. St. 282.

<sup>31</sup> Revisal 1905, §§ 2016, 2019, 2021-2023, 2026-2029, as amended by Pub. Laws 1909, p. 60, and Pub. Laws 1913, p. 242. Contractors, as well as mechanics and laborers, are within the constitutional provision. *Lester v. Houston*, 101 N. Car. 605, 8 S. E. 366. An ar-

chitect furnishing plans and specifications for a house is not entitled to a lien, since he has not performed any labor upon the house or furnished material for it. *Stephens v. Hicks*, 156 N. Car. 239, 72 S. E. 313. Electrical appliances sold to a power and light plant do not constitute materials within the statute for which a material-man's lien may be claimed. *Fulp v. Kernersville Light & Co.*, 157 N. Car. 154, 72 S. E. 869.

<sup>32</sup> There is no lien without a contract creating a debt on the part of the owner. There can be no debt, and consequently no lien, without his consent, express or implied. *Wilkie v. Bray*, 71 N. Car. 205.

where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished.

Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the superior court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien, provided that if the debt be not due within six months but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due.

Notice of lien shall be filed, as hereinbefore provided, except in those cases where a shorter time is prescribed at any time within six months after the completion of the labor or the final furnishing of the materials,<sup>33</sup> or the gathering of the crops.

All subcontractors and laborers who are employed to furnish or who do furnish material for the building, repairing or altering any house or other improvement on real estate, shall have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanics' lien now provided by law, when notice thereof shall be given as hereinafter provided,<sup>34</sup> which

<sup>33</sup> Lanier v. Bell, 81 N. Car. 337; Boyle v. Robbins, 71 N. Car. 130; Chadbourn v. Williams, 71 N. Car. 444. The lien attaches from the time the materials begin to be furnished, and the notice relates

back to that time. Chadbourn v. Williams, 71 N. Car. 444.

<sup>34</sup> The liens of contractors are not superseded, but the liens of subcontractors are given precedence. Lester v. Houston, 101 N. Car. 605, 8 S. E. 366.

may be enforced as provided for other liens except where it is otherwise provided: provided, that the sum total of all the liens due subcontractors and material-men shall not exceed the amount due the original contractor at the time of notice given.<sup>35</sup>

Whenever any contractor, architect or other person shall make a contract for building, altering or repairing any building or vessel, or for the construction or repair of a railroad, with the owner thereof, it shall be his duty to furnish to the owner or his agent, before receiving any part of the contract price, as it may become due, an itemized statement of the amount owing to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished, and upon delivery to the owner or his agent of the itemized statement aforesaid, it shall be the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which will be sufficient to pay such laborer, artisan or mechanic for labor done, or such person for material furnished, which said amount the owner shall pay directly to the laborer, mechanic, artisan or person furnishing materials. And it shall be the duty of the owner to require in writing from such contractor or other person before paying any part of the contract price an itemized statement in writing, duly subscribed and sworn to by such contractor or other person, of the amount due, if any, to any such laborer, mechanic or artisan, and for material furnished; and any owner who shall fail to require the furnishing of such an itemized statement before making any payment on account of such contract shall become liable to the extent of such payment or payments to any person or persons for such sums as may be owing them for work or labor done or material furnished to or for said

<sup>35</sup> The lien does not attach till the notice is given; and if the owner has at that time paid the

contractor in full, the notice is without effect. *Pinkston v. Young*, 104 N. Car. 102, 10 S. E. 133.

contractor, architect or other person in or about said property, and such sum shall be or become a lien on said property as specified in said section or any other law of this state, and as fully in all respects as if such itemized statement had been required and furnished. The owner may retain in his hands until the contract is completed, such sum as may have been agreed on between him and the contractor, architect or other person employing laborers, as a guaranty for the faithful performance of the contract by such contractor. When such contract has been performed by the contractor, such fund reserved as a guaranty shall be liable to the payment of the sum due the laborer, mechanic or artisan for labor done, or the person furnishing the materials as hereinbefore provided. Any laborer, mechanic, artisan or person furnishing materials may furnish to such owner or his agents before he shall have paid the contractor an itemized statement of the amount owing to such laborer, mechanic or artisan employed by said contractor, architect or other person for work or labor on such building, vessel or railroad, and any person may furnish to such owner or his agent an itemized statement of the amount due him for materials furnished for such purposes; and upon the delivery of such notice to such owner or his agent the person giving such notice shall be entitled to all the liens and benefits conferred by this section or by any other law of this state in as full and ample a manner as though the statement had been furnished by the contractor, architect or such other person. And after the notice herein provided is given, no payment to the contractor shall be a credit on or a discharge of the lien herein provided.

Upon judgment rendered in favor of the claimant, an execution for the collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest which the owner had in the premises or the

crops thereon, at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant.<sup>36</sup>

The sums due to the laborer, mechanic or artisan for labor done, or due the person furnishing materials, as shown in the itemized statement rendered to the owner, shall be a lien on the building, vessel or railroad built, altered or repaired, without any lien being filed before a justice of the peace or the superior court.

If any contractor or architect shall fail to furnish to the owner an itemized statement of the sums due to every one of the laborers, mechanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, he shall be guilty of a misdemeanor. If any contractor shall fail to apply the contract price paid him by the owner or his agent to the payment of bills for labor and material, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court.<sup>37</sup>

In the event the amount due the contractor by the owner shall be insufficient to pay in full the laborer, mechanic or artisan, for his labor, and the person furnishing materials for materials furnished, it shall be the duty of the owner to distribute the amount pro rata among the several claimants, as shown by the itemized statement furnished the owner; or of which notice shall have been given the owner by the claimant.

<sup>36</sup> As to form of action and judgment, see *Oakley v. Van Noppen*, 95 N. Car. 60; *Smaw v. Cohen*, 95 N. Car. 85.

<sup>37</sup> Revisal 1905, § 3663, as amended by Pub. Laws 1913, p. 243. This act is directed against the contractor, and is intended to compel him to furnish to the owner the statement necessary to notify

him of the claims of subcontractors. *Pinkston v. Young*, 104 N. Car. 102, 10 S. E. 133. Materialmen are relieved from the necessity of giving the owner notice of their claims only when the contractor furnishes the owner with an itemized account of such claims. *Pinkston v. Young*, 104 N. Car. 102, 10 S. E. 133.



§ 1219a. **North Dakota.**<sup>38</sup>—Any person who shall perform any labor upon, or furnish any materials, machinery or fixtures for the construction or repair of any work of internal improvement, or for the erection, alteration or repair of any building or other structure upon lands or in making any other improvements thereon, including fences, sidewalks, pavings, wells, grades, drains or excavations under a contract with the owner of such land, his agent, contractor or subcontractor, or with the consent of such owner, shall upon compliance with the provisions of this article have for his labor done, or materials, fixtures or machinery furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated, or to improve which said work is done, or the things furnished, to secure the payment for such labor, machinery or fixtures, provided no person furnishing material, machinery or fixtures for any of the purposes aforesaid, shall be entitled to a lien hereunder unless he shall keep an itemized account thereof, separate and apart from all other items of account against the purchaser, and has made a written demand for payment of such account at least fifteen days prior to the filing of the lien, and in the case of furnishing such materials, machinery or fixtures to a contractor or subcontractor no liens shall be allowed therefor unless the party furnishing the same shall keep a separate

<sup>38</sup>Rev. Code 1905, §§ 6237, 6240-6243, 6245, 6246, 6248, 6250, as amended by Laws 1907, p. 267, Laws 1911, p. 286, Laws 1913, pp. 327, 328. A lien is also given to miners and others for labor on, and materials furnished for, mines and structures connected therewith. Rev. Code 1905, §§ 6256-6263. Claims or contracts for furnishing lightning-rods are not within the statute. Rev. Code

1905, § 6237, as amended by Laws 1911, p. 286. The owner must inform himself as to whether the laborers working on his building or those furnishing materials for the building have been paid therefor, and where he pays his contractor within the time for filing liens he does so at his peril. *Langworthy Lumber Co. v. Hunt*, 19 N. Dak. 433, 122 N. W. 865.

account against said contractor or subcontractor of the material, machinery or fixtures so furnished to be used in the construction, alteration, repair or improvement of the property of each separate person (except in cases where the property is owned by several persons jointly or as cotenants, in which case such joint owners or cotenants shall be deemed a person within the meaning of this act), and the mingling of charges in one account for material, machinery or fixtures to be used in the construction, alteration, repair or improvement of the property of different persons (except in cases of joint owners or all owners in common) shall defeat the right to a lien against either of such persons, provided, further, that no person who furnishes any material, machinery or fixtures as aforesaid to a contractor or subcontractor shall be entitled to file such lien hereunder unless he notifies the owner or one of the owners, in case of joint owners, of the premises upon or for which the same is to be used, by registered letter immediately after the making of such contract to so furnish material or machinery or fixtures to such contractor or subcontractor, that he is about to furnish the same and the probable charge therefor, provided, further, that where the work or material for which mechanic's lien is being claimed was furnished under contract with the contractor or subcontractor, the property owner shall not be liable to lien claimants to an aggregate amount greater than the contract price he was to pay such contractor or subcontractor. The owner shall be presumed to have consented to the furnishing of such labor or material or machinery or fixtures if at the time, he had knowledge thereof and did not give notice of his objections thereto to the person entitled to such lien. The provisions of this paragraph shall not be constructed to apply to claims or contracts for lightning rods or any of their attachments.

Every person who wishes to avail himself of the above provisions shall, in addition to the above requirements, file

with the clerk of the district court of the county in which such land, building or improvement is situated, a notice in writing giving the name of the possessor of the land, a description of the property to be charged with the lien, the date of the contract, and that he will claim and thereafter file a verified account thereof, as provided by statute, and perfect a mechanic's lien against the said described building, improvements or premises according to law, in the event the same shall not have been paid. This notice shall be signed by such person so entitled to such mechanic's lien or by authorized agent. The clerk of court shall file and record such notice in a book to be entitled the "Book of Mechanic's Liens Notice" upon the receipt of a fee of twenty-five cents for filing and indexing the same. A mechanic's lien shall be void against the owner or holder of any mortgage or deed or conveyance, whose mortgage, deed or conveyance shall have been filed and recorded prior to the filing for record of herein prescribed notice of mechanic's lien.

Every person who shall be entitled to a mechanic's lien for material under the provisions of this statute, and who wishes to avail himself of the provisions hereinbefore specified shall in addition to the requirements above enumerated file with his lien a statement to the effect that the owner of the premises has consented that said line [lien] may be filed, which statement must be signed by the owner of said premises, and which statement must be made in duplicate and duplicate delivered to the owner of the premises, and both original and duplicate notice be signed on or before the time the first material is furnished; provided, that when the owner of the premises has consented that a lien may be filed against the premises by a contractor it shall not be necessary for any subcontractor or material-man to obtain any further consent to the filing of liens for materials furnished for the improvement of said premises. (Here follows statutory form of notice and penalty for filing unlawful lien.)

Every person, who wishes to avail himself of the provisions of this act, shall file with the clerk of the district court of the county or judicial subdivision in which the property to be charged with the lien is situated and within ninety days after all the things aforesaid shall have been furnished or the labor done a just and true account of the demand due him after allowing all credits and containing a correct description of the property to be charged with such lien and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien, except as against purchasers or incumbrancers in good faith and for value whose rights accrue after the ninety days and before any claim for the lien is filed, or as against the owner except the amount paid to the contractor after the expiration of the ninety days and before the filing of the same.

The clerk of the district court shall indorse upon every account the date of its filing, and shall make an abstract thereof in a book to be kept by him for that purpose, and properly indexed, containing the date of its filing, the name of the person filing the lien, the amount of such lien, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same. He shall also make and keep a tract index in which shall be entered a description of all property covered or charged with the lien.

Liens under the provisions of this act shall have priority in the following order: 1. For manual labor. 2. For materials. 3. Subcontractors, other than manual laborers. 4. Original contractors. Liens in the same class filed within the ninety days shall share ratably in the security; but liens in the same class filed thereafter shall have priority in the order of the filing of the accounts thereof as aforesaid. Liens under the provisions of this act shall be preferred to all other liens or incumbrances upon such building, erection or other improvement and the land on which the same is situated, or

to improve which the labor was done or things furnished, or either of them, filed or docketed subsequent to the commencement of such building, erection or other improvement.

The entire land upon which any such building, erection or other improvement is situated, or to improve which the labor was done or things furnished, including that portion of the same not covered therewith, shall be subject to all liens hereby created to the extent of all the right, title and interest owned therein by the owner thereof for whose immediate use or benefit such labor was done or things furnished and when the interest owned in such land by such owner of such building, erection or other improvement is only a leasehold interest, the forfeiture of such lease for the nonpayment of rent or for noncompliance with any of the other stipulations therein shall not forfeit or impair such lien so far as it concerns such buildings, erections and improvements, but the same may be sold to satisfy such lien and be removed within thirty days after the sale thereof by the purchaser.

Any person having a lien by virtue of this act may bring action to enforce the same in the district court in the county or judicial subdivision in which the property is situated, and any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced, the court may consolidate them; provided, however, that before such lienholder may enforce such lien as herein provided, he shall give ten days' written notice to the record owner of property affected, of his intentions so to do, which notice shall be made by personal service, or by registered letter directed to the person's last known address. Provided, further, that if notice is given by registered letter, that twenty days' notice from date of registry receipt must be given before beginning action to enforce such lien. Whenever in the sale of the property subject to the lien there is a deficiency of the proceeds, judgment may be entered for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages.

Upon the written demand of the owner, his agent or contractor, served on the person holding the lien, requiring him to commence suit to enforce such lien, such suit shall be commenced within thirty days thereafter, if the debt for which the lien is security is due, and if not due, within thirty days after the same becomes due, or the lien shall be forfeited.

Every person for whose immediate use and benefit any building, erection or improvement is made, having the capacity to contract, including guardians of minors or other persons shall be included in the word "owner" thereof.

All persons furnishing things or doing work provided for by this act shall be considered subcontractors, except such as have therefor contracts directly with the owner, proprietor, his agent or trustee.

§ 1220. **Ohio.**<sup>39</sup>—Every person who does work or labor upon, or furnishes machinery, material or fuel, for constructing, altering, or repairing a boat, vessel or other water-craft, or for erecting, altering, repairing, or removing a house, mill, manufactory, or any furnace, or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for digging, drilling, boring, operating, completing, or repairing of any gas well, oil well, or other well, or for altering, repairing or constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract, express or implied, with the owner, part owner, or lessee, of any interest in real estate, or the authorized agent of the owner, part owner, or lessee, of any interest in real estate, and every person who shall

<sup>39</sup> The statute giving a lien to one furnishing machinery or other material for drilling or operating an oil or gas well gives no lien to one selling such machinery to the contractor. *Jerecka*

*Mfg. Co. v. Struther*, 8 Ohio C. D. M. 5, 14 Ohio Cir. Ct. 400. Gen. Code 1910, §§ 8324-8326, 8328, 8329, 8331, 8332, and Laws 1913, pp. 369, 373, 375, 376.

as subcontractor, laborer, or material-man, perform any labor, or furnish machinery, materials, or fuel, to each original or principal contractor, or any subcontractor in carrying forward, performing, or completing any such contract, shall have a lien to secure the payment thereof upon such boat, vessel, or other water-craft, or upon such house, mill, manufactory, furnace, or other building or appurtenance, fixture, bridge, or other structure, or upon such gas well, oil well, or other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the machinery or material so furnished, and upon the interest, leasehold, or otherwise, of the owner, part owner, or lessee, in the lot or land upon which they may stand,<sup>40</sup> or to which they may be removed, to the extent of the right, title and interest of the owner, part owner, or lessee, at the time the work was commenced or materials were begun to be furnished by the contractor, under the original contract, and also to the extent of any subsequent acquired interest of any such owner, part owner, or lessee.

Every person or his agent or attorney, whether contractor, subcontractor, material-man or laborer, who wishes to avail himself of the provisions of this statute, shall make and file in the office of the recorder in the county or counties in which said labor was performed, or machinery, material or fuel furnished, an affidavit containing a statement<sup>41</sup> showing the amount<sup>42</sup> due over and above all legal offsets, a descrip-

<sup>40</sup> The words "lot of land on which the same may stand" do not mean merely the ground covered, but include the land used with or appropriated to the building or structure. *Choteau v. Thompson*, 2 Ohio St. 114.

<sup>41</sup> Where a mechanic undertakes and completes a building as an entire undertaking, and for an entire price, he need not, in an account filed with the county re-

recorder, in order to secure a mechanic's lien, make a detailed statement of his labor and materials. In such case the entire job may be set down as a single item. *Davis v. Hines*, 6 Ohio St. 473.

<sup>42</sup> When a statement of items not required. *Thomas v. Huesman*, 10 Ohio St. 152. When overstatement of amount does not defeat the lien. *Thomas v. Huesman*, 10 Ohio St. 152.

tion of the property to be charged with the lien, the name of the person for whom such machinery, materials or fuel were furnished and labor performed and of the owner, part owner or lessee, if known. Such affidavit shall be filed within sixty days from the date on which the last of the machinery, materials or fuel shall have been furnished at the building or the last of the labor shall have been performed by the person claiming the lien. (Here follows statutory form of affidavit.)

The several liens herein provided for shall be liens from the date the first labor was performed, or the first machinery, materials, or fuel, was furnished by the contractor under the original contract, and shall continue for six years after said affidavit is filed in the office of the county recorder. If the action be brought to enforce such lien, within that time it shall continue in force until final adjudication thereof, and such liens shall take priority, as follows: If several liens be obtained by several persons upon the same job, in the manner hereinbefore prescribed, they shall have no priority among themselves,<sup>43</sup> except that liens filed by persons performing manual labor shall have priority to the extent of the labor performed during the thirty days immediately preceding the date of the performance of the last labor. They shall be preferred to all other titles, liens or incumbrances, which may attach to or upon such construction, excavation, machinery, or improvement, or to, or upon the land upon which they are situated, which shall either be given or recorded subsequent to the commencement of said construction, excavation, or improvement.

Any subcontractor, material-man, laborer or mechanic who has performed labor or furnished material, fuel or machinery, who is performing labor, or furnishing material, fuel or machinery, or is about to perform labor, or furnish material, fuel or machinery for the construction, alteration,

<sup>43</sup> Hazard Powder Co. v. Loomis, 2 Dis. (Ohio) 544; 13 Ohio Dec. 333; Choteau v. Thompson, 2 Ohio St. 114.



removal, or repair of any property, appurtenance or structure, described above, or for the construction, improvement or repair of any turnpike, road improvement, sewer, street or other public improvement, or public building provided for in a contract between the owner, or any board, officer or public authority and a principal contractor, and under a contract between such subcontractor, material-man, laborer or mechanic and a principal contractor or subcontractor, at the time of beginning to perform such labor or furnish such material, fuel or machinery, or at any time, not to exceed four months from the performance of the labor or the delivery of the machinery, fuel or material, may file with the owner, board or officer, or the authorized clerk or agent thereof, a sworn and itemized statement of the amount and value of such labor performed, and to be performed, material, fuel or machinery furnished, containing a description of any promissory note or notes that have been given by the principal contractor or subcontractor, on account of the labor, machinery or material, or any part thereof, with all credits and set-offs thereon.

Upon receiving the notice required by the following paragraph, such owner, board or officer or public authority or authorized clerk, agent or attorney thereof, shall detain in his hands all subsequent payments from the principal or subcontractor to secure such claims and the claims and estimates of other subcontractors, material-man, laborers, mechanics or persons furnishing materials to or performing labor for any contractor or subcontractor who intervenes before the next subsequent payment under the contract, or within ten days thereafter.<sup>44</sup>

<sup>44</sup> "The claim of a subcontractor can be charged upon the owner only in the way prescribed by the statute—by delivering his attested account against the contractor to the owner. But when

the owner is a corporation, the delivery of such account to the person whom the corporation has authorized to be its representative or active agency to act in the special matter arising under the

Such subcontractor, material-man, mechanic, laborer or person so filing his statement with the owner, board, officer or authorized clerk or agent or attorney thereof, in order to notify his fellow subcontractors, material-men, mechanics and laborers, at the same time shall file a copy thereof with the recorder of the county where such property is situated. If he fails so to do, the filing of the notice with the owner, board, officer or authorized clerk, agent or attorney thereof shall give him no preference over other claimants.

The owner of any property upon which a lien has been taken may notify in writing the person then owning said lien or his agent or attorney, to commence suit thereon. If the owner of such liens fails to commence suit within sixty days after receiving such notice the lien shall be null and void. But nothing herein shall prevent the claim being collected by law as other claims.

All other subcontractors, material-men, laborers, mechanics or persons furnishing material, fuel or machinery who, before the first subsequent payment falls due after the deposit of a copy of such statement with the county recorder by a subcontractor, material or machinery-man, laborer, or person furnishing material, or within ten days thereafter, file with such owner, board, officer or authorized clerk, agent or attorney thereof, a sworn and itemized statement or estimate of the labor, machinery, fuel or material furnished or to be furnished by them under a contract with a principal or subcontractor, containing a description of any promissory note or notes given therefor, or any part thereof, shall be paid pro rata with the person first so filing such statement and with each other, out of such first and other subsequent payments so falling due. Upon failure so to do, they shall have no

contract upon which the claim is based, is a compliance with the statute; for such person or officer must be regarded as the proper medium for reaching the corpora-

tion, or as the one having its authority to receive such notice." *Dunn v. Rankin*, 27 Ohio St. 132, 145, per Day, J.

recourse against the owner, board, officer or the clerk or agent thereof for any prior payments made under his contract with his head contractor or subcontractor.

The owner, board, officer or clerk, agent or attorney thereof, upon the receipt of such statement shall, or the lien claimant, his agent or attorney, in the name of such owner, board or officer, may, furnish the principal contractor or subcontractor with a copy thereof, within five days after receiving it. If such principal or subcontractor fails within five days after such receipt by him, to notify, in writing, such owner, board, officer, or clerk, agent or attorney thereof of his intention to dispute such claim, he shall be considered as assenting to its correctness. Thereupon such subsequent payment shall be applied by such owner, his agent or attorney, pro rata, upon such claim, and the amounts, when due, of such claim or estimates as have been meanwhile filed by other subcontractors, material-men, laborers, mechanics or persons furnishing materials, and assented to or adjusted as herein provided for, before the first of such subsequent payments falls due, or within ten days thereafter.

If a head contractor or subcontractor neglects or refuses to pay,<sup>44a</sup> within five days after his assent to or adjustment of any claim, the amount thereof, and costs incurred, to the subcontractor or material-man, laborer or mechanic, the owner, board, officer or clerk or agent thereof, when due, shall pay the whole or a pro rata amount thereof as the case may be, as above provided out of payments subsequently falling due. On his failure so to do, within ten days

<sup>44a</sup> In the case of railroad subcontractors, when the matter can not be adjusted between the parties interested, it may be submitted to the arbitration of three disinterested persons, one to be chosen by each of the parties, and

one by the two thus chosen. Their decision, or that of any two of them, in the absence of fraud or collusion, shall be final and conclusive on the parties. Gen. Code 1910, § 8350.

thereafter, the subcontractor or material-man, laborer, mechanic or person furnishing material, when due, may recover against the owner, in an action for money had or received the whole or a pro rata amount, as the case may be, of his claim or estimate, not exceeding in any case the balance due to the principal contractor.

§ 1220a. **Oklahoma.**<sup>45</sup>—If out of subsequent payments, as they severally fall due under the contract, and for ten days thereafter, the owner or his authorized agent neglects or refuses to pay, when due, the whole or a pro rata amount, as the case may be, of the sworn statement or estimate of any subcontractor, material-man, laborer or mechanic, within four months thereafter. The claimant of a lien shall file with the recorder of the county wherein the property is situated an affidavit containing an itemized statement and description of any note with the amount and value of such labor, machinery or material with all credits and set-offs thereon, together with the statements required as above mentioned, from principal contractors, and shall thereby have a lien to secure the payment of such claim upon the boat, vessel or other water craft, or upon the house, mill, manufactory, building appurtenance, fixture, bridge or other structure or gas well, oil well or other well upon which the labor was done, or machinery or material were furnished, and upon the interest of the owner in the lot of land on which it stands, or to which it may be removed, which lien shall date back to the date of the furnishing of the first item of such labor, machinery or material and have the same operation, effect and duration, and be subject to the same obligation with respect to the owner, as the lien of a head contractor in similar cases.

Any person who shall, under oral or written contract with the owner of any tract or piece of land, perform labor or fur-

<sup>45</sup> Snyder's Comp. Laws 1909, as to parties and consolidation, §§ 6151-6153, 6155. For provisions see §§ 6156, 6157.

nish material for the erection, alteration or repair of any building, improvement or structure thereon, or who shall furnish material or perform labor in putting up any fixtures, machinery in or attachment to any such building, structure or improvement; or who shall plant any trees, vines, plants or hedge in or upon such land; or who shall build, alter, repair or furnish labor or material for building, altering or repairing any fence or footwalk in or upon said land, or any sidewalk in any street abutting such land, shall have a lien upon the whole of said tract or piece of land, the buildings and appurtenances, but if a homestead the lien shall be good on not to exceed five acres in a square form on which the building material, fixtures or machinery are located, in the manner herein provided, for the amount due him for such labor, materials, fixtures or machinery. If the title to the land is not in the person with whom any such contract was made, but is leased and unimproved, the lien shall be allowed on the buildings and improvements on such land separately from the real estate. Such liens shall be preferred to all other liens or incumbrances which may attach to or upon such land, buildings or improvements to either of them, subsequent to the commencement of such building, the furnishing or putting up of such fixtures or machinery, the planting of such trees, vines, plants or hedges, the building of such fence, footwalk or sidewalks, or the making of any such repairs or improvements.<sup>45a</sup>

Any person claiming a lien as aforesaid shall file in the office of the clerk of the district court of the county in which the land is situated a statement setting forth the amount claimed and the items thereof as nearly as practicable, the names of the owner, the contractor, the claimant, and a description of the property subject to the lien, verified by affi-

<sup>45a</sup> The lien provided by law for laborers and mechanics is in the nature of a notice of lis pendens. *Sawyer v. Shick*, 30 Okla. 353, 120 Pac. 581.

davit;<sup>45b</sup> provided, that if any promissory note, bearing a lawful rate of interest, shall have been taken for any such labor or material, it shall not be necessary to file an itemized statement of labor or material furnished, but in lieu thereof it shall be sufficient to file a copy of such note, with a sworn statement that said note, or any part thereof, was given for such labor or material used in the construction of such building or improvement; and if the whole of such note shall have been given for such labor or material, the lien shall be for the whole of the principal and interest of said note; but if a part of said note only shall have been given for such labor or material, then the lien shall be for a corresponding amount only, with interest at the rate specified in said note. Such statement shall be filed within four months after the date upon which material was last furnished or labor last performed under contract as aforesaid; and if the claim be for the planting of any trees, vines, plants or hedge, such statement shall be filed within four months from such planting. Immediately upon the receipt of such statement the clerk of the district court shall enter a record of the same in a book kept for that purpose, to be called the mechanics' lien docket, which shall be ruled off into separate columns, with headings as follows: "When filed," "Name of owner," "Name of claimant," "Amount claimed," "Description of property," and "Remarks," and the clerk shall make the proper entry in each column.

Any person who shall furnish any such material or perform such labor under a subcontract with the contractor, or as an artisan or day-laborer in the employ of such contractor, may obtain a lien upon such land, or improvements, or both, from the same time, in the same manner, and to the same extent as the original contractor, for the amount due

<sup>45b</sup> Material delivered but not used is not material furnished within the statute and the notice of lien must be filed within 60 days of a date when the last item of used material was furnished. *P. T. Walton Lumber Co. v. Cox*, 29 Okla. 237, 116 Pac. 798.

him for such material and labor; and any artisan or day-laborer in the employ of, and any person furnishing material to such subcontractor, may obtain a lien upon such land or improvements, or both, for the same time, in the same manner, and to the same extent as the subcontractor for the amount due him for such material and labor, by filing with the clerk of the district court of the county in which the land is situated, within sixty days after the date upon which material was last furnished or labor last performed under such subcontract, a statement, verified by affidavit, setting forth the amount due from the contractor to the claimant, and the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property upon which a lien is claimed; and by serving a notice in writing of the filing of such lien upon the owner of the land, or the improvements, or both; provided, that if with due diligence the owner can not be found in the county where the land is situated, the claimant, after filing an affidavit setting forth such facts, may serve a copy of such statement upon the occupant of the land. Or if the same be unoccupied, may post such copy in a conspicuous place upon the land or any building thereon. Immediately upon the filing of such statement the clerk of the district court shall enter a record of the same in the docket above provided for, and in the manner therein specified, that the owner of any land affected by such lien shall not thereby become liable to any claimant for any greater amount than he contracted to pay the original contractor. The risk of all payments made to the original contractor shall be upon such owner until the expiration of the sixty days herein specified, and no owner shall be liable to an action by such contractor until the expiration of said sixty days, and such owner may pay such subcontractor the amount due him from such contractor for such labor and material, and the amount so paid be held

and deemed a payment of said amount to the original contractor.

Any lien provided for by this act may be enforced by civil action in the district court of the county in which the land is situated, and such action shall be brought within one year from the time of the filing of said lien with the clerk of said court; provided, that where a promissory note is given such action may be brought at any time within one year from the maturity of said note. The practice, pleading and proceedings in such action shall conform to the rules prescribed by the code of civil procedure as far as the same may be applicable; and in case of action brought, any lien statement may be amended by leave of court in furtherance of justice as pleadings may be in any matter, except as to the amount claimed.

§ 1221. **Oregon.**<sup>46</sup>—Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, teamster, drayman and other person performing labor upon or furnishing material, or transporting or hauling any material of any kind to be used in the construction, alteration or repair, either in whole or in part, of any building,<sup>47</sup> wharf, bridge, ditch, flume, tunnel, fence, machinery or aqueduct, or any structure or superstructure, shall have a lien upon the same for the work or labor done or transportation or material furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder or other person having charge of the construction, alteration or repair, in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner.

<sup>46</sup> Ann. Codes & Stats. 1902, §§ 5640-5642, 5644, 5646, 5649.

<sup>47</sup> Does not include a building erected by municipal or other public authority for public use. Port-

land Lumbering and Mfg. Co. v. School Dist., 13 Ore. 283, 10 Pac. 350. No lien is allowed for building a sidewalk. Sarchett v. Legg, 60 Ore. 213, 118 Pac. 203.



The land upon which any building or other improvement as aforesaid shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof (to be determined by the judgment of the circuit court at the time of the foreclosure of such lien), shall also be subject to such lien, if, at the time the work was commenced or the materials for the same had been commenced to be furnished, the said land belonged to the person who caused said building or other improvement to be constructed, altered or repaired; but if such person owned less than a fee simple estate in such land, then only his interest therein shall be subject to such lien; and in case such interest shall be a leasehold interest, and the holder thereof shall have forfeited his rights thereto, the purchaser of such building or improvements and leasehold term, or so much thereof as remains unexpired at any sale under the provisions hereunder, shall be held to be the assignee of such leasehold term, and as such shall be entitled to pay the lessor all arrears of rent or other money and costs due under said lease, unless the lessor shall have regained possession of the land and property, or obtained judgment for the possession thereof, prior to the commencement of the construction, alteration or repair of the building or other improvement thereon; in which event, said purchaser shall have the right only to remove the building or other improvement, within thirty days after he shall have purchased the same; and the owner of the land shall receive the rent due him, payable out of the proceeds of the sale, according to the terms of the lease, down to the time of such removal.

A lien hereby created upon any parcel of land shall be preferred to any lien, mortgage or other incumbrance which may have attached to said land subsequent to the time when the building or other improvement was commenced, or the materials were commenced to be furnished and placed upon or adjacent to the land; also to any lien, mortgage or other

incumbrance which was unrecorded at the time when said building, structure or other improvement was commenced, or other materials for the same were commenced to be furnished, and placed upon or adjacent to the land; and all liens hereby created upon any building or other improvement shall be preferred to all prior liens, mortgages or other incumbrances upon the land upon which said building or other improvement shall have been constructed or situated when altered or repaired; and in enforcing such lien such building or other improvement may be sold separately from said land; and when so sold, the purchaser may remove the same, within a reasonable time thereafter, not to exceed thirty days, upon the payment to the owner of the land of a reasonable rent for its use from the date of its purchase to the time of removal.<sup>48</sup>

It shall be the duty of every original contractor, within sixty days after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber merchant, laborer or other person, save the original contractor, claiming the benefit of this act, within thirty days after the completion of the alteration or repair thereof, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the county clerk of the county in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and off-sets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property<sup>49</sup> to be charged with

<sup>48</sup> As to sufficiency of notice by claimant of such a lien, see *Kezartee v. Marks*, 15 Ore. 529, 16 Pac. 407. The lien attaches from the time the work is begun or the material is first furnished.

*Henry v. Hand*, 36 Ore. 492, 59 Pac. 330.

<sup>49</sup> It is sufficient that the notice gives the true amount of the claim without stating that the amount is over and above all just credits and offsets. *Whittier v.*

said lien, sufficient for identification, which claim shall be verified by the oath of himself or of some other person having knowledge of the facts.

No lien hereby provided for shall bind any building, structure or other improvement for a longer period than six months after the same shall have been filed unless suit be brought in a proper court within that time to enforce the same; or if a credit be given, then six months after the expiration of such credit; but no lien shall be continued in force for a longer time than two years from the time the work is completed by any agreement to give credit.

No payment by the owner of the building or structure to any original or subcontractor, made before thirty days from the completion of the building, shall be valid for the purpose of defeating or discharging any lien created by this act in favor of any workman, laborer, lumber merchant or material-man, unless such payment so made by the owner of the building or structure to such original or subcontractor has been distributed among such workmen, laborers, lumber merchants or material-men, or, if distributed in part only, then the same shall be valid only to the extent the same has been so distributed.

§ 1222. **Pennsylvania.**<sup>50</sup>—Every structure or other improvement, and the curtilage appurtenant thereto, shall be

Blakely, 13 Ore. 546, 11 Pac. 305, *Kezartee v. Marks*, 15 Ore. 529, 16 Pac. 407. As to what is a sufficient statement of the name of the owner, description of the property, and verification by oath, see *Kezartee v. Marks*, 15 Ore. 529, 16 Pac. 407. The law which provides that where improvements are made on land with the knowledge of the owner his interest shall be subject to a mechanic's lien unless within three days after he has had notice of such improvements being made

he shall give notice and post the same on the land that he will not be responsible for such improvement, is not unconstitutional. *Title Guarantee & Co. v. Wrenn*, 35 Ore. 62, 56 Pac. 271, 76 Am. St. 454. The notice of a lien may be in the form of an affidavit instead of a notice of lien as prescribed in the statute. *McFeron v. Doyens*, 59 Ore. 366, 116 Pac. 1063.

<sup>50</sup> *Purdon's Digest* (13th ed.), pp. 2466-7 et seq., §§ 7-10, 17, 19, 20, 24, 30, 45. The following liens

subject to a lien for the payment of all debts due to the contractor or subcontractor in the erection and construction or removal thereof, in the addition thereto, and in the alteration and repair thereof,<sup>50a</sup> and of the outhouses, sidewalks,

have been established: For making and grading pavement. *Wilver v. Sunbury*, 81 Pa. St. 57. For drilling oil well and furnishing tools, ropes, etc. *Vandergrift's Appeal*, 83 Pa. St. 126. A lien may be claimed for work and material under an implied contract. *Carey v. Seifert*, 44 Pa. Super. Ct. 577. The material-man who declines material to an owner for a particular structure does not lose his right to a lien because the owner sends the material for use in another structure. *B. F. Lee Co. v. Sherman*, 43 Pa. Super. Ct. 557, 560. Separate liens may be filed against different buildings or groups of buildings. *Scott v. Scott*, 196 Pa. St. 132, 46 Atl. 379. To secure a valid lien all statutory requirements must be complied with. *Wolf Co. v. Pennsylvania R. Co.*, 29 Pa. Super. Ct. 439; *Kountz v. Consolidated Ice Co.*, 36 Pa. Super. Ct. 639.

<sup>50a</sup> Formerly there was no lien for repairs, alterations, or additions. Such a lien was given by different acts applicable to particular counties, until in 1887, Acts, pp. 118, 119, such a lien was extended to all the counties of the commonwealth. This act, however, was repealed by the existing law. See § 83 of Act. The cases relating to this subject are quite numerous, but are of no interest since the changes in the statute. Some of the decisions are: *Han-*

*cock's Appeal*, 115 Pa. St. 1, 7 Atl. 773; as to alterations or repairs of a leasehold estate in Allegheny County; *Stoner's Appeal*, 135 Pa. St. 604, 19 Atl. 949, as to claim filed for a new addition, or back building, to an old building; *Hasslett v. Gillespie*, 95 Pa. St. 371, that there was no lien for new machinery furnished for the repair of an old mill. See *Best v. Baumgardner*, 122 Pa. St. 17, 15 Atl. 691, 1 L. R. A. 356, as to application of act of 1887 to materials furnished before the passage of this act. Where a claim is filed for work done and materials furnished in the construction of a building, but the contract shows that the work was really an alteration of an old building, the claim is properly struck off. Claims for erection and claims for alteration arise under different acts and differ in several respects. *Morrison v. Henderson*, 126 Pa. St. 216, 17 Atl. 599. Under a statute (March 28, 1835, now repealed) allowing a lien only for the erection or construction of a building, alterations and repairs which do not fairly change its exterior into a new structure can not confer a lien. *Miller v. Hershey*, 59 Pa. St. 64; *Patterson v. Frazier*, 123 Pa. St. 414, 16 Atl. 477. In the case of tenancies or leasehold estates, of alterations and repairs, and of fitting up or equipping old structures with machinery, gearing,

yards, fences, walls or other enclosure belonging to said structure or other improvement; and in the fitting up or equipment of the same for the purpose for which the improvement is made, including paper hanging, grates, furnaces, heaters, boilers, engines, chandeliers, brackets, gas and electric pipes, wires and fixtures; and for like debts, contracted by such owner in the fitting up or equipment with machinery, gearing, boilers, engines, cars or any other useful appliances, of new or old structures or other improvements, for business purposes, and for like debts, contracted by such owner for rails, ties, pipes, poles and wires, and the excavation for and laying and relaying or stringing and restringing, said rails, ties, pipes or wires, or erecting said poles, whether on the property described in the claim or upon other private property or public highways.

But no lien shall be allowed for labor or materials furnished for purely public purposes; nor against any property held by the committee of a lunatic, the guardian of a minor, or a trustee under deed, will or appointment by the court, unless by virtue of a contract made under authority of the court, or of the power contained in the deed or will.

boilers, engines, cars or other useful appliances, the claim must be filed in the court of common pleas of the county or counties in which the structure or other improvement is situate, within three months after the claimant's contract or agreement is completed; and in all other cases, within six months thereafter; and when filed, it shall be entered and indexed in the mechanics' lien docket. Upon it a writ of scire facias must issue within two years unless the owner by writing filed before the expiration of that time, waive the necessity for so doing for a further period, not exceed-

ing three years; and a verdict must be recovered or judgment entered on the scire facias within five years after it is issued. Final judgment must be entered on the verdict within five years after its recovery after judgment is entered, it must be revived, by writ of scire facias to revive the judgment or by judgment thereon, within each recurring period of five years. If a claim be not filed within the time aforesaid, or if not prosecuted in the manner and at the times aforesaid, it shall be wholly lost. Purdon's Dig. (13th ed.), p. 2475, § 19.

Nor shall any claim for alterations or repairs, or for fitting up or equipping old structures with machinery, gearing, boilers, engines, cars, or other useful appliances, be valid, unless it be for a sum exceeding one hundred dollars; and, in the case of a subcontractor, unless, also written notice of an intention to file a claim therefor, if the amount due be not paid, shall have been given to the owners or some one of them, or for him to an adult member of his family or the family with which he resides, or to his architect, agent, manager, or executive or principal officer, on or before [the] day the claimant completed his work or furnished the last of his materials. Nor shall any claim be valid against the estate of an owner, by reason of any consent given by him to his tenant to improve the leased property, unless it shall appear in writing, signed by such owner, that said improvement was in fact made for his immediate use and benefit.

The curtilage appurtenant to the structure or other improvement shall be such as is reasonably needed for the general purpose for which such structure or other improvement was made, and belonging to the same owner including other structures, whether newly erected, or altered, or changed for such purposes, and forming part of a single business or residential plant.

An estate, charge or lien, of which the claimant had actual or constructive notice before the date of such visible commencement, upon ground, if given to secure advances of money, knowingly to be furnished for the purpose of making the improvement in whole or in part, shall have, with prior liens and encumbrances, a preferential claim upon the funds raised by a judicial sale of said property, to the extent only of the actual value of the property immediately prior to such visible commencement of the work; but the proceeds of such sale, above such value, shall be applied to the payment of the mechanics' claim in preference to such estate, charge or lien.

Any subcontractor, intending to file a claim, must give to the owner written notice to that effect, together with a

sworn statement setting forth the contract under which he claims, the amount alleged to be still due and how made up, the kind of labor or materials furnished, and the date when the last work was done or materials furnished. Such notice and statement must be served at least one month before the claim is filed, and within three months after the last of his work was done or materials furnished, if he has six months within which to file his claims, and within forty-five days thereafter, if he has but three months within which to file it; but no such notice or statement need be served if the subcontractor be ruled to file his claim before the expiration of said periods. Service may be made personally on the owner anywhere, but, if he can not be served in the county where the structure or other improvement is situate, such notice and statement may be served on his architect or agent, or the party in possession of the structure or other improvement; and if there be no architect, agent or party in possession, it may be posted on the most public part of the structure or other improvement. After such notice, and until the claim is finally defeated, the owner may, unless approved security be given to indemnify him from loss, retain out of any payment due or to become due the contractor, a sum sufficient to protect him from loss.

If the legal effect of the contract between the owner and the contractor is, that no claim shall be filed by any one, such provision shall be binding; but the only admissible evidence thereof, as against a subcontractor, shall be proof of actual notice thereof to him, before any labor or materials furnished by him; or proof that a duly written and signed contract to that effect has been filed in the office of the prothonotary of the court of common pleas of the county or counties where the structure or other improvement is situate, prior to the commencement of the work upon the ground, or within ten days after the execution of the principal contract, or not less than ten days prior to the contract with the claimant; and the prothonotary shall index the

same, making the contractor the defendant and the owner the plaintiff. The only admissible evidence that such a provision has, notwithstanding its filing, been waived in favor of the claimant, shall be a written agreement to that effect signed by all those who, under the contract, are interested antagonistically to the claimant's allegations.

Such claim may be filed by any person, or persons, firm, association, or corporation, furnishing labor or materials to such structure or other improvement, and shall set forth: (1.) The name of the claimant.<sup>51</sup> (2.) The name of the owner of the structure or other improvement and property. (3.) The name of the party with whom the claimant contracted, and if not the owner, then whether or not such party contracted directly with the owner. (4.) A copy of his contract or contracts, if in writing, or a statement of the terms and conditions thereof, if any of them are verbal. (5.) The kind and character of the labor or materials furnished, or both, and whether the lien is claimed against the fee itself, or a lesser estate or interest therein. (6.) When the contract is with other than the owner, or not for an agreed sum, a detailed statement of the kind and character of the labor or materials furnished, or both, and the prices charged for each thereof. (7.) The amount or sum claimed to be still due and chargeable against the particular property, showing how that amount or sum is made up, and whether the claimant has any note or other collateral security for his claim and if so, what it is. (8.) A description of the property against which the lien is claimed together with such a description of the structure or other improvement as may be necessary for the purpose of identification. (9.) When the claimant first furnished labor or materials thereto, and when he last did so. (10.) From what date the lien is claimed, and, if from a time

<sup>51</sup> It is sufficient to name the owner of the building when the work was commenced. *Fourth Avenue Baptist Church v. Schreiner*, 88 Pa. St. 124.



preceding the filing of the claim, the reason why such date is selected. (11.) When the contract is with other than the owner, or the claim is for alterations or repairs or for fitting up old structures with machinery, gearing, boilers, engines, cars, or other useful appliances, when and how notice was given to the owner of an intention to file the claim.

The claim shall be sued out by writ of *scire facias*. (Here follows statutory form.)

§ 1223. **Rhode Island.**<sup>52</sup>—Whenever any building, canal, turnpike, railroad or other improvement shall be constructed, erected or repaired by contract with or at the request of the owner thereof, such owner being at the time the owner of the land on which the same then is, or by the husband of such owner with the consent of his wife in writing,<sup>53</sup> such building, canal, turnpike, railroad or other improvement, together with the said land, is hereby made liable and shall stand pledged for all the work done in the construction, erection or reparation of such building, canal, turnpike, railroad or other improvement,<sup>54</sup> and for the materials used in

<sup>52</sup> Gen. Laws 1909, p. 891 et seq., §§ 1-9.

<sup>53</sup> Since Rev. Stats. 1857, p. 343. Consent without writing sufficient before. *Briggs v. Titus*, 7 R. I. 441; *Bliss v. Patten*, 5 R. I. 376. A mechanics' lien does not attach to the estate of a married woman for improvements made upon it, unless she has contracted for them in writing jointly with her husband, or the husband's contract for them has received her written consent. Her own written contract in which the husband does not join is insufficient. *Cameron v. McCullough*, 11 R. I. 173.

<sup>54</sup> The lien is not confined to mechanics, but is extended to all

persons who have made repairs or improvements under contract with or by request of the owner. *Sweet v. James*, 2 R. I. 270. The contractor has a lien not only for his own labor, but for that of all persons employed by him, although they may have concurrent liens. *Sweet v. James*, 2 R. I. 270. Where it is agreed that an architect is to give orders on the owner on receiving releases from workmen or material-men of their liens, those executing such releases can not assert liens because the orders are not paid. *Golrick v. Tella*, 22 R. I. 281, 47 Atl. 598.

the construction, erection or reparation thereof, which have been furnished by any person,<sup>55</sup> before any other lien which shall originate subsequent to the commencement of such erection, construction or reparation on such land.<sup>56</sup>

Whenever any building, canal, turnpike, railroad or other improvement shall be constructed, erected or repaired by contract with or at the request of any lessee or tenant thereof, or by the husband of such lessee or tenant, with the consent of his wife in writing, the interest and title of such lessee and tenant in the said building, canal, turnpike, railroad or other improvement, and in the land on which the same is located, shall stand pledged for all the work done and materials used and furnished in the construction, erection or reparation of such building, canal, turnpike, railroad or other improvement, and not the interest or title of the landlord of such lessee or tenant, unless the consent in writing of such landlord is first obtained, assenting to such construction, erection or reparation, and acknowledging his estate to be also holden for the payment thereof.

Whenever any building, canal, turnpike, railroad or other improvement shall be constructed, erected or repaired by contract with or at the request of the owner thereof, such owner being at the time owner of less than a freehold in the land on which the same is located, or by the husband of such owner with the consent of his wife in writing, (and unless such consent in writing shall be given, no lien shall

<sup>55</sup> A lien for materials before the amendment of 1888 (Act Mar. 21, 1888) was given only to a person who had contracted with, or been requested by, the owner to erect the building. A subcontractor had no lien for materials furnished by him. *Hatch v. Faucher*, 15 R. I. 459, 8 Atl. 543. The amendment extended the lien to material furnished to the contractor for use in performing his con-

tract, and which was so used, though it was not furnished on the credit of the owner of the estate; but it did not extend the lien to material furnished to the contractor on general account. *Gurney v. Walsham*, 16 R. I. 698, 19 Atl. 323.

<sup>56</sup> This lien has precedence over any other lien which originates after the work has begun. *McDonald v. Kelly*, 14 R. I. 335.

be had either against the husband's or wife's interest in the same,) such building, canal, turnpike, railroad or other improvement, together with the title and interest of the owner thereof in the land on which the same is located, shall stand pledged for all the work done and material used and furnished in the construction, erection or reparation of such building, canal, turnpike, railroad or other improvement and not the interest or the title of the owner of the fee in such land, unless the consent in writing of such owner is first obtained, assenting to such construction, erection or reparation and acknowledging his estate to be also holden for the payment thereof.

If such building, canal, turnpike, railroad or other improvement shall be constructed, erected or repaired under a written contract, then the lien hereby created in favor of such contractor, for the sums stipulated to be paid on such contract, shall be wholly lost, unless legal process shall be commenced, for enforcing the same in manner provided by statute, within four months from the time that any payment on such contract shall become due and payable,<sup>57</sup> if such payment shall not then be made.

No person who shall do work for or furnish materials to be used in the construction, erection or reparation of any building, canal, turnpike, railroad or other improvement, without written contract, shall have any advantage of any lien therefor created hereby, unless he shall commence legal

<sup>57</sup> If by the contract the price is payable in time notes, the suit may be commenced within the time limited after the maturity of the notes. *Wheeler v. Schroeder*, 4 R. I. 383; *Sweet v. James*, 2 R. I. 270. If the materials are furnished, not under any one continuing contract, but from time to time, as the material-men were requested to furnish them, so that

each delivery was a separate transaction, beginning and ending in itself, they are entitled to have any delivery within six months before the account was lodged regarded as the time for commencing the delivery for materials then or subsequently furnished. *Gurney v. Walsham*, 16 R. I. 698, 19 Atl. 323.

process for enforcing the same, in manner provided by statute, within six months from the time of the commencing the doing of such work or of the commencing the delivery of materials, if payment for the same shall not then be made; and provided, further, that no lien shall attach for materials furnished unless the person furnishing the same shall, within sixty days after such materials are placed upon the land, give notice in writing to the owner of the property to be affected by the lien (if such owner be not the purchaser of the materials) that he intends to claim such lien, and shall within the aforesaid sixty days place a copy of said notice on record in the office of the town clerk or recorder of deeds of the town or city in which said land is situated, in a book to be kept for that purpose, and if such owner can not be found and has no place of abode within the state the said notice may be served by posting it on said land.<sup>58</sup>

Any person who shall do or furnish work or labor in the construction, erection, or reparation of any building, canal, turnpike, railroad, or other improvement, at the request of any person who has entered into a contract, whether in writing or not, as contractor or any subcontractor for such construction, erection, or reparation, shall have a lien for all such work and labor furnished or done by him within forty

<sup>58</sup> Where the materials are placed on the land from time to time, as requested, and not in pursuance of any entire contract, the notice need not be given within sixty days after the material-man commences delivering, but, whenever given, is good for any materials placed on the land within the next preceding sixty days. *Gurney v. Walsham*, 16 R. I. 698, 19 Atl. 323. The lien will attach only for that material furnished within sixty days of the giving of the notice, and will not extend back to the commencement of the

furnishing under the contract. *Newell v. Campbell Mach. Co.*, 17 R. I. 74, 20 Atl. 158. In Providence the notice is properly placed on record in the office of the recorder of deeds. *Gurney v. Walsham*, 16 R. I. 698, 19 Atl. 323. The mere filing of the copy is not enough. It must be recorded. Nor is the mere recording of the names of the parties to the notice, with a minute of the time when filed, a sufficient recording. *Dodge v. Walsham*, 16 R. I. 704, 19 Atl. 326.

days next preceding the time he shall give the notice hereinafter required. Any person in order to acquire such lien shall give notice in writing of his intention to claim such lien<sup>59</sup> personally to the person against whose estate or title he claims a lien, or by leaving the same at his last and usual place of abode, if any, in this state, and shall within ten days after giving such notice place a copy of said notice on record in the office of the town clerk or recorder of deeds of the town or city in which said land is situated, in a book to be kept for that purpose; and if such owner can not be found, and has no place of abode within the state, the said notice may be served by posting it on the said land; and within four months from the time notice shall be given as aforesaid, said claimant shall commence legal process, as provided by statute, to enforce the lien, otherwise said lien shall be lost.

The commencement of legal process to enforce the liens hereby created shall be the lodging the account or demand for which the lien is claimed, in the office of the town clerk of the town or towns in which the building, canal, turnpike, railroad or other improvement is situated, with notice to what building, canal, turnpike, railroad, improvement and land and to what or whose estate in the same the said account or demand refers, except in the city of Providence, where the same shall be lodged in the office of the recorder of deeds of said city; and the said clerk or recorder of deeds, as the case may be, shall record the names of the parties, the amount of the claims and the notice aforesaid, and the exact time<sup>60</sup> of the filing said account or demand in his office, in

<sup>59</sup> A subcontractor has a lien for his own labor and for that of his employees. *Hatch v. Faucher*, 15 R. I. 459, 8 Atl. 543. A laborer employed by the contractor is not entitled to a lien unless he gives the notice within the time limited. The fact that he is hired by the day is immaterial. *Mowry v.*

*Hill*, 14 R. I. 504. As to sufficiency of notice by laborers, see, also, *Kenyon v. Peckham*, 10 R. I. 402.

<sup>60</sup> *Bliss v. Patten*, 5 R. I. 376. When negotiable paper has been given for the price, as stated in the account filed, the petition is the commencement of the action. *Sweet v. James*, 2 R. I. 270. The

a book to be by him kept for that purpose; but the original account need not be recorded, but shall be kept on file.

Whenever any account or demand is left with any town clerk, or the recorder of deeds in the city of Providence, in pursuance of the preceding paragraph, such clerk or recorder shall note thereon the time, as near as may be, when the same was lodged with him as aforesaid.

At any time within twenty days after the commencement of legal process, as hereinbefore provided, the person commencing the same shall file his petition in equity, in the clerk's office of the superior court, setting forth the particulars of his account or demand, and particularly describing the building, canal, turnpike, railroad, improvement, land, and the estate and title in the same upon which he claims a lien for such account or demand, and praying that the said lien may be enforced against the same, and that the same may be sold to satisfy said account or demand, and all other accounts and demands for which the same is pledged and liable hereby.

provision as to recording is merely directory to the clerk, and his failure to comply with the statute will not invalidate the lien. *Spencer v. Doherty*, 17 R. I. 89, 20 Atl. 232. The serving and filing, within the required sixty days under § 5, of a notice of an intention to claim a lien, which contained a description of the materials and of the property to be affected and the amount claimed, is not a compliance with § 7 in regard to the commencement of legal process. *Tingley v. White*, 17 R. I. 533, 23 Atl. 100, especially if it is not stated that these matters were incorporated in the notice for the purpose of commencing legal process. The mechanics' lien law, Gen. Laws 1909, p. 891, gives,

in §§ 1-3, a lien for labor, but does not expressly state to whom it is given. Sections 4 and 5 relate to proceedings by the original contractor to get the benefit of a lien. Section 6 relates to proceedings by persons who do work or labor in the construction, etc., of a building, "at the request of any person who had entered into a contract, whether in writing or not, as contractor or any subcontractor for such construction," etc. The word "contract," in the last provision, includes only the original contract, and one who worked under a contract with a subcontractor was not entitled to a lien. *Morrison v. Whaley*, 16 R. I. 715, 19 Atl. 330; *Hatch v. Faucher*, 15 R. I. 459, 8 Atl. 543.

§ 1224. **South Carolina.**<sup>61</sup>—Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used, in the erection, alteration, or repair of any building or structure upon any real estate, by virtue of an agreement with, or by consent of, the owner of such building or structure, or any person having authority from, or rightfully acting for, such owner, in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due to him, and the costs which may arise in enforcing such lien under this statute, except as is provided by statute.

Any subcontractor or person contracting with an original contractor may have such a lien: provided, that before performing or furnishing labor or furnishing materials, or both, he do give notice in writing to the owner of the property to be affected thereby (or to the lawful agent of the owner if the original contract was made by and through such agent), and also to the original contractor, that he intends to claim such a lien: and provided, further, that the aggregate amount of any and all such liens and of the lien of the original contractor shall not exceed the amount of the lien of the original

<sup>61</sup> Code 1912, §§ 4113-4119, 4139. To entitle a person to the lien provided for in this statute, two things must concur: 1. There must be a debt due to the person claiming the lien for labor performed, or for materials furnished; 2. Such labor must be performed, or the materials must be furnished, by virtue of an agreement with, or by consent of, the owner of such building or his agent. A subcontractor is not entitled to such lien. The owner can not be said to have given his

“consent” to the furnishing of labor or material by a subcontractor, and the contractor has no authority from the owner, nor is he acting for the owner, in making contracts with workmen and others. “Consent,” within the meaning of the statute, implies something more than acquiescence. It implies an agreement to that which could not exist without such consent. *Geddes v. Bowden*, 19 S. Car. 1; *Gray v. Walker*, 16 S. Car. 143, 147; *Murray v. Earle*, 13 S. Car. 87, 89.

contractor; and any and all questions between an original contractor and a subcontractor or contractors, and between subcontractors, shall be first adjusted and settled before the owner can be required to pay, on his contract, anything to any of such contractors.

Such lien shall not avail or be of force against any mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed.<sup>62</sup>

The owner of any such building or structure in process of erection, or being altered or repaired, other than the party by whom or in whose behalf a contract for labor or materials has been made, may prevent the attaching of any lien for labor thereon not at the time performed, or materials not then furnished, by giving notice, in writing, to the person performing or furnishing such labor, or furnishing such materials, that he will not be responsible therefor.

Such lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, files in the office of the register of mesne conveyances or clerk of court of the county in which the same is situated a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner or owners of the property, if known, which certificate shall be subscribed and sworn to by the person claiming the lien, or by some one in his behalf, and shall be recorded in a book kept for the purpose by the register or clerk who shall be entitled to the same fees therefor as for recording mortgages of equal length. The delivery to the register clerk for filing, as hereinbefore provided, shall be and constitute

<sup>62</sup> *Devereux v. Taft*, 20 S. Car. 555. See *Watson v. Columbia Bridge Co.*, 13 S. Car. 433, as to priority of lien to pledge of the shares of a bridge company.



the delivery contemplated with regard to such liens in this code.

No inaccuracy in such statement, relating to the property to be covered by the lien, if the property can be reasonably recognized, or in stating the amount due for labor or materials, shall invalidate the proceedings, unless it appear that the person filing the certificate has wilfully and knowingly claimed more than is his due.

Unless a suit for enforcing the lien is commenced within six months after person desiring to avail himself thereof ceases to labor on or furnish labor or material for such building or structures, the lien shall be dissolved.<sup>63</sup>

If the interest of the owner in the building, structure, or land, is under attachment at the time of filing and recording the statement of the account, the attaching creditor shall be preferred to the extent of the value of the buildings and land as they were when the statement was recorded; and the court shall ascertain, by a jury or otherwise, as the case may require, what proportion of the proceeds of the sale shall be held subject to the attachment, as derived from the value of the property when the statement was recorded.

**§ 1224a. South Dakota.**<sup>64</sup>—Whoever contributes to the improvement of real estate by performing labor, or furnishing skill, material or machinery, for any of the purposes hereinafter stated, whether under a contract with the owner of such real estate or at the instance of any agent, trustee, contractor, or subcontractor, of such owner, shall have a lien upon said improvement, and upon the land on which it is

<sup>63</sup> The proceeding may be either by service of summons and petition, or by filing a petition, and obtaining from the court an order of notice. *Oliver v. Fowler*, 22 S. Car. 534; *Johnson v. Frazee*, 20 S. Car. 500. The action is com-

menced when the petition is filed. *Oliver v. Fowler*, 22 S. Car. 534. There can be no personal judgment for a deficiency. *Johnson v. Frazee*, 20 S. Car. 500.

<sup>64</sup> Sess. Laws 1913, p. 385 et seq.

situated or to which it may be removed, for the price or value of such contribution; that is to say, for the erection, alteration, repair or removal of any buildings, fixtures, bridge, fence, or other structure thereon, or for grading, filling in, or excavating the same, or for digging or repairing any ditch, drain, well, cistern, reservoir, or vault, thereon, or for laying, altering or repairing any sidewalk, curb, gutter, paving, sewer, pipe or conduit in or upon the same, or in or upon the adjoining half of any highway, street, or alley upon which the same abuts.

If the contribution be made under a contract with the owner and for an agreed price, the lien as against him shall be for the sum so agreed upon; otherwise, and in all cases as against others than the owner, it shall be for the reasonable value of the work done, and of the skill, material, and machinery furnished. It shall not extend to nor affect any rights in any homestead.

All such liens as against the owner of the land shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other incumbrance not then of record, unless the lienholder had actual notice thereof. As against a bona fide purchaser, mortgagee or incumbrancer without notice, however, no lien shall attach prior to the actual and visible beginning of the improvement on the ground, but a person having a contract for the furnishing of labor, skill, material or machinery for such improvement, may file for record with the register of deeds of the county within which the premises are situated, a brief statement of the nature of such contract, which statement shall be notice of his lien for the contract price or value of all contributions to such improvement thereafter made by him or at his instance.

Whenever land is sold under an executory contract requiring the vendee to improve the same, and such contract is forfeited or surrendered after liens have attached by rea-

son of such improvements, the title of the vendor shall be subject thereto; but he shall not be personally liable if the contract was made in good faith. When improvements are made by one person upon the land of another, all persons interested therein otherwise than as bona fide prior incumbrancers or lienors shall be deemed to have authorized such improvements, insofar as to subject their interests to the liens therefor. But any person who has not authorized the same may protect his interests from such liens by serving upon the persons doing the work or otherwise contributing to such improvement, within five days after the knowledge thereof, written notice that the improvement is not being made at his instance, or by posting like notice, and keeping the same posted, in a conspicuous place on the premises; provided, that as against a lessor no lien is given for repairs made by or at the instance of his lessee.

The owner may withhold from his contractor so much of the contract price as may be necessary to meet the demands of all persons, other than such contractor, having a lien upon the premises for labor, skill, or materials furnished for the improvement, and for which the contractor is liable; and he may pay and discharge all such liens and deduct the cost thereof from such contract price. Any such person having a lien under the contractor, may serve upon the owner, at any time a notice of his claim. The owner, within fifteen days after the completion of the contract, may require any person having a lien hereunder, by written request therefor, to furnish to him an itemized and verified account of his lien claim, the amount thereof, and his name and address; and no action or other proceeding shall be commenced for the enforcement of such lien until ten days after such statement is so furnished. The word "owner" as used herein shall include any person interested in the premises otherwise than as a lienor thereunder.

The lien shall cease at the end of ninety days after doing the last of such work, or furnishing the last item of such

skill, material, or machinery, unless within such period a statement of the claim therefor be filed for record with the register of deeds of the county in which the improved premises are situated. Such statement shall be made by or at the instance of the lien claimant, be verified by the oath of some person shown by such verification to have knowledge of the facts stated, and shall set forth: 1. A notice of intention to claim and hold a lien, and the amount thereof; 2. That such amount is due and owing to the claimant for labor performed, or for skill, material, or machinery furnished, and for what improvement the same was done or supplied [supplied]; 3. The names of the claimant, and of the person for or to whom performed or furnished; 4. The dates when the first and last items of the claimant's contribution to the improvement were made; 5. A description of the premises to be charged, identifying the same with reasonable certainty; 6. The name of the owner thereof at the time of making such statement, according to the best information then had.

§ 1225. **Tennessee.**<sup>65</sup>—There shall be a lien upon any lot of ground or tract of land upon which a house has been constructed, built, or repaired, or fixtures or machinery furnished or erected, or improvements made, by special contract with the owner or his agent,<sup>66</sup> in favor of the mechanic or undertaker, founder or machinist, who does the work, or any part of the work, or furnishes the materials, or any part of the materials, or puts thereon any fixtures, machinery, or material, either of wood or metal, and in favor of all persons who do any portion of the work or furnish any portion of the material, for the building contemplated herein.

If the contract be made with the mortgagor, and the

<sup>65</sup> Ann. Code 1896, §§ 3531-3546. As to constitutionality, see § 1304, post.

<sup>66</sup> By "special contract" is meant an employment and under-

taking to do the work. *Alley v. Lanier*, 1 Cold. (Tenn.) 540; *McLeod v. Capell*, 7 Baxt. (Tenn.) 196, 198; *O'Malley v. Coughlin*, 3 Tenn. Ch. 431.

mortgagee has written notice of the same, before the work is begun or materials furnished, and consent thereto, the lien shall have priority over the mortgage; and if he fail to object within ten days after receipt of the notice, his consent shall be implied.<sup>67</sup>

The lien shall include the building, fixture, or improvement, as well as the lot or land, and continue for one year after the work is finished or materials are furnished, and until the decision of any suit that may be brought within that time for the debt due said mechanic or undertaker, and bind the lot or land, although the owner may convey or otherwise dispose of the same.

Every journeyman or other person employed by such mechanic, founder, or machinist to work on the buildings, fixtures, machinery, or improvements, or to furnish material for the same, shall have this lien for his work or materials, if, within thirty days after the building is completed, or the contract of such laborer, mechanic, or workman shall expire, or be discharged, he or they shall notify, in writing, the owner of the property on which the building or improvement is being made, or his agent or attorney, if he reside out of the county, that said lien is claimed, and said lien shall continue for the space of ninety days from the date of such notice in favor of such subcontractor, mechanic, or laborer.<sup>68</sup>

If the work or improvement or materials be furnished for work done on the lands of any married woman, who has not signed the contract or agreement in writing, as provided

<sup>67</sup> The same rule applies where a vendor's lien is reserved in the deed. Ann. Code 1896, § 3537.

<sup>68</sup> By Acts 1845, ch. 118, § 2, a limitation was expressly made in the following words: "The claims herein secured by lien for work and labor done, and materials furnished, shall in no case exceed the amount agreed to be paid by

the owner or proprietor in his original contract with the undertaker." This provision was carried into the code of 1858, and is now in full force and effect, never having been repealed, expressly or by implication. Ann. Code 1896, § 3544; *Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045.

above, and in ignorance, on the part of said mechanic, laborer, or furnisher, of her right or claim, and if said married woman shall refuse to recognize or agree to said lien, said mechanic, laborer, or furnisher shall have the right, after giving ten days' notice, to take and remove such property, or the parts of the same on which his labor was performed, or materials, machinery, or other property was used.

The right of removal shall apply to all other cases of parties under disability, whether as minors, persons of unsound mind, or cestui que trusts, or in other cases of superior titles or liens, when the work was done by the laborer or mechanic in ignorance of the rights of such parties, and said right of removal shall be extended to any repairs or improvements ordered by the tenant or occupant, when the owner of the leased or rented premises declines to pay therefor, the same to be removed without injury to the property originally leased or rented.

The owner of the property on which the improvement is made shall have the right to demand from the original contractor an indemnity or refunding bond, to protect him in case of the enforcement of this lien by such subcontractors, mechanics, or furnishers [furnishers] and in the event such contractor is paid for the work done, or any part of it, covered by the foregoing paragraphs, and on payment to such subcontractors, mechanic, or furnisher of the amount due, he shall have judgment for such amount by motion on such bond, in any court having jurisdiction in such cases; but the contractor shall have the right to contest the legality of the claim of such mechanics or furnishers employed by him before he is made liable.

The lien shall be enforced by attachment, either in law or equity, or by judgment and execution at law, to be levied upon the property on which the lien is.<sup>69</sup>

<sup>69</sup> Burr v. Graves, 4 Lea (Tenn.) 552; McLeod v. Capell, 7 Baxt. (Tenn.) 196. While the mechan-

ics' lien statute must be liberally construed this rule does not apply to the determination of who

This lien shall operate only in favor of the mechanic or person who furnishes materials, and shall not pass to any person to whom the debt is transferred without notice of the lien.

The journeyman's lien shall not be lost where the undertaker has transferred the debt due him.

Such lien shall have precedence over all other liens for such time, if a statement of the amount due for such work, labor, or materials shall be filed with the county register, who shall note the same for registration, and put it on record in the trust book in his office, for which he shall have fifty cents, and also twenty-five cents for registering the affidavit to the same, which shall be paid by the party filing the same, but said fee shall be receipted for on the statement of account, and shall be charged as part of the cost, and this registration shall be notice to all persons of the existence of such lien.

§ 1226. **Texas.**<sup>70</sup>—Any person, or firm, lumber dealer or corporation, artisan, laborer, mechanic, or subcontractor,

is entitled to a lien thereunder. *Nans v. Cumberland Gap Park Co.*, 103 Tenn. 299, 52 S. W. 999, 47 L. R. A. 273 and cases cited.

<sup>70</sup> Rev. Civ. Stats. 1911, §§ 5621, 5622, 5624. 5626-5630, as amended by Gen. Laws 1913, p. 252. The Const., art. 16, § 37, which provides that "mechanics . . . shall have a lien, . . . and the legislature shall provide for . . . enforcement of said liens," creates the lien, and only leaves it for the legislature to provide the means of its enforcement. *Keating Imp. & Mach. Co. v. Marshall Elec. Light & Power Co.*, 74 Tex. 605, 12 S. W. 489. See also, *Beilharz v. Illingsworth*, (Tex.) 132 S. W. 106,

*Blakeney v. Nalle*, 45 Tex. Civ. App. 635, 101 S. W. 875. A contractor who fails to complete his contract through his own fault must rely on quantum meruit but he can not assert a lien. *Murphy v. Williams*, (Tex. Civ. App.) 116 S. W. 412. A mechanic's lien may be enforced for extras furnished even though the original contract price has been paid. *Zollars v. Snyder & Lacey*, 43 Tex. Civ. App. 120, 94 S. W. 1096. Laborers who construct a sidewalk in the street abutting a lot are entitled to a lien upon the lot. *Waples-Painter Co. v. Ross*, (Tex.) 141 S. W. 1027.

who may labor or furnish material, machinery, fixtures or tools to erect any house or improvement or to repair any building or improvement whatever, or who may labor or furnish material, machinery, fixtures or tools for the construction or repair of levees or embankments to be erected for the reclamation of overflow lands along any river or creek in this state, or furnish any material for the construction or repair of any railroad within this state under or by virtue of a contract with the owner, owners, or his or their agent, trustee, receiver, contractor or contractors, upon complying with the provisions herein contained, shall have a lien on such house, building, fixtures, improvements, land reclaimed from overflow or railroad, and all its properties, and shall have a lien on the lot or lots of land necessarily connected therewith, or reclaimed thereby, to secure payment for the labor done, lumber, material, machinery or fixtures and tools furnished for construction or repair. The word "improvement" as herein used shall be construed so as to include wells, cisterns, tanks, reservoirs or artificial pools or lakes made for supplying or storing water, and all pumps, syphons, windmills or other machinery or appliances used for raising water for stock, domestic use or for irrigation purposes.

In order to fix and secure the lien herein provided for, it shall be the duty of every original contractor, within four months, and every journeyman, day-laborer, or other person seeking to obtain the benefit of the provisions of this law, within thirty days, after the indebtedness shall have accrued, to file his or their contract<sup>71</sup> in the office of the

<sup>71</sup> A promissory note executed after the performance of the work for which a lien is claimed, stating that the consideration was for work and materials furnished on a certain house, does not show such facts as were necessary to fix a mechanic's lien under this

provision. *Reese v. Corlew*, 60 Tex. 70; *Taylor v. Huck*, 65 Tex. 238; *Lyon v. Elser*, 72 Tex. 304, 12 S. W. 177. The contract to be recorded is that by virtue of which the labor was done or the materials furnished, not any subsequent contract. *Lyon v. Ozee*, 66



county clerk of the county in which such property is situated, and cause the same to be recorded in a book to be kept by the county clerk for that purpose:<sup>72</sup> provided that, if such journeyman, day-laborer, or other person have no written contract, it shall be sufficient for them to file an itemized account of their claim, supported by affidavit, showing that the account is just and correct, and that all just and lawful offsets, payments and credits known to the affiant have been allowed.<sup>73</sup>

If there be no written contract, it shall be the duty of the person seeking to obtain the benefit herein provided for to deliver to the clerk of the county court a sworn account as above provided for, to be filed and recorded<sup>74</sup> as therein provided.<sup>75</sup>

Tex. 95, 17 S. W. 407; *Reese v. Corlew*, 60 Tex. 70; *Tinsley v. Boykin*, 46 Tex. 592. A provision for recording a written contract, out of which a mechanic's lien arises, applies to an instrument signed by the mechanic, and not by the owner, though accepted by him. *Martin v. Roberts*, 57 Tex. 564.

<sup>72</sup> The book need not be kept exclusively for that purpose. *Quinn v. Logan*, 67 Tex. 600, 4 S. W. 247. A contract is in writing when all its terms are in writing, though it is signed by one of the parties only. *Martin v. Roberts*, 57 Tex. 564. A bond so executed is a written contract, which, if duly recorded, fixes the lien. *Martin v. Roberts*, 57 Tex. 564. The written contract need not be authenticated before recording. *Pope v. Graham*, 44 Tex. 196. "The lien of a mechanic though not fixed before record of the contract or bill of particulars, when it is fixed, relates back to the

time when the work was performed, or the material furnished, and hence takes precedence of all claims to the property improved, which have been fastened upon it since that time. . . . The registration does no more than preserve a lien which exists already." *Trammell v. Mount*, 68 Tex. 210, 4 S. W. 377, 12 Am. St. 479; *Keating Imp. & Co. v. Marshall Electric & Co.*, 74 Tex. 605, 12 S. W. 489.

<sup>73</sup> The verbal contract need not be set out with the bill of particulars. It is sufficient to state that the work was done at the request, and with the approval, of the owner. *Pool v. Wedemeyer*, 56 Tex. 287.

<sup>74</sup> Failure to record the bill of particulars is a fatal noncompliance with the statute. *Lyon v. Ozee*, 66 Tex. 95, 17 S. W. 405; *Pool v. Sanford*, 52 Tex. 621; *Sens*

<sup>75</sup> Here follows statutory form.

In case the contract is filed and recorded as above provided for, a like description of the house, building or improvement, and a lot or tract of land, shall accompany the same, as is required by statutory forms, except that the same is not required to be under oath.

When a contract or account is filed and recorded as above required, it shall be deemed sufficient diligence to fix and secure this lien. If this lien is against land in a city, town or village, it shall extend to or into the lot or lots upon which such house, building or improvement is situated, or upon which such labor was performed; and, if the lien is against land in the country, it shall extend to and include fifty acres upon which such house, building or improvements are situated, or upon which such labor has been performed; and, if the lien is against a railroad company, it shall extend to and include all of its property.

The lien herein provided for shall attach to the house, building, improvements or railroad for which they were furnished, or the work was done, in preference to any prior lien or encumbrance or mortgage upon the land upon which the houses, buildings or improvements, or railroad, have been put, or labor performed, and the person enforcing the same may have such house, building or improvement, or any piece of the railroad property, sold separately; provided, any lien, encumbrance or mortgage on the land or improvement at the time of the inception of the lien herein provided for shall not be affected thereby, and holders of such liens need not be made parties in suits to foreclose liens herein provided for.

When the house, building, improvement, or any piece of

v. Trentune, 54 Tex. 218. The filing of a note taken for materials is not sufficient. *Lyon v. Elser*, 72 Tex. 304, 12 S. W. 177. The lien is not binding upon a bona fide purchaser for value without

notice, although the property is purchased within the time limited for filing the lien. *Odum v. Loomis*, 1 Tex. App. Civ. Cas., § 524.

the railroad's property are sold separately, the officers making the sale shall place the purchaser in possession thereof; and such purchaser shall have the right to remove the same within a reasonable time from the date of the purchase.

Every sale must be upon judgment rendered by some court of competent jurisdiction foreclosing such lien and ordering sale of such property.<sup>76</sup>

§ 1227. **Utah.**<sup>77</sup>—Mechanics, material-men, contractors, subcontractors, builders, and all persons of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, bridge, ditch, flume, aqueduct, tunnel, fence, railroad, wagon road, or other structure or improvement upon land, and also architects, engineers, and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys, or superintendence, or who have rendered other like profes-

<sup>76</sup> Every person, except the original contractor or builder, or those claiming under § 5623 [Rev. Civ. Stats. 1911] who may wish to avail himself of the benefits of this law, shall give at least ten days' notice in writing before the filing of the lien, as herein required, to the owner or owners, or agent, or either of them, that he holds a claim against such house, building or improvement, setting forth the amount, and from whom the same is due; and thereafter said owner, or owners, or agent, shall be authorized to retain in his hands the amount claimed until the same is settled or determined not to be owing. The district court has jurisdiction to decree a lien on land, without reference to the amount of the claim. *Handel v. Elliott*,

60 Tex. 145. The value of the property does not control jurisdiction. *Texas & St. L. R. R. Co. v. Allen*, 1 Tex. App. Civ. Cas., § 568. The lien as to the buildings is superior to a purchase-money mortgage. *Claes v. Dallas Loan Assn.*, 83 Tex. 50, 18 S. W. 421. The lien of a mechanic, material-man or laborer attaches only when he has followed the steps as directed by the statute. *Johnson v. Griffiths*, (Tex. Civ. App.) 135 S. W. 683.

<sup>77</sup> Comp. Laws 1907, §§ 1372-1392. One having no lien by contract must follow the requirements of the statute to secure his lien. *Volker-Scowcroft Lumber Co. v. Vance*, 32 Utah 74, 88 Pac. 896, 125 Am. St. 828; *Eccles Lumber Co. v. Martin*, 31 Utah 241, 87 Pac. 713.

sional service or bestowed labor in whole or part, describing, illustrating, or superintending such structure or work done or to be done, or in any part connected therewith, shall have a lien upon the property upon which they have rendered service, or performed labor, or furnished materials, for the value of such service rendered, labor done, or materials furnished, by each respectively, whether at the instance of the owner or of any other person acting by his authority or under him as agent, contractor, or otherwise; provided, that a lien or liens shall attach only to such interest as the owner or lessee may have in the real estate.

In case of a contract between an owner and a contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons except the contractor to the extent of the whole contract price; and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor; provided, that if at the time of the commencement to do work or furnish materials, the owner has paid upon the contract, and in accordance with the terms thereof, any portion of the contract price, the liens hereby created shall extend only to the unpaid balance of such contract price and of which such laborers and material-men shall have had notice. No part of the contract price shall, by the terms of any contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, for the purpose of evading or defeating the provisions of this act.

When any person entitled to a lien hereunder, other than the original contractor, shall have actually commenced to perform labor upon or to furnish materials for any building, improvement, or structure herein mentioned, the property shall be charged with the liens herein provided, and no payment made to the original contractor shall in anywise defeat or impair the claims for such liens.

The liens herein granted shall extend to and cover so much of the land whereon such building, structure, or im-

provement shall be made, as may be necessary for the convenient use and occupation of such building, structure or improvement, and the same shall be subject to such liens; and in case any such building shall occupy two or more lots or other subdivisions of land, such lots or other subdivisions shall be deemed one lot for the purpose of this act, and the same rule shall hold in cases of any other improvements that shall be practically indivisible, and shall attach to all machinery and other fixtures used in connection with any such lands, buildings or structures.

Whoever shall do work or furnish materials by contract, express or implied, with the owner as herein provided, shall be deemed an original contractor, and all other persons doing work or furnishing materials shall be deemed subcontractors.

The liens provided for herein are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or materials commenced to be furnished.

The liens herein provided shall relate back to and take effect as of the time of the commencement to do work upon and furnish materials on the ground for the structure or improvement, and shall have priority over any lien or incumbrance subsequently intervening, except a lien herein provided for of the same class, or which may have been created prior thereto, which was not then recorded, and of which the lienor hereunder did have actual notice.

Every original contractor, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this act, must, within forty days after furnishing the last material or performing the last

labor for any building, improvement or structure, or for any alteration, addition to, or repair thereof, or performance of any labor in or furnishing any materials for any mining claim, file for record with the county recorder of the county in which the property or some part thereof is situated, a claim in writing containing a notice of intention to hold and claim a lien, and a statement of his demand, after deducting all just credits and offsets, with the name of the owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the material, with a statement of the terms, time given, and conditions of his contract, specifying the time when the first and last labor was performed, or the first and last materials furnished, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person.

Any subcontractor before commencing to furnish materials or to perform work, or at any time thereafter and before the completion of his contract, may file a statement of claim with the recorder as hereinbefore provided, containing a notice of intention to hold and claim a lien, a description of the property to be charged, and the probable value of the work to be done, or the probable value of the materials to be furnished, as near as may be. From the time such statement shall have been filed, he shall have a lien for the work thereafter done, or materials furnished by him, not exceeding the sum stated as the probable value thereof; and in the event of such subcontractor claiming to have done work or furnished materials before the filing of such statement, he may include therein a statement of the value of the work already done or material furnished, as near as may be, for which, to the extent of the sums mentioned, his lien shall likewise attach.

The liens herein provided for may be enforced by an action in any court of competent jurisdiction, at any time within twelve months after the completion of the original con-

tract or the suspension of work thereunder for a period of thirty days, on setting out in the complaint the particulars of the demand, with a description of the premises to be charged with a lien.

The court shall cause the property to be sold in satisfaction of the liens and costs, as in the case of foreclosure of mortgages, subject to the right of redemption of the owner and creditors as provided by law; and if the proceeds of sale, after the payment of costs, shall not be sufficient to satisfy the whole amount of liens included in the decree, then said proceeds shall be paid in the order above designated, and pro rata to the persons claiming in each class, where the sum realized is insufficient to pay the persons of one class in full. In case of any excess of proceeds of sale, the remainder shall be paid over to the owner.

Every person, except the original contractor or builder, or those claiming under section 5623 [Rev. Civ. Stats. 1911], who may wish to avail himself of the benefits of this law, shall give at least ten days' notice in writing before the filing of the lien, as herein required, to the owner or owners, or agent, or either of them, that he holds a claim against such house, building or improvement, setting forth the amount, and from whom the same is due; and thereafter said owner or owners, or agent, shall be authorized to retain in his hands the amount claimed until the same is settled or determined not to be owing.

§ 1228. **Vermont.**<sup>78</sup>—When a contract or agreement is made, whether in writing or not, for erecting and repairing, moving or altering a building, steam engine or waterwheel attached to the real estate, or for furnishing labor or material therefor, the person proceeding in pursuance of said contract or agreement shall have a lien to secure the payment of the same upon such building, steam engine or waterwheel

<sup>78</sup> Pub. Stats. 1906, §§ 2644-2648.

and the lot of land on which the same stands; and a person who performs labor or furnishes materials to the amount of fifteen dollars or more for erecting, repairing, moving or altering such building, steam engine or waterwheel by virtue of a contract or agreement, whether in writing or not, with an agent, contractor or subcontractor of the owner thereof, shall, by giving notice in writing to said owner or the agent having charge of such property that he shall claim a lien for labor to be performed or material to be furnished, have a lien to secure the payment of the same upon such building, steam engine or waterwheel and the lot of land upon which the same stands.<sup>79</sup> A lien herein provided for shall continue in force for three months from the time when payment becomes due for such labor or materials, but shall not take precedence of a mortgage, given by the owner thereof upon such building, steam engine, waterwheel and lot of land on which the same stands, as security for the payment of money loaned and to be used by said owner in payment of the expenses of the same.

No lien shall attach under the above paragraph, until the person claiming the same files and causes to be recorded in the clerk's office of the town where such real estate is situated, a written memorandum, by him signed, asserting his claim, which shall charge such real estate with such lien,<sup>80</sup>

<sup>79</sup> The lien is given only to those who contract with the owner of the building, or have a claim against him for their labor. It is not given to workmen, employed by contractors, and between whom and the owner there is no privity of contract. *Greenough v. Nichols*, 30 Vt. 768. The lien attaches and takes effect when the memorandum is filed in the proper office, the same as a mortgage of that date. It affects rights then existing, whether le-

gal or equitable, to no greater extent than a mortgage executed at the same time would affect them. Prior rights and incumbrances remain prior. *Hinckley &c. Iron Co. v. James*, 51 Vt. 240; *Kenny v. Gage*, 33 Vt. 302. The lien covers only such materials furnished as are attached to the realty so as to be a part of it at the time the memorandum is filed. *Hinckley &c. Iron Co. v. James*, 51 Vt. 240.

<sup>80</sup> These provisions do not apply to a water-wheel or steam-



provided that neither such building, steam engine or water-wheel and lot of land, nor the owner thereof, shall be chargeable, by reason of such lien, in a sum exceeding the amount due at the time when such lien is asserted or to become due by virtue of such contract or agreement; and several such liens, asserted as aforesaid, if the sum due or to become due from the owner thereof is not sufficient to pay the same in full, shall be paid pro rata.

Within three months from the time of filing such memorandum, if such payment is due at the time of such filing, and within three months from the time of such payment becomes due, if it is not due at the time of such filing, such person may commence his action for the same, and cause said real estate or other property to be attached thereon;<sup>81</sup> and if he obtains judgment in the suit, the record of such judgment shall contain a brief statement of the contract upon which the same is founded. The plaintiff may, within five months after the date of such judgment, cause a certified copy of the record thereof to be recorded in the office of the clerk of the town in which such real estate or other property is situated; and it shall be thereupon holden for the amount due upon such judgment, with the cost of such copy and recording the same, as if it had been mortgaged for the payment thereof, from the time the copy of the contract and declaration was lodged in the town clerk's office; and the plaintiff may obtain possession and foreclose the defendant's equity of redemption, as in case of a mortgage.

When the owner of real estate dies after a lien has been recorded, pending an action brought against him to enforce a lien on such real estate, the action shall not abate or be affected by the death of said owner, but the executor or administrator of the deceased shall be cited in, and the suit

engine erected within or near a sawmill, gristmill, or factory, to be used for the purpose of operating machinery therein.

<sup>81</sup> The property must be actu-

ally attached within the three months. It is not enough that the writ is issued within that time. *Piper v. Hoyt*, 61 Vt. 539, 17 Atl. 798.

shall proceed to final judgment against the representative of the deceased defendant; and such real estate shall be holden for the amount due upon such judgment, with the cost of the copy of the record of the judgment and recording, as if it had been mortgaged for the payment of the same, in like manner as if the deceased defendant were alive: provided that such lien shall not be enforced to the diminution of a right or interest given by law to the surviving husband or wife, as the case may be, or to the children of such deceased person.

§ 1229. **Virginia.**<sup>82</sup>—All artisans, builders, mechanics, lumber dealers, and other persons performing labor about or furnishing materials for the construction, repair or improvement of any building or structure permanently annexed to the freehold, and all persons performing any labor or furnishing materials for the construction of any railroad, whether they be general or subcontractors or laborers, shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment of the premises, and upon such railroad and franchises, for the work done and materials furnished. But where the claim is for repairs only no lien shall attach to the property repaired unless the said repairs were ordered by the owner or his agent. It has been held that all persons who furnish supplies to a manufacturing or mining company have a prior lien for the price of such materials.<sup>83</sup>

<sup>82</sup> Code 1904, §§ 2475-2484. As to liens against transportation and mining companies, see Acts 1892, ch. 224. In the absence of an express statute no mechanic's lien can be taken on public buildings. *Phillips v. Rector &c. of University of Virginia*, 97 Va. 472, 34 S.

E. 66, 47 L. R. A. 284, and cases there cited.

<sup>83</sup> A corporation engaged in building and selling ships is a manufacturing company. *First Nat. Bank v. William R. Trigg Co.*, 106 Va. 327, 56 S. E. 158. See also, *In re West Norfolk Lumber Co.*, 112 Fed. 759.

A general contractor,<sup>84</sup> in order to perfect the lien given him by the preceding paragraph, shall at any time after the work is done and the materials furnished by him and before the expiration of sixty days from the time such building, structure or railroad is completed, or the work thereon otherwise terminated, file in the clerk's office in the county or corporation in which the building, structure or railroad or any part thereof is, or in the clerk's office of the chancery court of the city of Richmond, if the said building, structure or railroad, or any part thereof, is within the corporation limits of said city, an account showing the amount and character of the work done or materials furnished, the prices charged therefor, the payments made, if any, and the balance due, verified by the oath of the claimant or his agent, with a statement attached declaring his intention to claim the benefit of said lien, and giving a brief description of the property on which he claims the lien.<sup>85</sup> It shall be the duty of the clerk in whose office such account or statement shall be filed as hereinbefore provided to record the same in a book to be kept for that purpose, called mechanics' lien record, and to index the same in the name as well of the claimant of the lien as of the owner of the property, and from the time of such filing all persons shall be deemed to have notice thereof.

Any subcontractor, in which term is included all contractors and laborers and mechanics and those furnishing materials, as hereinbefore provided, other than general con-

<sup>84</sup> The term "general contractor" includes all persons furnishing materials for or doing work upon a building, under a contract made directly with the owner. *Merchants' & Mechanics' Sav. Bank v. Dashiell*, 25 Grat. (Va.) 616; *Boston v. Chesapeake & Ohio R. Co.*, 76 Va. 180.

<sup>85</sup> The requirement of an ac-

count necessarily implies an itemized account, and a statement merely of the balance due is not sufficient. *Shackleford v. Beck*, 80 Va. 573. Under a former statute, notice was not necessary when work was stopped by the owner. *Merchants' &c. Sav. Bank v. Dashiell*, 25 Grat. (Va.) 616.

tractors, in order to perfect the lien hereinabove given him, shall comply with the preceding paragraph, and in addition give notice in writing to the owner of the property or his agent of the amount and character of his claim. But the amount for which a lien may be perfected under this act shall not exceed the amount in which the owner is indebted to the general contractor at the time the notice is given,<sup>86</sup> or shall thereafter become indebted to said general contractor upon his contract with said general contractor for said structure or building or railroad. And when the labor shall have been performed or work done or material furnished for one who is himself a subcontractor, then the person claiming the lien shall also give a like notice to the general contractor: provided, that the amount for which a lien may be perfected by such person shall not exceed the amount for which said subcontractor could himself claim a lien hereunder.

No inaccuracy in the account filed, or in the description of the property to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given and the account conform substantially to the requirements of the two preceding paragraphs, and is not willfully false.

Any subcontractor may give notice in writing to the owner or his agent, stating the nature and character of his contract and the probable amount of his claim, and if such subcontractor shall at any time after the work done or material furnished by him and before the expiration of thirty

<sup>86</sup> The notice may be furnished at any time between the time of doing the labor, or furnishing the materials, and thirty days after the building is completed or work otherwise terminated. The affidavit must be furnished within that time. *Norfolk & Western R. Co. v. Howison*, 81 Va. 125; *Shen-*

*andoah Valley R. Co. v. Miller*, 80 Va. 821. Under a former statute the owner was liable regardless of the state of accounts between the owner and general contractor. *Norfolk & Western R. Co. v. Howison*, 81 Va. 125; *Roanoke Land &c. Co. v. Karn*, 80 Va. 589.

days from the time such building or structure is completed or the work thereon otherwise terminated furnish the owner thereof or his agent and also the general contractor with a correct account, verified by affidavit, of his claim against the general contractor for the work done or materials furnished and of the amount due, the owner shall be personally liable to the claimant for the amount due to said contractor by said general contractor: provided, the same does not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given or may thereafter become indebted by virtue of his contract with said general contractor.

If the account furnished be approved by the general contractor, or if after ten days' notice to him of the filing of the said account with the owner, such contractor shall fail to file with the the owner any objection in writing to the said account, in either case, the owner may pay the amount of the account to the subcontractor and shall then be entitled to credit for the amount so paid upon whatever may be due by him to the general contractor. If the general contractor disputes the correctness of the account furnished to the owner by the subcontractor at any time before the same is paid, the parties may have the amount of such disputed claim summarily adjudicated and settled by arbitrators,<sup>87</sup> selected, one by the general contractor, and one by the claimant, or by an umpire selected by the arbitrators, in case of their disagreement; and upon the failure or refusal of either of the said parties to select an arbitrator, then the matter in controversy shall be settled by an action at law; and upon the payment by the owner or his agent of the amount ascer-

<sup>87</sup> In an action against the owner by a subcontractor, it is not sufficient for the subcontractor to show that he has served his notice and filed his account as provided, but he must also aver and

prove that he has complied with the terms of his contract with the general contractor, under which the materials were furnished. *Kirn v. Champion Iron Fence Co.*, 86 Va. 608, 10 S. E. 885.

tained to be due by the award of the arbitrators or by action at law, he shall be released from all liability, if any there be, to the said subcontractor for the amount so paid. The cost of arbitration shall be borne and paid as the arbitrators may adjudge and award in each case.

No suit to enforce any lien perfected under the preceding paragraphs shall be brought after six months from the time when the whole amount covered by such lien has become payable: provided, however, that the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this paragraph.

The perfected lien of a general contractor on any building or structure shall inure to the benefit of any subcontractor who has not perfected a lien on such building or structure, provided such subcontractor shall give written notice of his claim against the general contractor to the owner or his agent before the amount of such lien is actually paid off or discharged.<sup>88</sup>

No assignment or transfer of any debt, or any part thereof, due or to become due to a general contractor by the owner for the construction, erection or repairing of any building, structure or railroad for such owner shall be valid or enforceable in any court of law or equity by any legal process or in any other manner by the assignee of any such debt unless and until the claims of all subcontractors, supply men and laborers against such general contractor for labor performed and materials furnished in and about the construction, erection and repairing of such building, structure or railroad shall have been satisfied: provided, that if such subcontractors, supply men and laborers shall give their assent in writing to such assignment it shall be thereby made valid as to them, but the payment or appropriation of such

<sup>88</sup> See § 2482a of Code 1904 for provisions for the protection of subcontractors against assignment of debt due the contractor by the owner.

assignment by the owner without such assent in writing shall not protect such owner from the demands of such subcontractors, supply men and laborers to the extent of such assignment.

No debt or demand, or any part thereof, due or to become due by the owner of any building, structure or railroad to a general contractor for the construction, erection or repairing of such building, structure or railroad shall be subject to the payment of any debt or the lien of any judgment, writ of fieri facias or any garnishee proceeding obtained or sued out upon any debt due such general contractor which shall have been contracted in any other manner or for any other purpose than in the construction, erection or repairing of such building, structure or railroad for such owner unless and until the claims due by such general contractor to all subcontractors, supply men and laborers for materials furnished and labor performed in and about the construction, erection or repairing of such building, structure or railroad shall have been paid.

If the person who shall cause such building or structure to be erected or repaired owns less than a fee simple estate in such land, then only his interest therein shall be subject to said liens. No lien or incumbrance upon the land created before the work was commenced or materials furnished shall operate upon the building or structure erected thereon, or materials furnished for and used in the same, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied; nor shall any lien or incumbrance upon the land created after the work was commenced or materials furnished operate on the land, or such building or structure, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied. And in the enforcements of the liens acquired by the act, any lien or incumbrance created on the land before the work was commenced or materials furnished shall be preferred in the distribution of the proceeds of sale only to

the extent of the value of the land estimated, exclusive of the buildings or structures, at the time of sale, and the residue of the proceeds of sale shall be applied to the satisfaction of the liens herein provided for.

The liens created and perfected hereunder may be enforced in a court of equity.<sup>89</sup> When a suit is brought for the enforcement of any such lien against the property bound thereby, all parties entitled to such liens upon the said property or any portion thereof, may file petitions in such suit asking for the enforcement of their respective liens, to have the same effect as if an independent suit were brought by each claimant. There shall be no priority among them except that the lien of a subcontractor shall be preferred to that of his general contractor.

§ 1230. **Washington.**<sup>90</sup>—Every person performing labor upon or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, well, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power or any other structure or who performs labor in any mine or mining claim or stone quarry, has a lien upon the same for labor performed, or material furnished by each, respectively, whether performed or furnished at the instance

<sup>89</sup> As to averments in suit by subcontractor, see *Norfolk & W. R. Co. v. Howison*, 81 Va. 125. The proceeding may be by motion without formal pleadings, and a party has no absolute right to a trial by jury of an issue found in such motion. *Pairo v. Bethell*, 75 Va. 825. As to regularity of proceedings by motion, see *Lester v. Pedigo*, 84 Va. 309, 4 S. E. 703. A sale for cash is proper when the amount of the debt is but a small proportion of the value of the

property covered by the lien. *Lester v. Pedigo*, 84 Va. 309, 4 S. E. 703.

<sup>90</sup> *Remington & Ballinger's Ann. Codes & Stats.* 1910, §§ 1129, 1130, 1132-1135, 1138, 1141, as amended by Supp. 1913, § 1133. See § 1304, post. Under a former statute the material-man or laborer has a lien, notwithstanding payment to the contractor. *Spokane Mfg. Co. v. McChesney*, 1 Wash. St. 609, 21 Pac. 198.



of the owner of the property subject to the lien or his agent; and every contractor, subcontractor, architect, builder or person having charge of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien<sup>91</sup> created hereby: provided, that whenever any railroad company shall contract with any person for the construction of its road, or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics and material-men, and persons who supply such contractors with provisions, all just dues to such persons or to any person to whom any part of such work is given, incurred in carrying on such work, which bond shall be filed by such railroad company in the office of the county auditor in each county in which any part of such work is situated. And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the person herein mentioned to the full extent of all such debts so contracted by such contractor.

The lot, tract or parcel of land upon which the improvement is made or the property is situated, subject to the lien above created, or so much thereof as may be necessary to satisfy the lien and the judgment thereon, to be determined by the court on rendering judgment in a foreclosure of the lien, is also subject to the lien to the extent of the interest of the person or company who, in his or its own behalf, or who, through any of the persons designated above to be the agent of the owner or owners caused the performance of the labor or the construction, alteration or repair of the property.

The liens hereby created are preferred to any lien, mort-

<sup>91</sup> One who fills in or improves of it, has a lien on the lot, a town lot, or the street in front

gage or other incumbrance which may attach subsequently to the time of the commencement of the performance of the labor, or the furnishing of the materials for which the right of lien is given hereby, and are also preferred to any lien, mortgage or other incumbrance which may have attached previously to that time, and which was not filed or recorded so as to create constructive notice of the same prior to that time, and of which the lien claimant had no notice.

Every person, firm or corporation furnishing materials, or supplies to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, well, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power or any other building or any other structure, or mining claim or stone quarry, shall, not later than five days after the date of the first delivery of such materials or supplies to any contractor or agent, deliver or mail<sup>92</sup> to the owner, or the reputed owner of the property on, upon or about which such materials or supplies are to be used, a notice in writing, stating in substance and effect that such person, firm or corporation has commenced to deliver materials and supplies for use thereon, with the name of the contractor or agent ordering the same, and that a lien may be claimed for all materials and supplies furnished by such person, firm or corporation for use thereon; and no further notice to the owner shall be necessary. No material-man's lien shall be enforced unless the provisions of this act have been complied with.

No lien hereby created shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date of the cessation of the performance of such labor or of the furnishing of such materials, a claim

<sup>92</sup> It is not necessary for a material-man to mail or deliver a notice to the owner where such materials are delivered directly to the owner. *Rieflin v. Grafton*, 63

Wash. 387, 115 Pac. 851. See also, *Heim v. Elliott*, 66 Wash. 361, 119 Pac. 826; *Seattle Lumber Co. v. Richardson & Elmer Co.*, 66 Wash. 671, 120 Pac. 517.

for such lien shall be filed for record as hereinafter provided, in the office of the county auditor of the county in which the property, or some part thereof, to be affected thereby is situated. Such claim shall state, as nearly as may be, the time of the commencement and cessation of performing the labor, or furnishing the material, the name of the person who performed the labor or furnished the material, the name of the person by whom the laborer was employed (if known), or to whom the material was furnished, a description of the property to be charged with the lien sufficient for identification, the name of the owner or reputed owner, if known, and if not known, that fact shall be mentioned, the amount for which the lien is claimed, and shall be signed by the claimant, or by some person in his behalf, and be verified by the oath<sup>93</sup> of the claimant, or some person in his behalf, to the effect that the affiant believes the claim to be just; in case the claim shall have been assigned the name of the assignee shall be stated; and such claim of lien may be amended in case of action brought to foreclose the same, by order of the court, as pleadings may be, in so far as the interests of third parties shall not be affected by such amendment. (Here follows statutory form of claim.) Any number of claimants may join in the same claim for the purpose of filing the same and enforcing their liens, but in such case the amount claimed by each original lienor, respectively, shall be stated: provided, it shall not be necessary to insert in the notice of claim of lien provided for by this section any itemized statement or bill of particulars of such claim.

The county auditor must record the claims mentioned herein in a book to be kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed.

<sup>93</sup> See §§ 1405, 1406, post. The mechanic's lien law will not be extended to secure liens of persons who do not come clearly

within the provisions of the lien statutes. *Thutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869. Judgment modified, 102 Pac. 766.

No lien hereby created binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such lien; or, if credit be given, then eight calendar months after the expiration of such credit; and in case such action be not prosecuted to judgment within two years after the commencement thereof, the court in its discretion, may dismiss the same for want of prosecution, and the dismissal of such action, or a judgment rendered therein, that no lien exists, shall constitute a cancellation of the lien.

In every case in which different liens are claimed against the same property, the court, in the judgment, must declare the rank or class of liens, which shall be in the following order: 1. All persons performing labor; 2. All persons furnishing material; 3. The subcontractors; 4. The original contractor. And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; and personal judgment may be rendered in an action brought to foreclose a lien, against any party personally liable for any debt for which the lien is claimed, and if the lien be established, the judgment shall provide for the enforcement thereof upon the property liable as in case of foreclosure of mortgages; and the amount realized by such enforcement of the lien shall be credited upon the proper personal judgment, and the deficiency, if any remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against the party liable therefor. The court may allow, as part of the costs of the action, the moneys paid for filing or recording the claim, and a reasonable attorney's fee in the superior and supreme courts.

§ 1231. **West Virginia.**<sup>94</sup>—Every mechanic, builder, artisan, workman, laborer, or other person, who shall perform

<sup>94</sup> Code 1906, §§ 3111-3115, 3119- 3121.

any work or labor upon or furnish any material or machinery for constructing, altering, repairing or removing a house, mill, manufactory, or other building, appurtenances, fixtures, bridge, or other structure, by virtue of a contract with the owner or his authorized agent, shall have a lien to secure the payment of the same, upon such house or other structure, and upon the interest of the owner in the lot of land on which the same may stand or to which it may be removed. But the aggregate amount of the liens authorized hereby shall not exceed the amount stipulated in the contract with the owner to be paid therefor, and there shall be no priority of liens as between the parties claiming hereunder.

Every material-man, workman, laborer, mechanic or other person, performing any labor or furnishing any material or machinery, under a contract with a principal contractor or his subcontractor, for the construction, alteration, repair or removal of any house or other structure, provided for in a contract between the owner thereof or his authorized agent and such principal contractor, shall have a lien to secure the payment of the value of the labor performed, and the material or machinery furnished (not exceeding the price for the same stipulated in the contract between such principal contractor or his subcontractor, and such material-man, laborer or mechanic,) upon such house or other structure, and upon the interest of the owner in the lot of land upon which the same may stand, or to which it may be removed. The liens authorized by this and the preceding paragraph shall have priority over any lien created by deed or otherwise on such house or other structure and the lots on which the same are erected, subsequently to the time when such labor shall have been performed, or material or machinery furnished.<sup>95</sup> The laborer and mechanic shall have the first lien,

<sup>95</sup> The lien attaches from the time the labor is commenced, or the material begun to be furnished. *Charleston Lumber &c. Co. v. Brockmyer*, 18 W. Va. 586. No payment by the owner to a

and the liens of laborers, mechanics or persons furnishing machinery or material to a contractor, shall take precedence over any lien already taken or to be taken by the contractor indebted to them; and an assignment or transfer by such head contractor of his contract with the owner, or by a subcontractor of his contract with the head contractor, as well as all proceedings in attachment or otherwise against such head contractor, or a subcontractor, to subject or incumber his interest in such contract, shall be subject to the liens of every laborer, mechanic or material-man who has done any labor or furnished any material for constructing, altering, repairing or removing any such house or other structure under a contract with such contractor or subcontractor. It shall be the duty of such laborer, mechanic or person furnishing material, to file with the owner or his authorized agent an itemized account of the labor done or material or machinery furnished, verified by affidavit, within thirty-five days after the same is performed or furnished, which said thirty-five days shall be construed to mean that the laborer, mechanic or person furnishing material shall have thirty-five days after he shall have ceased to have performed labor, or furnished machinery or material, to file such notice,<sup>96</sup> and that if the notice is given within thirty-five days, as aforesaid, it shall include all items for labor performed or machinery or material furnished, within a period not exceeding nine months from the date of said notice, to the owner of the property on

contractor shall impair the lien of a laborer or material-man. The owner may limit his liability to the price stipulated between himself and the contractor by having the contract recorded in the office of the clerk of the county court. Otherwise the contractor shall be held to be his agent and the property improved shall be held for the true value of all labor done and material furnished. Williams

&c. Co. v. Bailey, 68 W. Va. 681, 70 S. E. 696.

<sup>96</sup> Under a former statute it was held that although such notice be given within the time specified, no lien arises if the owner has already paid the contractor in full for the erection of the building. McKnight v. Washington, 8 W. Va. 666; Stout v. Golden, 9 W. Va. 231.

which the lien is to be charged; and his neglect or failure so to notify the party to be charged within thirty-five days, after he shall have ceased to furnish labor, machinery or material, shall release the owner from all responsibility, and this property from all lien for any item therein done or furnished prior to the said notice; and the owner may at any time by notice in writing require such laborer, mechanic or person furnishing the labor, material or machinery, to file with him such itemized account, and the neglect or failure so to do within ten days, after receiving such notice, shall release the owner from all responsibility, and his property from all lien, for all labor done or material or machinery furnished by the person so neglecting or failing prior to the said giving of such notice: provided, however, that any laborer or other person employed to do work or furnish material, or machinery for the construction, alteration, repair or removal of any house or other structure, by another who may have contracted with the owner therefor, may, before doing any work or furnishing any material or machinery, give the owner of such house or other structure notice in writing that, if he is not paid therefor by the person employing him, he will look to the owner for payment; and it shall not be necessary for the person who has given such notice to file the itemized account with the owner hereinbefore provided, unless he is required by the owner in writing so to do, nor shall his neglect or failure to file the same, unless so required, in any way affect or impair his lien on such house or other structure.

The itemized account of the labor done or material or machinery furnished, verified by affidavit, as herein set out shall be sufficient if in form and effect as follows: (Here follows statutory form.)

Every lien herein provided for shall be discharged unless the person desiring to avail himself thereof shall, within sixty days after he ceases to labor on, or furnish material

or machinery for such building or other structure, file with the clerk of the county court of the county, in which the same is situated, a just and true account of the amount due him, after allowing all credits, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner or owners of the property, if known, which account shall be sworn to by the person claiming the lien, or some person in his behalf.<sup>97</sup>

It shall be the duty of the clerk of the county court of the county to enter every such account in a book by him kept for the purpose, to be called, "The Mechanics' Lien Record," which shall be properly indexed, and in which he shall state the names of the parties, the amount and character of the claim, and when filed, and the description of the property to be charged by said lien, for which service he shall receive a fee of fifty cents, to be paid by the person claiming the lien. No payment by the owner or his agent, to a contractor, shall affect or impair the lien of a laborer, or material-man, hereinabove provided for. But such owner may limit his liabilities so that the amount to be paid by him shall not exceed in the aggregate, the price stipulated in the said contracts between himself and the contractor, by having the said contract, or so much thereof, as shows the contract price, and the times of its payment, recorded in the office of the clerk of the county court of the county, where such house or other structure is situated, prior to the performance of the labor and the furnishing of the material, or the machinery for the same. But, if such owner fails to have

<sup>97</sup> *Mayes v. Ruffners*, 8 W. Va. 384; *Stout v. Golden*, 9 W. Va. 231. A subcontractor of the second degree, who shows no privity of contract with the owner of the land, can acquire no lien by giving the notice so provided for. *McGugin v. Ohio River R. Co.*, 33

W. Va. 63, 10 S. E. 361. The word "person" as used in the statute giving liens to persons, etc., includes corporations. *Tennis Bros. Co. v. Wetzel & T. R. Co.*, 140 Fed. 193, *affd.* 145 Fed. 458, 75 C. C. A. 266.



said contract so recorded, the contractor shall be held to be his agent; and the house or other structure, and the lots on which it is situated, then be held liable for the true value of all labor done, and material and machinery furnished therefor, prior to such recording, although the same may exceed, in the aggregate, the price stipulated in the contract between the owner and the contractor.

When the owner fails to perform his part of the contract, and by reason thereof the other party, without his own default, is prevented from completely performing his part, he shall be entitled to a reasonable compensation for as much as he has performed, in proportion to the price stipulated for the whole.

The lien is enforced by bill in chancery. Unless a suit to enforce a lien is commenced within six months after the person desiring to avail himself thereof shall have filed his account in the clerk's office, as hereinbefore provided, such lien shall be discharged,<sup>98</sup> but a suit commenced by any person having such lien, shall for the purpose of preserving the same, inure to the benefit of all other persons having a lien hereunder on the same property.

§ 1232. **Wisconsin.**<sup>99</sup>—Every person who, and firm, corporation or association which, as principal contractor, architect, civil engineer or surveyor who performs or procures to be performed any work or labor, furnishes any materials or prepares any plans, specifications or estimates: 1. For in or about the erection, construction, repair, protection or removal of any dwellinghouse, building or appurtenance thereto, structure, bridge, wharf, dock, pier, fence, wall or screen

<sup>98</sup> *Phillips v. Roberts*, 26 W. Va. 783. There can be no mechanic's lien unless it has been provided for by statute and to secure a lien under the statute one must comply with all the provisions of the statute. *Tygart Valley Brew. Co.*

*v. Vilter Mfg. Co.*, 184 Fed. 845, 107 C. C. A. 169, revg. 168 Fed. 1002.

<sup>99</sup> Stats. 1898, §§ 3314, 3315, 3318, 3321, 3322, 3324, 3326, as amended by Laws 1913, ch. 213.

or other permanent erection or any machinery so erected or constructed as to be or become a part of the freehold upon which it is situated; 2. In or about the improving or equipping of any house or building with chandeliers, brackets, wires, pipes or appurtenances for supplying gas, electric or other light, water or heat; 3. In the dredging, digging, excavating, constructing or equipping any channel, well, cellar, vault, fountain, fishpond, trench or tunnel; 4. In the filling, dredging, improving, digging, driving or removing piles in any water or water-course, any water-lot, meadow, marsh, swamp or other low lands; 5. In the making or repairing any walk, sidewalk, crosswalk, curbing or apron; 6. In grading, graveling, leveling or otherwise constructing or repairing any street, alley, roadway or gutter upon land, irrespective of any easement on or over said land; 7. Or in setting out or planting any hedge, or fruit or ornamental trees, shall have a lien thereupon and upon the interest of the owner of any such building, machinery or other structure or work of any kind herein mentioned, or of the interest of the person causing such work or labor to be done, or such materials, plans, specifications or estimates to be furnished in and to the land upon which the same is situated, not exceeding forty acres, or if within the limits of a city or incorporated village upon the piece or parcel of land designed for use in connection with such house, building, machinery, structure or other such work, not exceeding one acre.<sup>1</sup> Such lien shall be prior to any other lien which originates subsequent to the commencement of the construction, repairs, removal or work<sup>2</sup> aforesaid of or upon such dwelling-house, building,

<sup>1</sup> *Hill v. La Crosse & M. R. Co.*, 11 Wis. 214. Where a material-man pays freight on materials as a convenience to the contractor it may be included in the claim and lien. *Barker & Co. Lumber Co. v. Marathon Paper Mills Co.*, 146 Wis. 12, 130 N. W. 866.

<sup>2</sup> The lien attaches as of the time of the commencement of the building or other improvement, and has precedence over all liens attaching subsequently. In *re Hoyt*, 3 Biss. (U. S.) 436, Fed. Cas. No. 6805; *Rees v. Ludington*, 13 Wis. 276, 80 Am. Dec. 741; *Jessup*

machinery, structure or work; shall also be prior to any unrecorded mortgage given before the commencement of such construction repairs, removal or work, of which mortgage the person claiming the lien has no notice, and shall also attach to and be a lien upon the real property of any person upon whose premises such improvements are made, such owner having knowledge thereof and consenting thereto, and may be enforced as herein provided. In case any person shall order or contract for the purchase of any machinery to be placed in or connected to or with any building or premises, and such person shall not have an interest in such building or premises in or connected with which such machinery is placed sufficient for a lien, as herein provided for, to secure payment for said machinery the person furnishing the same shall have and retain a lien upon such machinery and have the right to remove from such building or premises such machinery, in case there shall be default in making payment therefor when due, leaving such building or premises in as good condition as before such machinery was placed in or on the same.

Every person who, performs any work or labor for or furnishes any materials in any of the cases enumerated in the preceding paragraph, may have the lien and remedy hereby given if, within sixty days after performing such work or labor or furnishing such materials he shall give notice in writing to the owner, or his agent, of the property to be affected by such lien, if to be found in the county, and if neither can be found therein, by filing such notice in the office of the clerk of the circuit court of said county, setting forth that he has been employed to perform or furnish, and has performed or furnished, such work, labor or material, with a statement of the labor performed or the materials

v. Stone, 13 Wis. 466. Neither the contractor nor subcontractor has a lien for materials or labor where the building being erected, is de-

stroyed before it is completed. Goodman v. Baerlocker, 88 Wis. 287, 60 N. W. 415, 43 Am St. 893.

furnished, the amount due therefor and that he claims the lien given by this act; provided, however, that no such person except a laborer or principal contractor shall have the lien and remedy given hereby unless in addition to the notice herein provided for and within ten days after the actual delivery of the first of such material or the performance of the first labor on the premises, he<sup>3</sup> shall give written notice personally to the owner or his agent of the property to be affected thereby, or if neither can be found, by depositing the same in the postoffice securely enclosed in an envelope with postage prepaid, duly registered, and addressed to the last known postoffice address of the person or persons intended to be notified, and by filing such notice in the office of the clerk of the circuit court of the county where such property is situated, that he has commenced to furnish such material or labor and that such owner will be liable therefor and his property subject to such lien in case the contractor shall fail to pay therefor. In describing the property to be affected by such notice, it shall be sufficient

<sup>3</sup> The lien of the subcontractor is not restricted to the amount due for work done and materials furnished within the time limited preceding the giving of the notice, but includes the whole of his claim for labor or materials. *Dorestan v. Krieg*, 66 Wis. 604, 29 N. W. 576. The lien of a subcontractor can not be made to cover work not included in the main contract as at first drawn or afterwards modified. *Siebrecht v. Hogan*, 99 Wis. 437, 75 N. W. 71. Damages for breach of a contract is not a lienable claim. *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490. Under the previous statute, no one but the contractor or his immediate subcontractor was entitled to the lien. *Kirby v. Mc-*

*Garry*, 16 Wis. 68; *Harbeck v. Southwell*, 18 Wis. 418. Under the statute as amended by Laws 1889, ch. 333 (of which § 3315 of the present statute is a revision), the right of lien is not restricted to cases where the material was sold and delivered in Wisconsin, and it is immaterial that the subcontractor sold and delivered the material in Illinois. *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071. Three joint contractors who have agreed to divide the work and proceeds are still deemed principal contractors, and persons performing labor or furnishing material to them may enforce a lien. *Harbeck v. Southwell*, 18 Wis. 418.

to state its location with reasonable certainty so that the owner will not be misled or deceived thereby. In the event that the owner shall complain of the insufficiency of any such notice, the burden of proof shall be upon him to show that he has been misled or deceived by such insufficiency thereof. Such notice when so served shall entitle such person furnishing such materials or labor to a right to a lien for the amount due and owing for the labor or materials so furnished as herein provided.

In the event that any such person so required to give the ten-day notice shall not give said notice in writing as hereinbefore provided within ten days after the commencement of the furnishing of such materials or labor, but subsequently shall serve such notice that he will claim the benefits of a lien as hereinabove provided, then and in that event he shall be entitled to a lien only to the extent of the amount then owing from the owner of such real estate for all improvements thereon for which such materials are furnished or labor performed and only for the amount and value of any materials furnished or labor performed subsequent to the time of serving such ten-day notice; and in case no such ten-day notice shall have been given at any time as herein provided, but such sixty-day notice be given, then and in that event he shall be entitled to a lien against the real estate to which such materials were furnished or upon which such labor was performed only to the extent of the amount owing and unpaid from the owner of such real estate for all improvements thereon for which such materials are furnished and labor performed, at the time of the service of such notice. In any event to complete such right of lien, the sixty-day notice must be served as herein before provided.

It shall be the duty of every contractor at the time he purchases any materials or contracts for the furnishing of any labor for any contract to deliver to such material-man

or other person with whom he contracts, a description of the real estate upon which the materials are to be used or the labor to be performed and the name of the owner thereof, and his agent, if any, and it shall also be the duty of every contractor before each and every payment is made to him or his assigns to give to the owner or his authorized agent a verified written statement containing the names of all persons furnishing materials or labor, whether used or to be used, to whom a lien is given by law, and no money shall become due to such principal contractor until ten days after each written statement has been so given; if, for any reason, the parties waive the giving of such written statement, which waiver to be effective must be in writing, then and in that event all moneys paid by the owner to the principal contractor shall be and constitute a trust fund in the hands of such principal contractor to be used only in the payment of claims due for labor and materials to persons entitled to a lien by law against said owner or his property and the using of such moneys by such principal contractor for any other purpose is hereby declared to be an embezzlement of said moneys punishable as provided for by law in case of embezzlement.

In all cases where a lien shall be filed under the provisions of this act by any person other than the principal contractor, it shall be his duty to defend any action brought thereupon at his own expense, and during the pendency of such action the owner may withhold from the contractor the amount of money for which such lien shall be filed; and in case of judgment against the owner or his property upon the lien he may deduct from any amount due by him to the contractor the amount of such judgment and costs, and if he shall have settled with the contractor in full may recover from him any amount so paid for which the contractor was originally liable.

And any contractor or any person furnishing materials

under him, who shall purchase materials on credit and represent at the time of making the purchase that the same are to be used in a designated building or other improvement and shall thereafter use or cause to be used the said material in the construction of any building or improvement other than that designated, without the written consent of the person from whom the materials were purchased, shall be punished by imprisonment in the county jail not more than three months or by a fine not exceeding three hundred dollars.<sup>4</sup>

The provisions of this act shall also apply to all cases where improvements are being placed upon real estate by the lessee under any lease continuing for a longer period than five years, in which cases the right of lien herein provided shall attach to the interests of such lessee and his assigns in such real estate, and the term "owner" of the real estate as herein mentioned shall, in all such cases, be deemed to mean and include any such lessee.

No lien hereby given shall exist and no action to enforce the same shall be maintained unless within six months from the date of the last charge for performing such work and labor, or of the furnishing of such materials,<sup>5</sup> a claim for such lien shall be filed in the office of the clerk of the circuit

<sup>4</sup> This provision, doing away with the former restriction of the amount which subcontractors may recover against the owner, is not unconstitutional. *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071.

<sup>5</sup> *Spruhen v. Stout*, 52 Wis. 517, 9 N. W. 277. A suit to foreclose a mechanics' lien is an equitable suit. *Willer v. Bergenthal*, 50 Wis. 474, 7 N. W. 352; *Spruhen v. Stout*, 52 Wis. 517, 9 N. W. 277. And the court may, on its own motion, submit any question of

fact to a jury, whose verdict is advisory merely, and may be disregarded. *Huse v. Washburn*, 59 Wis. 414, 18 N. W. 341. Issues of fact may also be tried by a jury on the demand of either party, whose verdict is conclusive. *Druse v. Horter*, 57 Wis. 644, 16 N. W. 14. Under an earlier statute, the proceeding was an action at law. *Marsh v. Fraser*, 27 Wis. 596. As to costs and attorney's fee, see *Allis v. Meadow Spring Distilling Co.*, 67 Wis. 16, 29 N. W. 543, 30 N. W. 300.

court of the county in which the lands affected thereby lie, and such action be brought within one year from such date, unless within thirty days next preceding the expiration of such year the person who filed the lien or his agent, attorney or assignee shall make and annex to the instrument on file an affidavit setting forth the interest which the lien claimant has by virtue of such lien in the property therein mentioned, upon which affidavit the clerk shall indorse the time of its filing. The effect of such affidavit shall not continue beyond one year from the time when such lien would otherwise cease to be valid. Such claim for lien may be filed and docketed within such six months notwithstanding the death of the owner of the property affected thereby or the person with whom the original contract was made, with like effect as if he were there living.

The lien may be foreclosed by action in the circuit court, or any county court having jurisdiction. The complaint<sup>6</sup> must set forth the contract under which the work was done or materials furnished, with the last date of doing or furnishing the same, and the assignment of the claim, if any. It must allege the filing of the claim as required by law, and must give a description of the premises. If the action is brought by a subcontractor, the complaint must set forth in substance the contract between him and the contractor, and allege that he gave notice to the owner, as required by law. Sale is made under the judgment.<sup>7</sup>

§ 1233. **Wyoming.**<sup>8</sup>—Every mechanic or other person, who shall do or perform any work or labor upon, or furnish any material, fixtures, engines, boilers or machinery for any building, erection or improvement upon land, or for repairing the same, under or by virtue of any contract with the

<sup>6</sup> For further details, read entire sections 3321, 3322, 3324, 3326 of Stats. 1898.

<sup>7</sup> As to actions against municipi-

palities, see Stats. 1898, § 3328.

<sup>8</sup> Comp. Stats. 1910, §§ 3799-3801, 3803, 3805, 3812, 3815-3817, as amended by Sess. Laws 1911, p. 94.



owner or proprietor thereof, or his or her agent, trustee, contractor, or subcontractor, upon complying with the provisions of this act, shall have for his work, or labor done, or materials, fixtures, boiler or machinery furnished, a lien upon such building, erection or improvements, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre, or if such building, erection or improvement be upon any lot of land in any town, city, or village, then such lien shall be upon such building, erection or improvement, and the lot or land upon which the same are situated, to secure the payment for such work or labor done, or materials, fixtures, engine, boiler or machinery furnished.

The entire land, to the extent aforesaid, upon which any such building, erection or other improvement is situated, including as well that part of the said land which is not covered with such building, erection or other improvement, as that part thereof which is covered with the same, shall be subject to all liens created by this chapter, to the extent of all the right, title and interest owned therein by the proprietor or owner of such building, erection or improvement for whose immediate use and benefit the labor was done, or things or material furnished.

The lien for the things or materials furnished or work and labor performed, shall attach to the building, erection or improvements for which they were furnished, or the work and labor was done, in preference to any prior lien or incumbrance or mortgage upon the land upon which said building, or erection, improvements or machinery have been erected or put, and any person enforcing such lien may have such building, erection, or improvements sold under execution, and the purchaser thereof may remove the same within a reasonable time thereafter, and such lien shall be preferred to all other incumbrances which may be attached to or upon such building or other improvements or the ground, lot or land upon which they are situated or located, or either of

them, subsequent to the commencement of such buildings or improvements.

It shall be the duty of every original contractor, within four months, and every subcontractor, and every journeyman and day-laborer, and every other person seeking to obtain the benefits of the provisions of this act, within ninety days after the indebtedness shall have accrued, to file in the office of the register of deeds of the proper county a just and true account of the demand due him, her, or them, after all just credits shall have been given, which is to be a lien upon such building or improvements, and a true description of all the property, or so near as to identify the same, upon which said lien is intended to apply, with the name of the owner or owners, contractor or contractors, or both, if known to the person filing the lien, which in all cases shall be verified by the oath of the person filing the lien, or by some reliable person for him; provided, that the original contractor shall not file a lien prior to the expiration of sixty days after the completion of the contract, and no provision contained in any contract made between the owner and the original contractor shall be construed to in any way affect or restrict the right of any subcontractor, journeyman or day laborer, to file his lien in the manner herein provided.

The pleadings, practice, process and other proceedings in cases arising under this act shall be the same as in ordinary civil actions and civil proceedings in the courts of this state, except as herein otherwise provided. The petition, among other things, shall allege the facts necessary for securing a lien under this act, and a description of the property charged therewith. Provided, however, that in any action begun by any laborer, material-man, subcontractor or other person, to enforce a lien under the provisions of this act, if the petition shall state and the evidence shall show that the work and labor was done and materials furnished for the use and benefit of the party or parties designated in the petition, and for use in, upon or about the property therein described

and against which the lien is sought to be enforced, and shall also state and show that the owner or proprietor of said property or his agent, had knowledge of the fact that said work and labor was being done and said materials were being furnished for use, in [,] upon and about said property, then and in that case any and all defects in the statement of said lien account as filed or notice given as herein provided shall be disregarded; provided, that said lien account as filed shall state the amount for which, the property against which, and the labor or materials for which, a lien is claimed, so as to enable the owner or his agent to identify the same; provided, further, that said notice shall be given and said lien account filed within the time limited by statute for so doing.

All actions under this act shall be commenced within six months after the filing of the lien, and prosecuted without delay to final judgment, and no lien shall continue to exist by virtue of the provisions of this act for more than six months after the lien shall be filed, unless within that time an action shall be instituted thereon, as hereinbefore described.

Every person, except the original contractor, who may wish to avail himself of the benefits of the provisions of this act, shall give ten days' notice, in writing, before filing the lien, as herein required, to the owner, owners or agent, or either of them, against such building or improvement, stating in said notice the amount of the same, and from whom it is due.

In cases where a lien shall be filed under the provisions of this act by any person other than a contractor, it shall be the duty of the contractor to defend any action brought thereon at his own expense, and during the pendency of such action the owner or agent may withhold from the contractor the amount of money for which said lien shall be filed, and in case of judgment being rendered against the owner or his property upon the lien, he shall be entitled

to deduct from any amount due by him to the contractor the amount of such judgment and cost, and if he shall have settled in full with the contractor he shall be entitled to recover back from the contractor any amount so paid by the owner for which the contractor was originally liable

Every person for whose immediate use, enjoyment or benefit any building, erection or improvement shall be made, shall be included by the word "owner" or "proprietor" thereof, under this act, not excepting such as may be minors over the age of eighteen years, and married women: and in case the husband of any married woman shall enter into any contract for the performance of any work, or the furnishing of any material, for which a lien is provided by this act, for the benefit of the wife's property, the husband so contracting shall be deemed *prima facie* to be the agent of his wife owning such property.

## CHAPTER XXXI.

### MECHANICS' LIENS—CONTRACT OR CONSENT OF OWNER.

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§ 1234. **Contract or consent of the owner.**—The statutes generally provide that the labor performed or the materials furnished, in order to constitute a lien upon the property to which they are applied, shall have been performed or furnished by virtue of a contract with, or the consent of, the owner of the land, or of the government.<sup>1</sup> The agreement

<sup>1</sup> Alabama: Contract with the owner of the land, his agent, trustee, contractor or subcontractor. See ante, § 1187; Arizona: Subcontractors and workmen under contract between the owner and the original contractor obtain liens by delivering to the owner an account of labor done or material furnished. See ante, § 1188; Arkansas: Contract, express or implied, with the owner or his agent, trustee, contractor, or subcontractor. See ante, § 1189; California: At the instance of the

owner, or of any other person acting by his authority as contractor or otherwise; and every contractor, subcontractor, architect, builder, or other person in charge, shall be deemed the agent of the owner. See ante, § 1190; Colorado: Contract, express or implied. See ante, § 1191; Connecticut: Agreement with, or consent of, the owner of the land, or some person having authority from or acting for such owner. See ante, § 1192; Delaware: Contract, express or implied, with the owner,

or consent of any person having authority from, or right-fully acting for, such owner in procuring or furnishing such labor or materials, has, by express provision in several states,

his agent, or contractor. See ante, § 1194; District of Columbia: Erected or repaired by the owner or his agent. See ante, § 1195; Florida: Procurement of the owner, his agent, or of a person contracting with him. See ante, § 1196; Georgia: When employment is by any other person than the owner, lien attaches only on notice to owner. See ante, § 1197; Idaho: Instance of owner or his agent. See ante, § 1198; Illinois: Contract, express or implied, or partly express and partly implied. See ante, § 1199; Iowa: Contract with the owner, his agent, trustee, contractor, or subcontractor. See ante, § 1201; Kansas: Contract with owner, or with a trustee, agent, husband or wife of such owner. See ante, § 1202; Kentucky: Contract with, or written consent of, owner. See ante, § 1203; Louisiana: Employed by the owner or his agent or subcontractor. See ante, § 1204; Maine: Contract or consent of owner. See ante, § 1205; Maryland: If contract not with owner, notice must be given him. See ante, § 1206. Massachusetts: Agreement with, or consent of, owner. See ante, § 1207. Michigan: Contract, express or implied, written or unwritten, with owner, part owner, or lessee, of any interest. See ante, § 1208. Minnesota: Contract with owner or agent, or at instance of the owner, his agent, trustee, contractor, or subcontractor. See

ante, § 1209. Mississippi: Contract with owner, or his written consent. See ante, § 1210. Missouri: Contract with owner, his agent, trustee, contractor, or subcontractor. See ante, § 1211. Nebraska: Contract, express or implied, with owner or his agent. See ante, § 1213. Nevada: At instance of owner or his agent. See ante, § 1214. New Hampshire: Contract with owner. See ante, § 1215. New Jersey: Consent of owner in writing or notice to him. See ante, § 1216. New Mexico: At instance of owner or his agent, contractor, subcontractor, architect, builder, or other person having charge, or with the knowledge of the owner. See ante, § 1217. New York: Consent of owner, his agent, contractor, subcontractor, or other person contracting with the owner. See ante, § 1218. North and South Dakota: Contract with the owner, his agent, trustee, contractor, or subcontractor. See ante, § 1219a. Ohio<sup>3</sup> Contract, express or implied, with owner or his agent. See ante, § 1220. Oklahoma: Contract with the owner, his agent, trustee, contractor, or subcontractor. See ante, § 1220a. Oregon: At instance of owner, his agent, contractor, subcontractor, architect, builder, or other person having charge. See ante, § 1221. Pennsylvania: Notice to the owner or his agent at the time of furnishing the materials or performing work. See ante, § 1222. Rhode

the same effect as the agreement or consent of the owner; and without such provision, the agreement or consent of the agent would have the same effect as the agreement or consent of the owner, the authority of the agent being proved. In some states it is provided that a contractor, subcontractor, architect, builder, or other persons having charge or control of the construction, alteration, or repair, either in whole or in part, of any building or other improvement, shall be held to be the agent of the owner for the purpose of giving a lien upon the property.

**§ 1235. Contract of owner necessary to establish lien.—**

A contract, express or implied, of the owner of the land is necessary to the establishment of a mechanic's lien upon it. The lien, however, is created, not by the contract, but by furnishing the materials or doing the work under the contract. Yet a contract creating an indebtedness on the part of the person whose property is to be charged with a lien must exist in the first place, and then the performing of labor or the furnishing of materials under the contract creates the lien.<sup>2</sup> It is not essential, however, that the owner

Island: Contract or request of owner. See ante, § 1223. South Carolina: Agreement with or consent of owner. See ante, § 1224. Tennessee: Special contract with owner or his agent. See ante, § 1225. Texas: Contract with owner, his agent, trustee, or contractor. See ante, § 1226. Utah: Contract, express or implied. See ante, § 1227. Vermont: Contract or agreement whether in writing or not. See ante, § 1228. Washington: At instance of owner, his agent, contractor, subcontractor, architect, builder, or person having charge. See ante, § 1230. West Virginia: Contract with owner or his agent. See ante, § 1231.

Wyoming: Contract with the owner or his agent, trustee, contractor, or subcontractor. See ante, § 1233.

<sup>2</sup> Arkansas: *Brown v. Morrison*, 5 Ark. 217; *Galbreath v. Davidson*, 25 Ark. 490, 99 Am. Dec. 233; *Cohn v. Hager*, 30 Ark. 25; *Klondyke Lumber Co. v. Williams*, 71 Ark. 334, 75 S. W. 854. But see *Cleveland, etc., Lumber Co. v. Piggse*, 84 Ark. 126, 105 S. W. 1194. Illinois: *Wendt v. Martin*, 89 Ill. 139; *Sutherland v. Ryerson*, 24 Ill. 517; *Hunter v. Blanchard*, 18 Ill. 318, 323, 68 Am. Dec. 547; *Granquist v. Western Tube Co.*, 240 Ill. 132, 88 N. E. 468, revg. judgment, 144 Ill. App. 230. Iowa:



should be personally liable for the work done or the mate-

Redman v. Williamson, 2 Iowa 488; Logan v. Attix, 7 Iowa 77; Miller v. Hollingsworth, 33 Iowa 224; Templin v. Chicago, B. & P. R. Co., 73 Iowa 548, 35 N. W. 634. Maine: Wescott v. Bunker, 83 Maine 499, 22 Atl. 388. Here the subcontractor and original contractor occupy essentially the same situation with respect to the owner. Cole v. Clark, 85 Maine 336, 27 Atl. 186, 21 L. R. A. 714, citing text. In Maryland the lien does not originate in contract of the owner, it is said, and no contract need exist. It originates in the doing of the labor or the furnishing the material, if followed by the proper notice to the owner, and claim of lien filed. Sodini v. Winter, 32 Md. 130; Franklin F. Ins. Co. v. Coates, 14 Md. 285; Treusch v. Shryock, 51 Md. 162. Massachusetts: Burke v. Coyne, 188 Mass. 401, 74 N. E. 942. To establish his lien contractor must try in good faith to fulfill his building contract. Michigan: Wagar v. Briscoe, 38 Mich. 587; Willard v. Magoon, 30 Mich. 273. Minnesota: O'Neil v. St. Olaf's School, 26 Minn. 329, 4 N. W. 47; Laird v. Moonan, 32 Minn. 358, 20 N. W. 354; Bohn v. McCarthy, 29 Minn. 23, 11 N. W. 127; Smith v. Barnes, 38 Minn. 240, 36 N. W. 346; Atkins v. Little, 17 Minn. 342; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513; Hill v. Gill, 40 Minn. 441, 42 N. W. 294. Missouri: Kansas City Planing Mill Co. v. Brundage, 25 Mo. App. 268; Henry v. Rice, 18 Mo. App. 497, 510; Barker v. Berry, 8 Mo. App. 440;

Hannon v. Gibson, 14 Mo. App. 33; Fitzgerald v. Thomas, 61 Mo. 499; Halliwell Cement Co. v. Elser, 156 Mo. App. 291, 137 S. W. 626. Nebraska: Pomeroy v. White, Lake Lumber Co., 33 Neb. 243; 49 N. W. 1131. New York: Muldoon v. Pitt, 54 N. Y. 269; Meyers v. Bennett, 7 Daly (N. Y.) 471; Richardson v. Reid, 50 Hun (N. Y.) 606, 3 N. Y. S. 224; Walker v. Paine, 2 E. D. Smith (N. Y.) 662; Broderick v. Poillon, 2 E. D. Smith (N. Y.) 554; Quinn v. New York, 2 E. D. Smith (N. Y.) 558; Dixon v. La Farge, 1 E. D. Smith (N. Y.) 722; Gay v. Brown, 1 E. D. Smith (N. Y.) 725; Pendleburg v. Meade, 1 E. D. Smith (N. Y.) 728; De Ronde v. Olmsted, 47 How. Pr. (N. Y.) 175; Knapp v. Brown, 11 Abb. Pr. (N. S.) (N. Y.) 118, 45 N. Y. 207; Burbridge v. Marcy, 54 How. Pr. (N. Y.) 446; Dugan v. Brophy, 55 How. Pr. (N. Y.) 121; Brown v. Zeiss, 9 Daly (N. Y.) 240; Cornell v. Barney, 94 N. Y. 394. Otherwise if the statute gives a lien for work done with the consent or permission of the owner. Burkitt v. Harper, 79 N. Y. 273; Otis v. Dodd, 90 N. Y. 336. North Carolina: Lester v. Houston, 101 N. Car. 605, 8 S. E. 366; Wilkie v. Bray, 71 N. Car. 205. Tennessee: O'Malley v. Coughlin, 3 Tenn. Ch. 431; Daniel v. Weaver, 5 Lea (Tenn.) 392. Wisconsin: Engfer v. Roemer, 71 Wis. 11, 36 N. W. 618. Other States: Sly v. Pattee, 58 N. H. 102; Mellor v. Valentine, 3 Colo. 255; Charleston Lumber & Mfg. Co. v. Brockmyer, 18 W. Va. 586;

rials furnished.<sup>3</sup> This contract may be either express or implied. It may be written or verbal. It need not specify the items of work or materials to be furnished: it is only requisite that these be furnished under a contract with the owner, or in pursuance with such a contract. Thus, under a general agreement by the owner for the purchase of lumber for a house, the lumber dealer may supply the lumber as it is called for, and may charge on account in the usual course of trade.<sup>4</sup>

A subcontractor's or laborer's right of lien, equally with the original contractor's, is dependent upon a contract between the owner and a contractor whereby the owner is bound for the work or materials.<sup>5</sup> A statute of Michigan which attempted to dispense with any contract or consent on the part of the owner, and allowed a lien to attach to the owner's property when there was a contract between the mechanics and any contractor or subcontractor, was declared unconstitutional, because it enabled the mechanic to deprive the owner of his title without any act, contract or consent on the owner's part.<sup>6</sup>

Tatum v. Cherry, 12 Ore. 135, 6 Pac. 715; Woodward v. McLaren, 100 Ind. 586; Wooten v. Archer, 49 Ga. 388.

<sup>3</sup> Davis-Henderson Lumber Co. v. Gottschalk, 81 Cal. 641, 22 Pac. 860; Davis & Rankin, etc., Co. v. Vice, 15 Ind. App. 117, 43 N. E. 889; Eccles Lumber Co. v. Martin, 31 Utah 241, 87 Pac. 713; Morrison v. Clark, 20 Utah 432, 59 Pac. 235, 77 Am. St. 924.

<sup>4</sup> Jones v. Swan, 21 Iowa 181; Stockwell v. Carpenter, 27 Iowa 119; Lamb v. Hanneman, 40 Iowa 41. After the contractor has completed his contract he can not by ordering more material subject the owner's interest to a lien.

Sheehan v. South River, etc., Co., 111 Ga. 444, 36 S. E. 759.

<sup>5</sup> Kansas City Planing Mill Co. v. Brundage, 25 Mo. App. 268; McGuigin v. Ohio River R. Co., 33 W. Va. 63, 10 S. E. 36.

<sup>6</sup> Spry Lumber Co. v. Trust Co., 77 Mich. 199, 43 N. W. 778, 6 L. R. A. 204, 18 Am. St. 396. This was the statute of 1887, Act No. 270. Campbell, J., delivering the judgment, said: "It strikes at the foundations of all property in land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required, and his freedom from default is no defense. He may pay in full,

The statutes of a few states do not require that there shall be any contract, express or implied, on the part of the owner; but when the contract is not with the owner, the mechanic, materialman, or laborer must notify the owner within a limited time of his claim of lien;<sup>7</sup> or in some states it is provided that the owner may prevent a lien by posting a notice to the effect that he will not be responsible for the improvement.<sup>8</sup>

§ 1236. Immaterial whether contract written or oral.—It is immaterial whether the contract for furnishing labor or material be written or verbal, express or implied, if it be sufficient to create an indebtedness from the owner to the person furnishing the labor or material upon its completion.<sup>9</sup>

in advance, or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials, and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter, except as a fact which binds no one, and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer. And, as for this purpose forms the only apparent reason for repealing the old law and passing the new one, the present statute and all its parts must fall together, leaving the law of the state where it was before the law of 1887 was passed." Followed in *Mellis v. Race*, 78 Mich. 80, 43 N. W. 1033. The Mechanic's Lien Law of Minnesota of 1887, ch. 170, was declared unconstitutional on similar grounds. That act provided that

the fact that the person performing labor or furnishing material was not enjoined by law from doing so, by the owner, should be conclusive evidence that such labor was performed or material furnished with and by the owner's consent. *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513, 1 L. R. A. 777, 12 Am. St. 663.

<sup>7</sup> As in Maryland, see ante, § 1206; *Treusch v. Shryock*, 51 Md. 162.

<sup>8</sup> In Washington a statute making every contractor, subcontractor, architect, builder, or other person in charge of the construction or repair of a building or other improvement, the agent of the owner, and giving a lien to materialmen or laborers, notwithstanding payment to the principal contractor, was declared constitutional as to future transactions. *Spokane Lumber Co. v. McChesney*, 1 Wash. St. 609, 21 Pac. 198.

<sup>9</sup> *Great Western Mfg. Co. v. Hunter*, 15 Nebr. 32, 16 N. W. 759;

Some statutes contemplate a contract on the part of the owner as distinguished from his consent; as when it is provided that the work must have been done or the materials furnished under contract with or at the instance of the owner of the land or building, or of his agent, or with the direction of the owner or his agent. Under such provisions there can be no lien unless there be shown a contract, express or implied, with the owner for doing the work or furnishing the materials.<sup>10</sup> A subcontractor with one who had contracted with the owner can, under such provisions, have a lien upon the interest of the owner in the lot or building for any amount which the owner is liable to pay;<sup>11</sup> but the interest of the owner cannot be subject to a lien, unless he has contracted for the building or improvement for which the work or materials are furnished, or unless they have been furnished at his instance or request.

§ 1237. **Lien under contract with owner's agent.**—A lien arises under a contract made by the owner's agent. This

Whitford v. Newell, 2 Allen (Mass.) 424; O'Keef v. Seip, 17 Kans. 131; Walkenhorst v. Coste, 33 Mo. 401; Foerder v. Wesner, 56 Iowa 157, 9 N. W. 100; Neilson v. Iowa Eastern R. Co., 51 Iowa 184, 33 Am. Rep. 124; Jones v. Swan, 21 Iowa 181; Cotes v. Shorey, 8 Iowa 416; Stockwell v. Carpenter, 27 Iowa 119; Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. 806. In several states, however, as in California, see ante, § 1190; New Jersey, see ante, § 1216; and Virginia, see ante, § 1229, the contract must be in writing. In California it must be recorded. In Kentucky, see ante, § 1203, and Mississippi, see ante, § 1210, the owner's contract may

be oral, but his consent must be in writing. As to authority of architect to contract for house at enhanced price, see Vickery v. Richardson, 189 Mass. 53, 78 N. E. 136. See also, Litherland v. Cohn Real Estate, etc., Co., 54 Ore. 71, 100 Pac. 1; Seattle Lumber Co. v. Sweeney, 43 Wash. 1, 85 Pac. 677.

<sup>10</sup> New York: Cornell v. Barney, 94 N. Y. 394; Knapp v. Brown, 45 N. Y. 207; Muldoon v. Pitt, 54 N. Y. 269; Brown v. Zeiss, 9 Daly (N. Y.) 240; Burbridge v. Marcy, 54 How. Pr. (N. Y.) 446; Dugan v. Brophy, 55 How. Pr. (N. Y.) 121; Burkitt v. Harper, 79 N. Y. 273; Otis v. Dodd, 90 N. Y. 336.

<sup>11</sup> Heckmann v. Pinkney, 81 N. Y. 211, 216.

would be so under the general rules of agency.<sup>12</sup> In some states the statutory provisions affect the general principle. Thus, under statutes which give liens under contracts implied from the owner's consent, much less than an express agency is required to bind the property by a lien. Under other statutes it is expressly provided that the lien may arise by virtue of an agreement with or by consent of the owner, "or some person having authority from or rightfully acting for such owner." Such a statute applies to an undisclosed principal, and a lien arises under the contract of his authorized agent, without regard to the state of the accounts between the principal and agent.<sup>13</sup> Thus, if the agent is limited to repairs not exceeding five hundred dollars, which sum he receives from the principal, mechanics whom he employs to furnish materials and perform the work are not limited to a lien for that amount if they were not informed of such limitation.<sup>14</sup> There is a distinction between the power conferred upon an agent and instructions given him relative to the exercise of the power. The limitation of the expenditure under the power does not affect the character of the power.

**§ 1238. Agent's authority.**—To authorize a lien there must be an employment by the owner, or his authorized agent. Even under a statute providing that a contractor, subcontractor, architect, builder or other person having charge of the construction, alteration, or repair of a building, shall be considered the agent of the owner, such per-

<sup>12</sup> *White Lake Lumber Co. v. Russell*, 22 Nebr. 126, 34 N. W. 104, 3 Am. St. 262; *O'Keef v. Seip*, 17 Kans. 131; *Hough v. Collins*, 176 Ill. 188, 52 N. E. 847; affg. 70 Ill. App. 661. See *West v. Pullen*, 88 Ill. App. 620.

<sup>13</sup> *Paine v. Tillinghast*, 52 Conn. 532. The principle of the law of agency, that when a creditor seeks

to hold an undisclosed principal liable he must take the account between the principal and his agent as he finds it when he first discovers the principal, does not apply. See *Doane v. Bever*, 63 Kans. 458, 65 Pac. 693.

<sup>14</sup> *Paine v. Tillinghast*, 52 Conn. 532.

son is not the statutory agent of the owner, unless he has been employed, directly or indirectly, at the instance of the owner or of his authorized agent.<sup>15</sup> Whether the owner's architect, in contracting for the completion of a building which had been left unfinished by the former contractor, acted in the matter as contractor or as agent for the owner, and whether the last contractor's work was done under the terms of the original contract, are questions for the jury.<sup>16</sup>

To sustain a lien under a contract made by an agent, the burden is upon the claimant to prove the agent's authority.<sup>17</sup> Such authority need not be express, but may be implied from the acts of the owner and the circumstances of the case.<sup>18</sup>

The statements or even the testimony of the agent himself are very far from being sufficient to prove his agency.<sup>19</sup>

§ 1239. **No lien on land of a minor.**—There can be no mechanic's lien upon the land of a minor, for he can make no contract which is binding upon himself or his property. The lien is incident only to a legal liability to pay a debt.<sup>20</sup> It is immaterial that the minor represented himself to be of age.<sup>21</sup> Even if there be a contract with his guardian for erecting a building upon a minor's property, no lien is con-

<sup>15</sup> Gould v. Wise, 18 Nev. 253, 3 Pac. 30; Lapham v. Ransford, 27 Ohio Cir. Ct. 80. Porch v. Agnew Co., 70 N. J. Eq. 328, 61 Atl. 721; Nicholstone City Co. v. Smalley, 21 Tex. Civ. App. 21, 51 S. W. 527.

<sup>16</sup> Goodfellow v. Manning, 148 Pa. St. 96, 23 Atl. 1052. See Mineah v. Stotts, 130 Iowa 530, 107 N. W. 425.

<sup>17</sup> Baxter v. Hutchings, 4 Ill. 116; Leismann v. Lovely, 45 Wis. 420, 422; Stout v. McLachlin, 38 Kans. 120, 15 Pac. 902; Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. 806.

<sup>18</sup> McDonell v. Dodge, 10 Wis. 106.

<sup>19</sup> Owens v. Northrup, 30 Wis. 482.

<sup>20</sup> Hall v. Acken, 47 N. J. L. 340; Johnson v. Parker, 27 N. J. L. 239; Ness v. Wood, 42 Minn. 427, 44 N. W. 313; Fish v. McCarty, 96 Cal. 484, 31 Pac. 529, 31 Am. St. 237; McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572; Alvey v. Reed, 115 Ind. 148, 17 N. E. 265, 7 Am. St. 418.

<sup>21</sup> Price v. Jennings, 62 Ind. 111; Alvey v. Reed, 115 Ind. 148, 17 N. E. 265, 7 Am. St. 418.

ferred if the guardian had no authority in law to make the contract.<sup>22</sup> Of course a minor may ratify a contract made during his minority out of which liens might arise. But such ratification cannot be implied from his retaining the property and collecting rents from it.<sup>23</sup> The ratification must be an intentional acknowledgment of the obligation of the contract.

**§ 1240. No lien by owner on his own building.**<sup>24</sup>—One who builds for himself upon the land of another under an arrangement, though verbal, that he shall purchase the land at an agreed price, can have no lien for labor and materials furnished, for in such case they are not furnished by virtue of a contract with the owner, or with another person who has contracted with the owner.<sup>25</sup>

Neither can the owner's agent include in a lien the amount of a contract for labor and materials made in the owner's own name, which the agent had subsequently paid.<sup>26</sup>

**§ 1241. The contract to be real, not fictitious.**—The contract, by virtue of which, under the lien law, a contractor is

<sup>22</sup> *Guy v. Du Uprey*, 16 Cal. 195, 76 Am. Dec. 518; *Copley v. O'Neil*, 57 Barb. (N. Y.) 299; *Burke v. Mackenzie*, 124 Ga. 248, 52 S. E. 653. A guardian can not subject the estate and property of his ward to a lien without first obtaining an order of court authorizing him to do so. *Fish v. McCarthy*, 98 Cal. 484, 31 Pac. 529, 31 Am. St. 237; *Guy v. Du Uprey*, 16 Cal. 195, 76 Am. Dec. 518. But in a Kentucky case, where a guardian of minor children, in good faith but without any authority, reconstructed an old building, which enhanced the value of the property, it was held that materialmen, whose property had been in good faith used in making the

improvements, were equitably entitled to be paid the actual cost of their materials out of the enhanced rental value of the property, after deducting therefrom the insurance, taxes, and costs of keeping the premises in repair. *Bent v. Barnett*, 90 Ky. 600, 12 Ky. L. 563, 14 S. W. 596.

<sup>23</sup> *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572.

<sup>24</sup> *Littleton Savings Bank v. Osceola Land Co.*, 76 Iowa 660, 39 N. W. 201; *Hamilton v. Williford*, 90 Ga. 210, 15 S. E. 753.

<sup>25</sup> *Gray v. Carleton*, 35 Maine 481; *Babb v. Reed*, 5 Rawle (Pa.) 151, 28 Am. Dec. 650; *Stevenson v. Stonehill*, 5 Whart. (Pa.) 301.

<sup>26</sup> *Kerby v. Daly*, 45 N. Y. 84.

protected, must be between parties who in fact, and not in form merely, hold toward each other the relation of contracting parties. It must be a real, not a fictitious bargain. Therefore, where the owner of land to protect it against creditors conveyed it to a third person, with whom he at the same time executed a contract by the terms of which the actual owner agreed to build a house upon the land and to furnish all the material for the same for a stipulated price, which the nominal owner agreed to pay by a mortgage for that amount upon the land, it was held the contract and the filing of it were a nullity as against creditors claiming a lien upon the building.<sup>27</sup> The contract in such case may be relied upon as expressing the consent in writing of the legal owner to the erection of the building.

**§ 1242. Contract with owner to be precise.**—Under some statutes, to enable a contractor to maintain a lien, his contract with the owner must be precise and definite as to the amount that may become due under it. The contract is sufficient if the amount due under it may be ascertained from the data given in it, and the work is to be done within a fixed time. But there must be some limitation both as to the amount payable under the contract, and as to the time within which it may be fulfilled.<sup>28</sup> Thus an agreement to paint and paper a house for a fair price, not specifying the number of coats of paint, nor the rooms to be papered, nor the quality of paper, is not sufficiently definite under the lien law of Massachusetts to create a lien as against a subsequent mortgagee.<sup>29</sup>

A contract to build a house at a certain price by the day, the contractor employing such help as he may deem necessary, and at such prices as he may deem reasonable and

<sup>27</sup> *Young v. Wilson*, 44 N. J. L. 157. *Y. 666*; *Ryan v. Desmond*, 118 Ill. App. 186.

<sup>28</sup> *Wilder v. French*, 9 Gray (Mass.) 393; *Manchester v. Searle*, 121 Mass. 418; *Smith v. Coe*, 29 N. *29 Manchester v. Searle*, 121 Mass. 418.



proper, is too indefinite to give him, or the workmen employed by him, a lien for labor performed under the contract.<sup>30</sup>

But a general employment of a carpenter at wages by the day, to be afterwards agreed upon, to work in getting out finish for a house, is a contract sufficiently definite to be the foundation for a lien.

These decisions, requiring definiteness of contract, are exceptional, and do not apply generally.<sup>31</sup>

**§ 1243. Capacity of owner to contract.**—In order to subject the legal title or estate to a lien, the holder of such title must have the legal capacity to contract. The legal owner must not only be a party to the contract out of which the lien arises, but he must have the capacity to make the legal estate liable for his contract. He can bind only his own interest in the land; and therefore, if he merely holds the legal title without any beneficial interest, as in case the purchase-money has been wholly paid by another who is in open, visible and exclusive possession, a contract by the holder of the mere legal title for the building of a house upon the land will not give the builder a lien for labor performed and materials furnished under such contract as against the equitable title. To create a lien against the equitable interest, the equitable owner must have had actual or constructive notice of the contract.<sup>32</sup>

A trustee with power to build may, of course, bind the trust property with liens incident to the building.<sup>33</sup> A trustee who by the terms of the trust is authorized to improve

<sup>30</sup> Sanderson v. Taft, 6 Gray (Mass.) 533; Parker v. Anthony, 4 Gray (Mass.) 289; Wilder v. French, 9 Gray (Mass.) 393; Myers v. Buchanan, 46 Miss. 397; Wilson v. Sleeper, 131 Mass. 177; Mornan v. Carroll, 35 Iowa 22.

<sup>31</sup> Greene v. Paul, 155 Pa. St.

126, 25 Atl. 867. See Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. 350, where several writings were held to constitute one contract.

<sup>32</sup> Marston v. Stickney, 60 N. H. 112; Sly v. Pattee, 58 N. H. 102.

<sup>33</sup> Taylor v. Gilsdorff, 74 Ill. 354.

the land held in trust, "provided there shall be no lien, incumbrance, or charge created thereby on said premises," cannot charge the land with a mechanic's lien by virtue of any contract made by him.<sup>34</sup> But ordinarily a trustee cannot make permanent improvements without authority for that purpose conferred in the instrument creating the trust, and without such authority he cannot bind the property by lien.<sup>35</sup>

Trustees to whom land is conveyed to hold and pay over the profits to the cestuis que trust, after deducting the incidental expenses, may contract debts for repairs required for the proper use of the property, for which liens may attach. The trustees in such case have power to preserve the buildings and prevent their waste and destruction; and consequently liens may attach for the repairs they direct to be made.<sup>36</sup>

An executor who has a bare power to sell and convey has no authority to enter into an agreement for the improvement of the real estate of his testator, and thereby subject the property to mechanics' liens.<sup>37</sup> But an executor who is also a devisee may by such a contract subject his own interest to a lien; but he does this in his capacity of owner. But if one of several executors is also a devisee, and refused to become a party to the original contract for improvements, a lien therefor can not be decreed against his interest.<sup>38</sup>

A majority of the members of a religious society, includ-

<sup>34</sup> Franklin Savings Bank v. Taylor, 131 Ill. 376, 23 N. E. 397.

<sup>35</sup> Meyers v. Bennett, 7 Daly (N. Y.) 471, 476; Herbert v. Herbert, 57 How. Pr. (N. Y.) 333; Hall v. Bullock, 29 Ky. L. 1254, 97 S. W. 351.

<sup>36</sup> Cheatham v. Rowland, 92 N. Car. 340; Herbert v. Herbert, 57 How. Pr. (N. Y.) 333.

<sup>37</sup> Ness v. Wood, 42 Minn. 427, 44 N. W. 313; Austin v. Munroe, 47 N. Y. 360; Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; Adams v. Adams, 16 Vt. 228.

<sup>38</sup> Ness v. Wood, 42 Minn. 427, 44 N. W. 313.

ing its trustees, believing that the necessary funds could be raised by voluntary contributions, voted to have improvements made to its church building, and appointed a committee to make a contract for and superintend the work. A builder, with knowledge that voluntary contributions were relied on to pay for the same, undertook to do the work for a certain sum, relying upon obtaining his pay through the agency of the society. No other arrangements were made for paying the builder for his services. It was held that the builder, having performed the work, became entitled to enforce a lien upon the building.<sup>39</sup>

**§ 1244. No power by equitable owner to bind legal owner.**—The equitable owner can not make a contract which will subject the estate of the legal owner to a lien,<sup>40</sup> though he can subject his equitable interest to a lien; and when the lien is enforced by sale, the sale is subject to the rights of the legal owner.<sup>41</sup> Thus, where one having only an agreement for the purchase of land to be paid for in instalments, and having possession, erected buildings, and then, being unable to make the payments as stipulated, surrendered the property to the owner, it was held that a sale under a lien enforced against the equitable owner conveyed no title to the land or the buildings; and consequently the purchaser at such sale could not recover possession of houses which the equitable owner had erected upon posts, and which the legal owner had, after the surrender of the property to him, removed from the land.<sup>42</sup>

<sup>39</sup> Gortemiller v. Rosengarn, 103 Ind. 414, 2 N. E. 829.

<sup>40</sup> Rollin v. Cross, 45 N. Y. 766; Steel v. Argentine Min. Co., 4 Idaho 505, 42 Pac. 585, 95 Am. St. 144; Westport Lumber Co. v. Harris, 131 Mo. App. 94, 110 S. W. 609.

<sup>41</sup> Weaver v. Sheeler, 118 Pa. St. 634, 12 Atl. 558; Wagar v. Briscoe,

38 Mich. 587; Dalrymple v. Ramsey, 45 N. J. Eq. 494, 18 Atl. 105; Goldheim v. Clark, 68 Md. 498, 13 Atl. 363; Krotz v. A. R. Beck Lumber Co., 34 Ind. App. 577, 73 N. E. 273, quoting text. Sheppard v. Messenger, 107 Iowa 717, 77 N. W. 515.

<sup>42</sup> Wagar v. Briscoe, 38 Mich.

The title to land conveyed to unincorporated trustees of a religious society, in trust for the use of the society, is in the grantees named in the deed, or the survivor of them. It does not vest in new trustees who may be elected from time to time. No lien can attach to a church erected on such land under a contract with such society, unless the church is erected with the consent of such survivor; and such consent is not shown merely by proof that he lived within a quarter of a mile of the site of the church, if he was upwards of ninety-seven years of age, and had not acted in the affairs of the society for many years.<sup>43</sup>

Under the statutes of some states the lien does not attach to equitable estates or interests, but only to legal estates and interests.<sup>44</sup>

§ 1245. No power by tenant to subject owner's land to lien.—A person merely having possession of land without title can not subject the land to a mechanic's lien without the consent, express or implied, of the owner.<sup>45</sup> A contract with one in possession, as a mere intruder or as a tenant, does not create a lien as against the owner of the land.

587; *Courtemanche v. Blackstone* Val. St. R. Co., 470 Mass. 50, 48 N. E. 937, 64 Am. St. 275.

<sup>43</sup> *Peabody v. Eastern Methodist Society*, 5 Allen (Mass.) 540.

<sup>44</sup> *Dalrymple v. Ramsey*, 45 N. J. Eq. 494, 18 Atl. 105. Such is not the case in Illinois. *Springer v. Kroeschell*, 161 Ill. 358, 43 N. E. 1084, affg. 59 Ill. App. 434; nor in Minnesota, where, moreover, an equitable interest can be conferred by an oral contract. *Carey-Lombard Lumber Co. v. Bierbauer*, 76 Minn. 434, 79 N. W. 541.

<sup>45</sup> *Thaxter v. Williams*, 14 Pick. (Mass.) 49; *Stevens v. Lincoln*, 114 Mass. 476; *Proctor v. Tows*, 115

Ill. 138, 3 N. E. 569; *Baxter v. Hutchings*, 49 Ill. 116; *McCarty v. Carter*, 49 Ill. 53, 55, 95 Am. Dec. 572; *Redman v. Williamson*, 2 Iowa 488; *Wilkins v. Litchfield*, 69 Iowa 465, 29 N. W. 447; *Tracy v. Rogers*, 69 Ill. 662; *Ogg v. Tate*, 52 Ind. 159; *Harlan v. Rand*, 27 Pa. St. 511; *Conklin v. Bauer*, 62 N. Y. 620; *Rollin v. Cross*, 45 N. Y. 766; *Loonie v. Hogan*, 9 N. Y. 435, 2 E. D. Smith (N. Y.) 681, Seld. Notes (N. Y.) 214, 61 Am. Dec. 683; *Huff v. Jolly*, 41 Kans. 537, 21 Pac. 646; *Griffin v. Seymour*, 15 Colo. App. 487; *Rochford v. Rochford*, 188 Mass. 108, 74 N. E. 299, 108 Am. St. 465, where the posses-

Upon a petition to enforce a lien under such a contract, the owner of the land may come in and answer, although he was not a party to the contract or to the petition.

In general, it may be said that only the interest of the contracting party can be subjected to the lien;<sup>46</sup> and if he has no interest, there is nothing to which the lien can attach.<sup>47</sup> But one in possession of land under a contract of purchase has an interest in the land, and, if he erects a building thereon, this interest is chargeable with a lien in favor of a material-man or laborer.<sup>48</sup>

An insurance company which reconstructs a building that has been destroyed by fire can confer no lien as against the owner upon mechanics and material-men engaged in the work; they must look wholly to their contract with the company for payment.<sup>49</sup> Where a son allowed his mother to occupy his house while he was absent from the state, and she contracted in her own name for the erection of another house on the lot, representing that it was her own, though the son had previously authorized her to make other improvements on the lot, and had sent her money to pay for them, upon his refusal to pay for the house it was held that the builder could not enforce a mechanic's lien.<sup>50</sup>

sor subsequently bought the land and gave a mortgage to secure the purchase price.

<sup>46</sup> *Woodburn v. Gifford*, 66 Ill. 285; *Austin v. Wohler*, 5 Ill. App. 300; *Donaldson v. Holmes*, 23 Ill. 85; *Judson v. Stephens*, 75 Ill. 255; *Bray v. Smith*, 87 Iowa 339, 54 N. W. 222.

<sup>47</sup> *Scales v. Griffin*, 2 Doug. (Mich.) 54; *Wagar v. Briscoe*, 38 Mich. 587; *Woodburn v. Gifford*, 66 Ill. 285; *Chicago Lumber Co. v. Schweiter*, 45 Kans. 207, 25 Pac. 592.

<sup>48</sup> *King v. Smith*, 42 Minn. 286, 44 N. W. 65; *Meyer Bros. Drug Co. v. Brown*, 46 Kans. 543, 26 Pac. 1019; *Krotz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273, quoting text. *Williamson v. Shank*, 41 Ind. App. 513, 83 N. E. 641.

<sup>49</sup> *Bruner v. Sheik*, 9 Watts & S. (Pa.) 119; *Harlan v. Rand*, 27 Pa. St. 511.

<sup>50</sup> *Sheer v. Cummings*, 80 Tex. 294, 16 S. W. 37.

§ 1246. **Building erected on land of a stranger.**—If by mistake a building is erected on the land of a stranger, there is, of course, no right of lien against him, or purchasers from him, nor upon the land upon which it was intended to build. The owner of a lot in a city contracted for materials for the erection of a dwelling-house on it. By mistake the house was erected on an adjoining lot which belonged to a stranger. The supposed owner mortgaged the house, and the lot on which the house was intended to be built, to one who advanced upon it more than the value of the land alone. Subsequently the mortgagee purchased of the stranger the lot of land upon which the house was actually built. The material-man claimed a lien on the house, and the lot upon which the house was intended to be built. It was held that the lien did not attach to the dwelling as against the mortgagee who had become the owner; and, moreover, that it did not attach to the lot on which it was intended to erect the house, because the statute contemplates that there shall be a lien only upon the land improved, and there can be no lien on land which is not improved.<sup>51</sup>

§ 1247. **Right of purchaser in possession under a contract to subject property to lien.**—One in possession of land under a verbal or written contract to purchase can not subject to a mechanic's lien either the building or the land, to the prejudice of the legal owner, without his consent, even under a statute which contemplates a remedy either against the building or the land.<sup>52</sup> The lien of the mechanic or ma-

<sup>51</sup> *Smith v. Barnes*, 38 Minn. 240, 36 N. W. 346.

<sup>52</sup> *Dustin v. Crosby*, 75 Maine 75; *Poor v. Oakman*, 104 Mass. 309; *Craig v. Swinerton*, 8 Hun (N. Y.) 144, *affd.* 76 N. Y. 608; *Hickox v. Greenwood*, 94 Ill. 266; *Wagar v. Briscoe*, 38 Mich. 587; *Pickens v. Plattsmouth Investment Co.*, 31 Nebr. 585, 48

N. W. 473; *Bremen v. Foreman*, 1 Ariz. 413, 25 Pac. 539; *Middletown Savings Bank v. Fellowes*, 42 Conn. 36; *Walker v. Burt*, 57 Ga. 20; *Wilkins v. Litchfield*, 69 Iowa 465, 29 N. W. 447; *Dierks v. Walrod*, 66 Iowa 354, 23 N. W. 751; *Guy v. Carriere*, 5 Cal. 511; *Wornden v. Hammond*, 37 Cal. 61; *Miller Hardwood Lumber Co. v.*

terial-man in such case must be measured by the extent of the equity of the purchaser under the executory contract.<sup>53</sup>

The building legally becomes a part of the real estate as soon as it is attached to the land, and the building is all that the debtor in such case could claim to own, and he does not own this unless he has placed it upon the land with the owner's permission, with the right of removal. The building could neither be sold as the debtor's personal property, nor levied upon as his real estate. The lien, if there is one, should be enforced against the building and lot as real estate.<sup>54</sup> If by agreement the building is to be the property of the person who caused it to be erected, and it is erected with the consent of the landowner, the person who erects it is not only the owner of the building, but has a qualified interest in the land, and a lien may attach to such building and qualified interest.<sup>55</sup>

Though no purchase is ever made by the contractor, and the premises with the improvements revert to the owner, the latter is not, by his acceptance, use, and enjoyment of

Wilson, 50 Ark. 380, 19 S. W. 974; People's Saving Assn. v. Spears, 115 Ind. 297, 17 N. E. 570. See, however, Moore v. Jackson, 49 Cal. 109; Scales v. Griffin, 2 Doug. (Mich.) 54; Conklin v. Bauer, 62 N. Y. 620; Rollin v. Cross, 45 N. Y. 766; Hoag v. Hay, 103 Iowa 291, 72 N. W. 525; Lamb Lumber Co. v. Roberts, 23 S. Dak. 191, 121 N. W. 93. But see Salzer Lumber Co. v. Claflin, 16 N. Dak. 601, 113 N. W. 1036.

<sup>53</sup> Getto v. Friend, 46 Kans. 24, 26 Pac. 473; Chicago Lumber Co. v. Schweiter, 45 Kans. 207, 25 Pac. 592.

<sup>54</sup> Skillin v. Moore, 79 Maine, 554, 11 Atl. 603.

<sup>55</sup> Hooker v. McGlone, 42 Conn. 95; Hillhouse v. Pratt, 74 Conn.

113, 49 Atl. 900. Some statutes give a lien wherever buildings are erected upon lands with the consent of the owner. Schuyler v. Hayward, 67 N. Y. 253, 257, per Allen, J.

The general lien law of New York, Laws 1885, ch. 342, § 5, of which the present provisions (Birdseye's Ct. G. Consol. Laws 1909, p. 3176, § 13, p. 3179, § 15) are a revision, provided that an owner who had entered into a contract to sell land should be deemed to be the owner, within the meaning of the act, until the deed has been actually delivered and recorded. Under this provision it was held that a contract for the sale of land, which obligated the vendee to erect six houses thereon within

the improvements, estopped to deny that he made or authorized the contract for placing them upon his land.<sup>56</sup>

§ 1248. **Right of one having contract for purchase of house to subject it to a lien.**—One having merely a contract for the purchase of land cannot subject the freehold to a mechanic's lien,<sup>57</sup> although he subsequently, after the completion of the work for which a lien is claimed, takes a conveyance of the fee in pursuance of the contract.<sup>58</sup> To create

a specified time, and in which the vendor agreed to advance a designated sum to partly pay the cost of their construction, was sufficient to show the vendor's consent that the buildings be erected. *Miller v. Mead*, 127 N. Y. 544, 28 N. E. 387, 13 L. R. A. 701; also *Schmalz v. Mead*, 125 N. Y. 188, 26 N. E. 251, affg. 15 Daly (N. Y.) 223, 4 N. Y. 614, 23 N. Y. S. 117; *Pope v. Heckscher*, 109 App. Div. (N. Y.) 495, 96 N. Y. S. 533, affd. 190 N. Y. 508, 83 N. E. 1130.

<sup>56</sup> *Wilkins v. Litchfield*, 69 Iowa 465, 29 N. W. 447.

<sup>57</sup> Maine: *Conner v. Lewis*, 16 Maine 268; *Johnson v. Pike*, 35 Maine 291. Wisconsin: *Lauer v. Bandow*, 43 Wis. 556, 27 Am. Rep. 571; *Liesmann v. Lovely*, 45 Wis. 420. Illinois: *Proctor v. Tows*, 115 Ill. 138, 3 N. E. 569; *Hickox v. Greenwood*, 94 Ill. 266. New Jersey: *Associates of Jersey Co. v. Davidson*, 29 N. J. L. 415; *McIntosh v. Thurston*, 25 N. J. Eq. 242; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 13, revd. 21 N. J. Eq. 530. New York: *Miller v. Clark*, 2 E. D. Smith (N. Y.) 543; *Loonie v. Hogan*, 9 N. Y. 435, 2 E. D. Smith (N. Y.) 681, 61 Am. Dec. 683. Other

states: *Brown v. Morrison*, 5 Ark. 217; *Soule v. Dawes*, 7 Cal. 575; *Scales v. Griffin*, 2 Doug. (Mich.) 54; *Rusche v. Pittman*, 34 Ind. App. 159, 72 N. E. 473; *Hillhouse v. Pratt*, 74 Conn. 113, 49 Atl. 905.

<sup>58</sup> Massachusetts: *Hayes v. Fessenden*, 106 Mass. 228; *Metcalf v. Hunnewell*, 1 Gray (Mass.) 297; *Howard v. Veazie*, 3 Gray (Mass.) 233. Connecticut: *Middletown Savings Bank v. Fellowes*, 42 Conn. 36, 49. See Maine and New Jersey cases in preceding note. Michigan: *Restrick Lumber Co. v. Wyrembolski*, 164 Mich. 71, 128 N. W. 1083. In Minnesota, Texas, Kansas and Illinois, it is held that in such case the mechanic is entitled to his lien, and that the purchaser who has finally received the title is estopped to deny the title and ownership. *Colman v. Goodnow*, 36 Minn. 9, 29 N. W. 338, 1 Am. St. 632; *Boyd v. Blake*, 42 Minn. 1, 43 N. W. 485; *Schultze v. Alamo Ice, etc. Brew. Co.*, 2 Tex. Civ. App. 236, 21 S. W. 160; *Mulvane v. Lumber Co.*, 56 Kan. 675, 44 Pac. 613; *Interstate B. & L. Assn. v. Ayers*, 177 Ill. 9, 52 N. E. 343, affg. 71 Ill. App. 529; *Montgomery v. Allen*, 107 Ky. 298, 21 Ky. L. 1001, 53 S. W. 813.



a valid lien, the person whose agreement or consent is necessary for that purpose must, at the time of such agreement or consent, have the capacity to confer that right. The subsequent conveyance is not an enlargement of an estate or interest to which the lien had already attached. It is a new title; and there is no estoppel by which the newly acquired title will inure to the support of the claim of a lien. There is in such case no agreement or consent, express or implied, on the part of the owner, that would charge his interest in the land with any liability for the expense of building upon it.

The same rule applies in case of the forfeiture of the executory contract for the sale of the land for the purchaser's default, after he has entered into possession and erected a house on the land. A provision in the contract that all improvements which the purchaser might make should become the property of the vendor adds nothing to the legal effect of the contract of purchase.<sup>59</sup> But if, after a purchaser has made improvements for which a lien has attached upon his equitable interest, he makes a settlement with the vendor by which the contract for purchase is cancelled and the vendor enters into possession, knowing at the time of settlement that the improvements had been made, the mechanic is entitled to enforce his lien upon the equitable interest that the purchaser had when his lien attached.<sup>60</sup>

So far as the interest of purchaser goes, he is an owner within the meaning of the mechanic's lien laws.<sup>61</sup> The lien extends to the whole interest of such equitable owner, whatever it may be.<sup>62</sup>

If, by agreement between the vendor and vendee, the latter surrenders his equitable interest, and the vendor un-

<sup>59</sup> *Wheaton v. Berg*, 50 Minn. 525, 52 N. W. 926; *McGinniss v. Purrington*, 43 Conn. 143.

<sup>60</sup> *Kerrick v. Ruggles*, 78 Wis. 274, 47 N. W. 437.

<sup>61</sup> *Stockwell v. Carpenter*, 27 Iowa 119.

<sup>62</sup> *Monroe v. West*, 12 Iowa 119, 79 Am. Dec. 524.

dertakes to pay the lien claim, there being no equitable consideration requiring the court to treat the vendor's interest as still outstanding, it will be regarded as merged in the legal estate, and the lien will be enforced against the whole estate.<sup>63</sup>

§ 1249. **Lien on building erected by one having a bond for a deed.**—Where an owner of land gives a bond or contract for a deed to the purchaser, who procures a building to be erected thereon, the lien of the mechanic attaches upon the purchaser's interest only, and the vendor cannot be required to part with his title until he receives full payment of the purchase-money. If a mechanic's lien is established in such case, a sale of the property may be ordered, subject to the rights of the vendor, and out of the proceeds the mechanic should first be paid, and then the amount due any subsequent incumbrancer, and the balance, if any, to the equitable owner. The vendor's title and interest remain undisturbed.<sup>64</sup>

The case is similar where the vendor has left a deed as an escrow to be delivered to the purchaser upon payment of a note for the purchase-money. The purchaser in such case built a house on the land, but, being unable to pay the note for the purchase-money, by arrangement had the deed left in escrow surrendered, and procured another to pay the purchase-money and receive from the vendor a deed of the land, the person taking the deed giving to the equitable owner an instrument agreeing to reconvey to the latter upon payment of the amount advanced for him. It was held that the holder of the title under such deed occupied the position of the vendor, and could not be required by one having

<sup>63</sup> *Boyd v. Blake*, 42 Minn. 1, 43 N. W. 485.

<sup>64</sup> *Hickox v. Greenwood*, 94 Ill. 266; *Kidd v. Wilson*, 23 Iowa 464. See *Nolander v. Burns*, 48 Minn. 13, 50 N. W. 1016; *National Bank*

*v. Williams*, 38 Fla. 305, 20 So. 931; *Beck v. Catholic University*, 172 N. Y. 387, 15 N. E. 204, 60 L. R. A. 315 revg. 62 App. Div. (N. Y.) 599, 71 N. Y. S. 370.

a mechanic's lien upon the house to part with his title until he received payment of the purchase-money he had advanced for the land.<sup>65</sup>

If one who has contracted to purchase land fails to pay the purchase-money and to become entitled to a conveyance, the liens of mechanics which have attached to the property in the meantime attached to his interest only, but the court may order a sale of the land and improvements to satisfy the liens after payment from the proceeds of the amount due on the contract of purchase.<sup>66</sup>

Where the contract of sale requires the purchaser to make certain improvements as part of the consideration, the purchaser becomes the agent of the vendor for that purpose and the title of both is subject to a lien for materials furnished.<sup>66a</sup> But this doctrine is not extended to leases.<sup>66b</sup>

**§ 1250. Lien on building alone.**—Under a statute which allows a lien upon the building alone, a person in possession under a contract to purchase may be considered the owner; and if the contract to purchase is not carried out, a lien against the building alone may be established, and this may be sold with a right of removal.<sup>67</sup> This, under the statute of Iowa<sup>68</sup> giving a lien upon the building separate from the land, it is held that a right to a lien upon the building or other improvement may be created by a contract made by

<sup>65</sup> *Ruggles v. Blank*, 15 Bradw. (111.) 436.

<sup>66</sup> *Irish v. Lundin*, 28 Nebr. 84, 44 N. W. 80.

<sup>66a</sup> *Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108; *Colorado Iron Works v. Taylor*, 12 Colo. App. 451, 55 Pac. 942; *Baker v. Waldron*, 92 Maine, 17, 42 Atl. 225, 69 Am. St. 483. See *Maher v. Shull*, 1 Colo. App. 322, 52 Pac. 1115.

<sup>66b</sup> *Antler Park, etc., Min. Co. v.*

*Cunningham*, 29 Colo. 284, 68 Pac. 226; *Williams v. Eldorado, etc. Gold Min. Co.*, 35 Colo. 127, 83 Pac. 780. See *The Hendrie, etc. Co. v. The Holy Cross, etc. Co.*, 17 Colo. App. 345, 68 Pac. 785.

<sup>67</sup> *Jodd v. Duncan*, 9 Mo. App. 417; *Jameson v. Gile*, 98 Iowa 490, 67 N. W. 396. Otherwise in *Illinois. Hickox v. Greenwood*, 94 Ill. 266.

<sup>68</sup> See Rev. Code 1897, § 3089.

a trespasser, without any contract or consent on the part of the owner of the fee.<sup>69</sup>

§ 1251. **Consent of owner.**<sup>70</sup>—There is a broad distinction between statutes which provide for a lien for work performed or materials furnished, by virtue of the contract of the owner or his agent, and those which provide for a lien for work and materials furnished with the consent of the owner.<sup>71</sup> Under the former, no lien can be sustained unless a contract of the owner, express or implied, is proved;<sup>72</sup> while under the latter a lien may be sustained when the owner's consent can be implied from his acts or declarations, or from the circumstances attending the transaction.<sup>73</sup> In such case it is not necessary to show that the acts of the mechanic or lien claimant should have been in any way induced by the consent of the owner.<sup>74</sup>

§ 1252. **Lien for labor.**—Any workman who has performed labor in the erection of a house with the consent of

<sup>69</sup> Lane v. Snow, 66 Iowa 544, 24 N. W. 35. Approved in Smith v. St. Paul &c. Ins. Co., 106 Iowa 225, 76 N. W. 676.

<sup>70</sup> "Consent" has in several cases been treated as equivalent to "permission" by the owner. Miller v. Mead, 53 Hun (N. Y.) 636, 6 N. Y. S. 273, 26 N. Y. St. 155, affd. 127 N. Y. 544, 28 N. E. 387, 13 L. R. A. 701; Rollin v. Cross, 45 N. Y. 766, 770; Ottiwell v. Muxlow, 15 Daly (N. Y.) 308, 6 N. Y. S. 518, 24 N. Y. St. 38. In the latter case it was said that "'consent' implies a degree of superiority; at least, the power of preventing. It implies not merely that a person accedes to, but authorizes, an act." In some cases it has been said that consent may be implied from knowledge. Husted v. Mathes,

77 N. Y. 388, 390. Even silence may under some circumstances be deemed consent. Nellis v. Bellinger, 6 Hun (N. Y.) 560.

<sup>71</sup> King v. Smith, 42 Minn. 286, 44 N. W. 65.

<sup>72</sup> Jones v. Walker, 63 N. Y. 612; Ziegler v. Galvin, 45 Hun (N. Y.) 44, 9 N. Y. St. 459.

<sup>73</sup> Otis v. Dodd, 90 N. Y. 336, affg. 24 Hun (N. Y.) 538; Burkitt v. Harper, 79 N. Y. 273, affg. 14 Hun (N. Y.) 581; Husted v. Mathes, 77 N. Y. 388; Rollin v. Cross, 45 N. Y. 766; Hallahan v. Herbert, 4 Daly (N. Y.) 209, 11 Abb. Pr. (N. S.) (N. Y.) 326; Nellis v. Bellinger, 6 Hun (N. Y.) 560.

<sup>74</sup> Nellis v. Bellinger, 6 Hun (N. Y.) 560.

the owner, is entitled to a lien under statutes by which the owner's estate is bound for improvements made with his consent, as well as by his contract. Such consent may be necessarily implied from the contract under which the house is built. Where the contract of the owner with a builder necessarily empowers the builder to employ any necessary workman in the execution of the contract, that workman is entitled to a lien for his labor; for instance, a plasterer employed by such builder is entitled to a lien for his labor.<sup>75</sup> Laborers employed by the committee of a school district to repair a schoolhouse, under a vote passed at a meeting of the inhabitants of the school district, may enforce a lien for their work, although by the terms of the contract the committee were personally responsible for the labor. The consent of the school district, or the owners of the land, is implied.<sup>76</sup>

#### § 1252a. Contract between the owner of land and a builder.

—Where a contract between the owner of land and a builder provides that the former will advance money to the latter, to be spent in erecting houses upon such land, and that the owner will convey the land to the builder, or to any one whom he should designate, for a certain price per foot and the amount of the advances, with interest, and that the builder will erect the houses and purchase the land, on these terms, within a certain time, the land is subject to a lien in favor of one who performs labor in erecting the houses in the employment of a subcontractor; for the labor in such case is performed with the consent of the owner.<sup>77</sup> It must be inferred that the owner authorized the purchaser to em-

<sup>75</sup> Parker v. Bell, 7 Gray (Mass.) 429; Weeks v. Walcott, 15 Gray (Mass.) 54; Dewing v. Congregational Society, 13 Gray (Mass.) 414; Beatty v. Parker, 141 Mass. 523, 6 N. E. 754; Moore v. Erickson, 158 Mass. 71, 32 N. E. 1031; Monaghan v. Goddard, 173 Mass.

468, 53 N. E. 895; Paine v. Tillinghast, 52 Conn. 532. See, however, in South Carolina, Gray v. Walker, 16 S. Car. 143.

<sup>76</sup> Morse v. School District, 3 Allen (Mass.) 307.

<sup>77</sup> Hilton v. Merrill, 106 Mass. 528; Smith v. Norris, 120 Mass. 58;

ploy workmen, and to make contracts necessary for building the houses; and therefore the work would be performed on his estate with his consent. And so, if a vendor advances money to his vendee, and agrees to convey the land as soon as the foundations of a house shall be constructed, and take a mortgage for the land and advances, the vendee has authority, before the delivery of the deed, to create liens for labor and materials used therefor.<sup>78</sup>

An agreement by the owner of land to convey it to a purchaser, who should first erect a house upon the land within a specified time and should pay all claims against it so that there should be no liens upon the premises, whereupon the owner would convey the land, and the purchaser would give back a mortgage for the value of the land, show the consent of the owner to the erection of the house, and renders the property subject to lien.<sup>79</sup>

Where a contract of sale contains a stipulation that the vendee shall expend a certain sum in building on the land, the deed to be delivered on payment of the purchase-money, the vendor thereby consents to the erection of buildings before the deed is delivered.<sup>80</sup>

Worthen v. Cleaveland, 129 Mass. 570; Hackett v. Badeau, 63 N. Y. 476; Dickerson v. Meehling, 30 Nebr. 718, 46 N. W. 1123; Henderson v. Connolly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. 490; Hill v. Gill, 40 Minn. 441, 42 N. W. 294; Schmalz v. Mead, 125 N. Y. 188, 26 N. E. 251, affg. 15 Daly (N. Y.) 223, 4 N. Y. S. 614, 23 N. Y. St. 117; Miller v. Mead, 3 N. Y. S. 784; affd. 53 Hun (N. Y.) 636, 26 N. Y. St. 155, 6 N. Y. S. 273. See, however, McIntosh v. Thurston, 25 N. J. Eq. 242. In New Jersey a written consent is necessary to bind the owner. Strong v. Van Deursen, 23 N. J. Eq. 369; Associates v. Davison, 29 N. J. L. 415.

<sup>78</sup> Carew v. Stubbs, 155 Mass. 549, 30 N. E. 219. See, also, Ellenwood v. Burgess, 144 Mass. 534, 11 N. E. 755.

<sup>79</sup> Mulrey v. Barrow, 11 Allen (Mass.) 152; Gates v. Whitcomb, 4 Hun (N. Y.) 137, 6 Thomp. & C. (N. Y.) 341; Shearer v. Wilder, 56 Kans. 252, 43 Pac. 224.

<sup>80</sup> McCue v. Whitwell, 156 Mass. 205, 30 N. E. 1134. The case of Hayes v. Fessenden, 106 Mass. 228, differs in the fact that the contract for the sale of the land did not authorize the erection of a building, or the creation of any incumbrance on the property, before the consummation of the sale by delivery of the deed.

**§ 1253. Consent of owner to improvement not implied.—**

In general, it may be said that the owner's consent can not be implied from his knowledge that improvements are in process of construction which would give rise to a lien if they were made with his authority or consent.<sup>81</sup> Knowledge on the part of the owner that another, without authority, has made a contract for the erection of a building, and that under such contract the building is approaching completion, is not sufficient to bind the owner or his property. Thus, if a husband, on his own responsibility, contracts for the building of a house upon his wife's estate, her mere silence or failure to dissent from the contract does not make the contract binding upon her.<sup>82</sup>

Mere knowledge of the owner that a laborer is working upon the building does not amount to a consent which entitles the laborer to a lien.<sup>83</sup> Consent within the meaning of the statute is held to mean something more than acquiescence. It implies an agreement to that which could not exist without such consent.<sup>84</sup>

**§ 1254. Consent of owner implied under some circumstances.—**But consent may be implied from knowledge under some circumstances. The owner's consent to the erection of a building upon his land may be implied from his

<sup>81</sup> Bliss v. Patten, 5 R. I. 376, 380; McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572; People's Sav. Assn. v. Spears, 115 Ind. 297, 17 N. E. 570; Hedlund v. Payne, 60 Misc. (N. Y.) 603, 113 N. Y. S. 841.

<sup>82</sup> Alderman v. Hartford, etc. Co., 66 Conn. 47, 33 Atl. 589, where a subcontractor contracted with the lien claimant for a boatload of stone; Copeland v. Kehoe, 67 Ala. 594; Woodward v. McLaren, 100 Ind. 586; DeKlyn v.

Gould, 165 N. Y. 282, 59 N. E. 95, 80 Am. St. 719.

<sup>83</sup> Gray v. Walker, 16 S. Car. 143; Jeffersonville, etc. Co. v. Riter, 138 Ind. 170, 37 N. E. 652, construing Act of 1883. See also, Marshall v. Cohen, 11 Misc. (N. Y.) 397, 32 N. Y. S. 283, 65 N. Y. St. 310.

<sup>84</sup> Geddes v. Bowden, 19 S. Car. 1; Murray v. Earle, 13 S. Car. 87; Hanson v. News Pub. Co., 97 Maine 99, 53 Atl. 990, quoting text.

knowledge of its construction taken in connection with his acts and purposes.<sup>85</sup> Thus, the fact that the owner of land has given a bond for a deed, and has put the purchaser in possession, knowing that he intended to build, and knowing afterwards that the purchaser's contractor was engaged in the work of building, is evidence for the jury to show consent on the part of the owner, and the weight of such evidence is for the jury to determine.<sup>86</sup> If the owner afterwards consents that the contractor may build, the inference is that he consents that he shall build in accordance with his contract with the purchaser. The contract being an entire contract, the consent covers the work performed before the consent was given, as well as that which was afterwards done in compliance with the contract.<sup>86a</sup>

A contract of sale gave the purchaser no right to enter on the land, but he, without such authority, commenced excavating for the purpose of building. The owner, on becoming aware of the work, directed that it be stopped; but it was afterwards resumed, and foundation walls constructed, although it did not appear that this was known to the owner. The purchaser was finally ejected for failure to make payments required by the contract. It was held that these facts would not sustain an inference of consent to the doing of the work.<sup>87</sup>

<sup>85</sup> *Ottiwell v. Muxlow*, 15 Daly (N. Y.) 308, 6 N. Y. S. 518, 24 N. Y. St. 38.

<sup>86</sup> *Davis v. Humphrey*, 112 Mass. 309; *Wheaton v. Trimble*, 145 Mass. 345, 5 N. E. 381, 14 N. E. 104, 1 Am. St. 463; *Hilton v. Merrill*, 106 Mass. 528; *Smith v. Morris*, 120 Mass. 58; *Arnold v. Spurr*, 130 Mass. 347; *McCormack v. Butland*, 191 Mass. 424, 77 N. E. 761; *Allen v. Sales*, 56 Mo. 28; *Wheeler v. Scofield*, 6 Hun (N. Y.) 655; *Kealey v. Murray*, 61

*Hun* (N. Y.) 619, 15 N. Y. S. 403, 40 N. Y. St. 23; *Husted v. Mathes*, 77 N. Y. 388; *Nellis v. Bellinger*, 6 Hun (N. Y.) 560; *Paine v. Tillinghamst*, 52 Conn. 532; *Bray v. Smith*, 87 Iowa 339, 54 N. W. 222.

<sup>86a</sup> *Davis v. Humphrey*, 112 Mass. 309.

<sup>87</sup> *Cowen v. Paddock*, 137 N. Y. 188, 33 N. E. 154, affg. 62 Hun (N. Y.) 622, 17 N. Y. S. 387, 43 N. Y. St. 342. See, also, *Rossi v. MacKellar*, 13 N. Y. S. 827, 37 N. Y. St. 503.



**§ 1255. By statute in some states, consent implied from knowledge.**—These statutory provisions subject the interest of the owner to lien claims, notwithstanding the labor and materials have not been furnished at his instance, if, knowing that the construction, alteration, or repair is being made, or is contemplated, he fails to give notice that he will not be responsible for the same.<sup>88</sup>

<sup>88</sup> In Nevada, Rev. Laws 1912, Art. 2221, and Oregon, B. & C. Ann. Codes and Stat. 1902, § 5643, *Allen v. Rowe*, 19 Ore. 188, 23 Pac. 901, it is provided that every building or other improvement constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner, or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this statute, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration, or repair [clause concerning intended construction not in Oregon law], give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement situated thereon. California statute is similar. See ante, § 1190. Under this statute the owner's interest may be subjected to a lien, if, know-

ing of improvements or repairs made by his lessee, he fails to give notice that he will not be responsible therefor. *Gould v. Wise*, 18 Nev. 253, 3 Pac. 30. And so, if one loans money on an incompleated building for the purpose of finishing the building, taking a mortgage or trust deed upon it as security, and, knowing of the continued work upon the building, allows it to go on without giving the notice provided, his interest is subject to liens for labor done and materials furnished for the completion of the building. *Fuquay v. Stickney*, 41 Cal. 583. This provision does not apply to nor affect the interest of a prior mortgagee under a recorded mortgage, and does not require him to give notice so as to be protected from liability. *Williams v. Santa Clara Mining Assn.* 66 Cal. 193, 5 Pac. 85. The notice should be given within three days after the owner has notice of the actual commencement of a building—not within three days of his learning of a contemplated future building. *William H. Birch & Co. v. Magic Transit Co.*, 139 Cal. 496, 73 Pac. 238. See also, *Gentle v. Britton*, 158 Cal. 325, 111 Pac. 9.

Under such a provision the interest of the lessor may readily be charged with a lien for construction or improvement of a building on the leased premises. Thus, if the lease in terms provides that certain repairs shall be made at the expense of the lessee, and that such repairs shall for the first year be in full satisfaction for the rent, this of itself shows knowledge on the part of the lessor of the intended repairs within the meaning of the statute.<sup>89</sup>

Under such a statute, evidence that the owner has an agent residing in the vicinity of the premises who personally visited them, and knew that work was being done and improvements made by the lessee, is *prima facie* sufficient to charge the owner with knowledge of the fact, and subject his interest as lessor to liens for such work and improvements.<sup>90</sup>

**§ 1256. Owner estopped to deny consent.**—If the owner of lands stands by and allows another who is in possession of the land to represent that he is the owner, and on the faith of such representation obtain material for the construction of a house upon the land, the owner will not be allowed to reap the benefit of the fraud he has permitted, but his property will be subjected to a lien for the materials so obtained.<sup>91</sup> And so, if the owner stands by and induces a mechanic or material-man to give credit to another as the owner, he can not defeat the lien therefor by claiming ownership.<sup>92</sup>

The owner of a house before its completion contracted to sell it, and to complete it like one adjoining. Before the contract was carried out, the purchaser bought a range and

<sup>89</sup> Gould v. Wise, 18 Nev. 253, 3 Pac. 30; McNulty Bros. v. Offerman, 141 App. Div. (N. Y.) 730, 126 N. Y. S. 755.

<sup>90</sup> Gould v. Wise, 18 Nev. 253, 3 Pac. 30.

<sup>91</sup> Buckstaff v. Dunbar, 15 Nebr.

114, 17 N. W. 345; Weber v. Weatherby, 34 Md. 656; Mellor v. Valentine, 3 Colo. 255.

<sup>92</sup> Higgins v. Ferguson, 14 Ill. 269; Donaldson v. Holmes, 23 Ill. 85; Eastwood v. Standard Mines, etc. Co., 11 Idaho 195, 81 Pac. 382.

furnace, which were delivered on the premises with the knowledge of the owner, and were set in brick in the cellar. The vendor was bound by his contract to provide a furnace, but that ordered by the purchaser was of higher cost than that which the vendor was to provide. Subsequently the purchaser abandoned the contract, refused to take the house, and forfeited a deposit he had made on entering upon the contract. It was held that the owner, in permitting the articles to be attached to the house without objection, made the house answerable for the claim, and that he was estopped from disputing the lien.<sup>93</sup>

The owner may by his acquiescence in the improvements made by another on his lands,<sup>94</sup> or by his ratification of the acts of another, subject his interest in the land to a lien.<sup>95</sup>

**§ 1257. Lien on the interest of persons having improvements made.**—In general the lien attaches to the interest, whatever it may be, of the person who causes labor or materials to be used in the erection or repair of a building or other structure, though this be only an equitable interest.<sup>96</sup> Such interest may be an undivided interest in common, a life estate

<sup>93</sup> Weber v. Weatherby, 34 Md. 656. And see Blake v. Pitcher, 46 Md. 453.

<sup>94</sup> Burdick v. Moulton, 53 Iowa 761, 6 N. W. 48; McCarty v. Carter, 49 Ill. 53, 95 Am. Dec. 572.

<sup>95</sup> Burdick v. Moulton, 53 Iowa 761, 6 N. W. 48.

<sup>96</sup> Illinois: Paulsen v. Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. 532; Chisholm v. Williams, 128 Ill. 115, 21 N. E. 215; Tracy v. Rogers, 69 Ill. 662; Steigleman v. McBride, 17 Ill. 300; Judson v. Stephens, 75 Ill. 255; Hickox v. Greenwood, 94 Ill. 266; Hughes v. McCasland, 122 Ill. App. 365; Smith v. Moore, 26 Ill. 392.

Indiana: Wilkerson v. Rust, 57 Ind. 172; Littlejohn v. Millirons, 7 Ind. 125.

Iowa: Redman v. Williamson, 2 Iowa 488; Monroe v. West, 12 Iowa 119, 79 Am. Dec. 524; Clark v. Parker, 58 Iowa 509, 12 N. W. 553; Conrad v. Starr, 50 Iowa 470; Stockwell v. Carpenter, 27 Iowa 119.

Kansas: Jarvis-Conklin Mortgage Trust Co. v. Sutton, 46 Kans. 166, 26 Pac. 406; Seitz v. Union Pacific R. Co. 16 Kans. 133.

Michigan: For the purpose of this act the words "owner, part owner or lessee," shall be construed to include all the interest,

or a lesser estate, or a mere right of possession.<sup>97</sup> There may be a decree of sale of the interest of one who has merely a contract of purchase. Thus, if a building is erected by one who is in possession of land under a contract to purchase, the title remaining in the vendor for the security of the purchase-money, a decree may be made for the sale of the property to satisfy the lien, with a provision that the purchase-money due the vendor should first be paid out of the proceeds of the sale.<sup>98</sup>

The lien attaches to a leasehold interest;<sup>99</sup> to an estate for life or in remainder; to a tenancy by the curtesy;<sup>1</sup> to a pre-emption right;<sup>2</sup> to a right under a contract of purchase;<sup>3</sup> to the interest of a tenant in common,<sup>4</sup> or of a joint owner.<sup>5</sup>

either legal or equitable, which such person may have in the real estate upon which the improvements contemplated by this act are made, including the interest held by any person under contracts of purchase, whether in writing or otherwise. *Howell's Stats.* 1912, § 13794; *Wagner v. Briscoe*, 38 Mich. 587.

Missouri: *Fleitz v. Vickery*, 3 Mo. App. 593; *O'Brien v. Hanson*, 9 Mo. App. 545.

New York: *Ombony v. Jones*, 19 N. Y. 234; *Rollin v. Cross*, 45 N. Y. 766, 768; *Hallahan v. Herbert*, 4 Daly (N. Y.) 209, 11 Abb. Pr. (N. S.) (N. Y.) 326, *affd.* 57 N. Y. 409; *Hobbs v. Day*, 51 Hun (N. Y.) 644, 3 N. Y. S. 900, 22 N. Y. St. 92.

Ohio: *Dutro v. Wilson*, 4 Ohio St. 101; *Choteau v. Thompson*, 2 Ohio St. 114.

Pennsylvania: *Weaver v. Sheeler*, 118 Pa. St. 634, 12 Atl. 558; *Prutzman v. Bushong*, 83 Pa. St.

526; *Keller v. Denmead*, 68 Pa. St. 449.

Other States: *Atkins v. Litte*, 17 Minn. 342; *Worden v. Hammond*, 37 Cal. 61.

<sup>97</sup> *Paulsen v. Manske*, 126 Ill. 72, 18 N. E. 275, 9 Am. St. 532.

<sup>98</sup> *Bremen v. Foreman*, 1 Ariz. 413, 25 Pac. 539.

<sup>99</sup> *Choteau v. Thompson*, 2 Ohio St. 114; *Gaule v. Bilyeau*, 25 Pa. St. 521, 1 Phila. (Pa.) 466; *Rush v. Fisher*, 8 Phila. (Pa.) 44; *Judson v. Stephens*, 75 Ill. 255.

<sup>1</sup> *Fitch v. Baker*, 23 Conn. 563; *Butler v. Rivers*, 4 R. I. 38; *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572.

<sup>2</sup> *Turney v. Saunders*, 4 Scam. (Ill.) 527; *Paulsen v. Manske*, 126 Ill. 72, 18 N. E. 275, 9 Am. St. 532.

<sup>3</sup> *Stockwell v. Carpenter*, 27 Iowa 119; *Chicago Lumber Co. v. Osborn*, 40 Kans. 168, 19 Pac. 656.

<sup>4</sup> *Keller v. Denmead*, 68 Pa. St. 449.

<sup>5</sup> *Hillburn v. O'Barr*, 19 Ga. 591.

But an inchoate right of dower is not an interest which a wife can charge with a lien under her contract. But a dower estate which has been assigned or set off to a widow is subject to a lien under her contracts.<sup>6</sup>

The lien will attach to the title and interest of the person by whom the building is erected, and to that alone, though his title be only an equitable one, unless the contract or consent of the owner of the fee be also shown. But if the person against whom the lien is filed, although the holder of the legal title, is but a mere depositary of it for the benefit of the person on whose order the materials are furnished, and to whose account they are charged, the property will be bound by the lien filed.<sup>7</sup>

One who has entered into an agreement to purchase land, and procured the building of a house thereon, can not divest the mechanic's lien by surrendering the agreement to purchase, and allowing his wife to take a new agreement from his vendor.<sup>8</sup>

**§ 1258. Necessity that person making improvements have some estate.**—But the contracting party must have some estate or interest in the land on which the building or structure stands, unless the statute expressly gives a lien upon the building separate from the land.<sup>9</sup> Even a statute

<sup>6</sup> *Ermul v. Kullok*, 3 Kans. 499, 500.

<sup>7</sup> *Weaver v. Sheeler*, 124 Pa. St. 473, 17 Atl. 17, 118 Pa. St. 634, 12 Atl. 558.

<sup>8</sup> *Wingert v. Stone*, 142 Pa. St. 258, 21 Atl. 812.

<sup>9</sup> *Tracy v. Rogers*, 69 Ill. 662. The agent of a land company had authority to negotiate the sale of town lots at a certain price, part to be paid in cash and the balance on time, and the contracts of sale to be in writing, and forwarded to the owner for ap-

proval, and were not to be effective until payment was made and the contracts so approved. Certain builders inquired of the agent the price of a lot, and stated that they would take it, but, though acquainted with the terms and conditions of sale, they never made any payment, nor entered into a written contract of purchase. Under an agreement with the builders, a firm of contractors furnished material for a building on the lot, without the knowledge or consent of the own-

which in some of its provisions gives countenance to the idea that a lien may be claimed upon the building though there can be none upon the land, will not be held to have this effect without express provisions giving such a lien, and providing for enforcement of the lien by a sale and removal of the building. "The statute must be deemed to have been enacted in view of the elementary principle of the law, that the building is attached to the land as an incident and passes with it, that the owner is the owner of the building. So fundamental and vital a principle pervading the law of real estate should not be deemed to be overturned except by clear and explicit language."<sup>10</sup> It was accordingly held in this case that a lumber dealer, who had furnished lumber for a building to one who had no estate in the land upon which the building was erected, had no lien on either the building or the land. "Not on the land, because the builder had no interest whatever in it; and not on the building, because the lien on the building was by virtue of the increased value the building gave to the land in the hands of the owner. It was not until the lumber ceased to be personal property, and had put its value in the land, that the lien attached to either."<sup>11</sup>

ers. It was held that the builders had no interest or estate in the lot, and could not create a lien on the lot or building for the labor and material furnished by the contractors. *Huff v. Jolly*, 41 Kans. 537, 21 Pac. 646.

<sup>10</sup> *Babbitt v. Condon*, 27 N. J. L. 154, per Green, C. J.

<sup>11</sup> *Coddington v. Hudson County Dry Dock & Co.*, 31 N. J. L. 477, 481, per Vredenburg, J. The learned judge further said: "These principles will be found illustrated by a reference to the history of the lien laws. The first act upon the subject I can find, was passed in Pennsylvania in

1803, and was confined in its operation to the city of Philadelphia, and provided that every dwelling-house or other building and the lot on which it stands, should be liable for the debts contracted by its owner for work and materials furnished. It was because of the increased value of the land in the hands of the owner by reason of the building, that the lien was given, and this is the principle that runs through all the lien laws since passed, whether in Pennsylvania or elsewhere. Our act was passed in 1835, and was the same in effect as that of Pennsylvania, and, like

A lien may be created by a contract made by several persons for labor and material for a building to be erected on the land of one of them.<sup>12</sup>

§ 1259. **Lien on title subsequently acquired.**—Whether the lien attaches to a title subsequently acquired, or only to the title the owner had when the lien first came into existence, is a point upon which the cases are not altogether in accord. This is for the most part if not wholly by reason of the different terms of the statutes under which the cases have arisen. Under some statutes the lien attaches only to such title as the owner had at the time the lien attached. Where, under such a statute, a lien attaches from the commencement of a building, or from the time of the commencement of the work or of the furnishing of the materials for

it, applied only to particular places, and it so continued, making the lien on the land in the hands of the owner of the fee only. But it was found hard to make the owner of the fee liable for debts contracted by the tenants for years or for life, or otherwise, and the law was early modified in Pennsylvania. It remained in our state in its original form, being only extended in territorial area, until 1853, when the legislature reviewed the whole matter, and followed pretty much in the wake of Pennsylvania, except that there they proceed by equitable forms. But our legislature of 1853 introduced this great improvement upon our old law. Preserving the principle that the land should be liable to the lien, on account of the increased value given to it by the building, it yet subjects to the lien, only the estate the owner of the building had in the land.

It does not subject estates of any other owner without his written consent, and thus does squity all around; but still preserves the first principle of the lien law, to subject to its provisions the estate of the owner of the building in the land, whether he is owner of the land in fee, for life or for years, on account of the increased value, real or supposed, given to it by the building. Many of the other states have followed more or less closely in the wake of Pennsylvania, but all proceeding upon this fundamental idea, viz., to hold a lien on the estate of the owner of the building in the land, on account of the increased value given by the building to the land, and the natural injustice there is in the owner of the land appropriating to his use, without compensation, the toil and capital of others."

<sup>12</sup> Van Court v. Bushnell, 21 Ill. 624; Roach v. Chapin, 27 Ill. 194,

which a lien is claimed, the lien attaches to such title only as the person who contracted for such work or materials had at the time the lien attached.<sup>13</sup> If at that time he had an equitable title, then only his equitable interest is subject to the lien; but if at that time he has only a vague verbal understanding with the owner for the purchase of the land, he has not even an equitable title; and though he acquires title by a conveyance from the owner before the filing of the lien, the lien will not attach to this subsequently acquired title. In such case there is no interest or title to which the lien can attach.

Where the lien is created by the execution and delivery of the contract, as in Massachusetts, it is held that if the person contracting for labor and materials had no estate or interest in the land at that time, he can confer no right of lien under such contract, although before the contract is recorded, or the labor and materials are furnished, he acquires the legal title to the land.<sup>14</sup> But it seems that if the party making the contract has an interest in the land at the time of its execution, to which a lien could attach, and, before the lien is enforced, his estate is enlarged, the lien may attach to his larger right or interest; especially if this larger interest arises out of the interest or estate he had at the time of making the contract, and is not a new estate acquired by a new title.<sup>15</sup>

A subsequent conveyance under a contract of purchase is not an enlargement of any estate existing in the vendee. The title by the conveyance is a new and independent title,

196; *Mellor v. Valentine*, 3 Colo. 255; *Smith v. Johnson*, 2 MacAr. (D. C.) 481.

<sup>13</sup> *Sisson v. Holcomb*, 58 Mich. 634, 26 N. W. 155. See *Weaver v. Sheeler*, 118 Pa. St. 634, 12 Atl. 558, which, however, is not directly in point. *Frolich v. Blackstock*, 155 Mich. 604, 119 N. W. 906.

<sup>14</sup> See ante, § 1248; *Howard v. Veazie*, 3 Gray (Mass.) 233. And see *De Ronde v. Olmsted*, 5 Daly (N. Y.) 398, 47 How. Pr. (N. Y.) 175.

<sup>15</sup> *Kirby v. Tead*, 13 Met. (Mass.) 149; *Howard v. Veazie*, 3 Gray (Mass.) 233, per Bigelow, J.; *Montgomery v. Allen*, 107 Ky. 298, 21 Ky. L. 1001, 53 S. W. 813.



and it does not inure to the benefit of one whom the purchaser had employed to labor or furnish materials before the conveyance, and while the only interest the purchaser had was under his contract.<sup>16</sup> If, however, the labor is done or the materials are furnished after the conveyance, with the owner's consent, though the contract was made before the conveyance, the owner's estate under the conveyance is subject to a lien.<sup>17</sup>

Other authorities hold that a mechanic's lien upon an equitable estate attaches to the subsequently acquired legal estate.<sup>18</sup> The vendee having contracted for the erection of a building upon land for the purchase of which he held a contract, after having received the legal title, is estopped to deny the title and ownership as against persons who have furnished materials and performed labor under his contract with them.<sup>19</sup>

### § 1260. Contract of married woman as foundation of lien.

—The contract of a married woman in respect to her separate estate binds herself and her property, at least in equity, and may be the foundation of a lien.<sup>20</sup> Her power to con-

<sup>16</sup> *Hayes v. Fessenden*, 106 Mass. 228.

<sup>17</sup> *Corbett v. Greenlaw*, 117 Mass. 167; *O'Brien v. Hanson*, 9 Mo. App. 545.

<sup>18</sup> *Lyon v. McGuffey*, 4 Pa. St. 126, 45 Am. Dec. 675; *Hooker v. McGlone*, 42 Conn. 95; *McGraw v. Godfrey*, 56 N. Y. 610, 16 Abb. Pr. (N. S.) (N. Y.) 358; *Rollin v. Cross*, 45 N. Y. 766; *Hill v. Gill*, 40 Minn. 441, 42 N. W. 294; *Boyd v. Blake*, 42 Minn. 1, 43 N. W. 485; *Salem v. Lane, &c. Co.*, 189 Ill. 593, 60 N. E. 37, 82 Am. St. 481; See ante, § 1248.

<sup>19</sup> *Colman v. Goodnow*, 36 Minn. 9, 29 N. W. 338, 1 Am. St. 632.

<sup>20</sup> Alabama: *Ex parte Schmidt*,

62 Ala. 252; *Copeland v. Kehoe*, 67 Ala. 594, 599; *Cutcliff v. McAnally*, 88 Ala. 507, 7 So. 331; *Wadsworth v. Hodge*, 88 Ala. 500, 7 So. 194. Arkansas: *Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. 753, 35 Am. St. 101. Connecticut: *Hitchcock v. Kiely*, 41 Conn. 611; see, under earlier statutes, *Fitch v. Baker*, 23 Conn. 563. Illinois: *Greenleaf v. Beebe*, 80 Ill. 520. Indiana: *Vail v. Meyer*, 71 Ind. 159; see, under earlier statutes, *Caldwell v. Asbury*, 29 Ind. 451; *Lindley v. Cross*, 31 Ind. 106, 109, 99 Am. Dec. 610. Iowa: *Kidd v. Wilson*, 23 Iowa 464; *Greenough v. Wiggington*, 2 G. Greene (Iowa) 435. Minnesota: *Carpenter v.*

tract for repairs and improvements of her property is inseparably incident to her right to take and hold real estate for her own separate use, or as her own property.

Her contract, like the contract of any owner, may be express or implied. It may be her personal contract, or her contract made through an agent. She may authorize her husband to contract in her behalf; or she may, by her consent and approval of her husband's contract, bind herself and her property for the payment of any indebtedness for labor or materials expended upon her lands.<sup>21</sup>

To the extent to which a married woman can, by her own contract or act, bind her separate estate, to that extent and that only can her contract with a mechanic give rise to a lien. Under statutes which provide that a married woman can not convey her real estate except by joining with her

Leonard, 5 Minn. 155; Tuttle v. Howe, 14 Minn. 145, 100 Am. Dec. 205. Missouri: Murphy v. Murphy, 15 Mo. App. 600; Burgwald v. Weippert, 49 Mo. 60; Tucker v. Gest, 46 Mo. 339. New York: Hauptman v. Catlin, 20 N. Y. 247; Fowler v. Seaman, 40 N. Y. 592; Husted v. Mathes, 77 N. Y. 388; Cashman v. Henry, 75 N. Y. 103, 5 Abb. N. Cas. (N. Y.) 230, 44 N. Y. Super. Ct. 100n, 31 Am. Rep. 437. North Carolina: Ball v. Paquin, 140 N. Car. 83, 52 S. E. 410, 3 L. R. A. (N. S.) 307. Ohio: Edwards v. Edwards, 24 Ohio St. 402; Machir v. Burroughs, 14 Ohio St. 519. Pennsylvania: Finley's App. 67 Pa. St. 453; Barto's App. 55 Pa. St. 386; Germania Savings Bank's App. 95 Pa. St. 320; Murray v. Keyes, 35 Pa. St. 384; Lippincott v. Leeds, 77 Pa. St. 420; Kulns v. Turney, 87 Pa. St. 497. To charge the separate property of a married woman with a mechanic's

lien for work and labor done or materials furnished, it must be alleged in the claim, and proved on the trial, that the work or materials were necessary for the reasonable improvement or repair of such separate estate, and substantially that they were so applied, and that the same was done and furnished by her authority and consent. Einstein v. Jamison, 95 Pa. St. 403, per Mercur, J.; Shannon v. Shultz, 87 Pa. St. 481; Kulns v. Turney, 87 Pa. St. 497; Forrester v. Preston, 2 Pitts. (Pa.) 298; Kelly v. McGehee, 137 Pa. St. 443, 20 Atl. 623; Bevan v. Thackara, 143 Pa. St. 182, 22 Atl. 873, 24 Am. St. 529, 24 Am. St. 526; Peperday's Appeal, 152 Pa. St. 621, 25 Atl. 568. Otherwise since Act of June 3, 1887, repealed in 1901. Rhode Island: Bliss v. Paten, 5 R. I. 376, 380.

<sup>21</sup> Greenleaf v. Beebe, 80 Ill. 520.

husband in a formal deed and being privily examined, she can not by her own contract give rise to a mechanic's lien which would bind the corpus of her real estate, for a lien may result in a sale.<sup>22</sup>

**§ 1261. Common-law disability of a married woman.**—The common-law disability of a married woman to bind her property by contract has been quite generally removed by legislation; but in a few states this disability has not been wholly removed, and in such states her sole contract for building a house on her land would be void, and could not be the basis of a lien upon the property.<sup>23</sup> It is unimportant

<sup>22</sup> *Charleston Lumber & Mfg. Co. v. Brockmyer*, 18 W. Va. 586. In West Virginia it is held that a married woman may by a contract bind the rents and profits of her separate estate during the continuance of her marriage; and it follows that by a contract with a mechanic she may create a lien which will attach to the rents and profits of a building erected on her separate estate under such contract. Such a lien could only be enforced by renting out the property from year to year during the continuance of the marriage. *Charleston Lumber & Mfg. Co. v. Brockmyer*, 18 W. Va. 586.

<sup>23</sup> *Alabama*: *Copeland v. Kehoe*, 67 Ala. 594, under a former statute. Otherwise under the present law, Code 1907, § 4782; *Cutcliff v. McNally*, 88 Ala. 507, 7 So. 331; *Wadsworth v. Hodge*, 88 Ala. 500, 7 So. 194. *Arkansas*, under former statutes. *Rogers v. Phillips*, 8 Ark. 366, 47 Am. Dec. 727. But all disability now removed. *Walker v. Jessup*, 43

Ark. 163; *Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. 753, 35 Am. St. 101. *Florida*: The former mechanic's lien law did not apply to married women or their property. *O'Neil v. Percival*, 20 Fla. 937, 51 Am. Rep. 634. *Kentucky*: *Fetter v. Wilson*, 12 B. Mon. (Ky.) 90. But under the present statute a married woman may incur a lien on her property by a written contract with her husband for necessary repairs. *Marsh v. Alford*, 5 Bush (Ky.) 392. *Mississippi*: *Gray v. Pope*, 35 Miss. 116, 72 Am. Dec. 117; *Selph v. Howland*, 23 Miss. 264. *Missouri*: under former statutes. *Sibley v. Casey*, 6 Mo. 164. By Act of 1889 a married woman is enabled to contract and be contracted with. In *Tennessee*, prior to 1881, a wife's general estate was not chargeable by a mechanic's lien. Ann. Code 1896, § 3532; *O'Malley v. Coughlin*, 3 Tenn. Ch. 431; *Sexton v. Alberti*, 10 Lea (Tenn.) 452. *Freeman, J.*, said: "The liability of the land to the lien, would seem to be met by the fact that,

whether the wife or the husband be the agent through whom the contract is made; or whether, indeed, it is made by one or both of them.<sup>24</sup>

**§ 1262. Married woman's land not subject to lien when contract is with husband only.**—The land of a married woman is not subject to a lien arising under the contract of her husband without her concurrence, and the fact that she knew of the work while it was in progress, and made no objection to it, does not of itself charge her interest in the land with a lien.<sup>25</sup>

under our law, she could only dispose of or convey it by conveyance in connection with her husband, and after privy examination before certain officers, as prescribed by our statutes. While a lien is not a right to land, nor an interest in land, as such, but a charge fixed upon it by the law or contract, till it would seem an incongruity to hold that the wife could thus indirectly contract for a result by which her land might be conveyed or disposed of against her will, when she could not have done so directly, or except under prescribed forms, which have not been complied with." But a married woman having power to bind her separate estate could charge it with a mechanic's lien, especially for repairs. *Shacklett v. Polk*, 4 Heisk. (Tenn.) 104. See present statutory provision. Code 1896, §§ 3532, 3533. In Texas, a wife whose husband had left her and had gone into a distant state, and had been absent two years, and from whom she was about to obtain a divorce, was held to be vested with the

power to manage and control her separate property, for her own protection as a feme sole, and with the power to subject the same to a lien for repairs. *Wright v. Blackwood*, 57 Tex. 644.

<sup>24</sup> *Copeland v. Kehoe*, 67 Ala. 594; *Sexton v. Alberti*, 10 Lea (Tenn.) 452.

<sup>25</sup> *Arkansas: Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. 753, 35 Am. St. 101; *Rudd v. Peters*, 41 Ark. 177; *Harris v. Graham*, 86 Ark. 570, 111 S. W. 984. *Connecticut: Huntley v. Holt*, 58 Conn. 445, 20 Atl. 469, 9 L. R. A. 111; *Flannery v. Rohrmayer*, 46 Conn. 586, 588, 33 Am. Rep. 36; *Gilman v. Disbrow*, 45 Conn. 563, 566. *Pardee, J.*, said: "As a prerequisite to the lien she should herself either have made the contract or have consented to the performance of the work after information from them [the builders] that it was not to be done upon the personal credit of the husband, nor upon the credit of his life estate, but upon the credit of her fee, and that this last would be subjected to a lien in default

Of course the wife may make her husband her agent; and she may do this unintentionally by her acts, conduct or

of payment." Where a wife owns land upon which a building is erected with her knowledge, she helping to select the materials, the materialman may have a lien. *Foskett v. Swayne*, 70 Conn. 74, 38 Atl. 893. Georgia: *Cornelia Planing Mills v. Wilcox*, 129 Ga. 522, 59 S. E. 223; *Blount v. Dugger*, 115 Ga. 109, 41 S. E. 270. Illinois: *Wendt v. Martin*, 89 Ill. 139; *Little v. Vredenburgh*, 16 Bradw. (Ill.) 189; *Geary v. Hennessey*, 9 Bradw. (Ill.) 17. Indiana: *Capp v. Stewart*, 38 Ind. 479; *Falkner v. Colshear*, 39 Ind. 201; *Johnson v. Tutewiler*, 35 Ind. 353; *Armstrong v. Nichols*, 32 Ind. 408; *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235. And see *Sharpe v. Clifford*, 44 Ind. 346; *Shilling v. Templeton*, 66 Ind. 585. *Colt v. Lawrenceburg Lumber Co.*, 44 Ind. App. 122, 88 N. E. 720. Iowa: *McLaren v. Hall*, 26 Iowa 297; *Miller v. Hollingsworth*, 33 Iowa 224, 36 Iowa 163; *Price v. Seydel*, 46 Iowa 696; *Nelson v. Cover*, 47 Iowa 250; *James v. Dalby*, 107 Iowa 463, 78 N. W. 51; *Young v. Swan*, 100 Iowa 323, 69 N. W. 566. Kentucky: *Fetter v. Wilson*, 12 B. Mon. (Ky.) 90. Michigan: *Hall v. Erskitz*, 125 Mich. 332, 84 N. W. 310. Missouri: *Hughes v. Anslyn*, 7 Mo. App. 400; *Barker v. Berry*, 8 Mo. App. 446; *Barker v. Berry*, 4 Mo. App. 585; *Meyer v. Broadwell*, 83 Mo. 571; *Kansas City Planing Mill Co. v. Brundage*, 25 Mo. App. 268; *Eystra v. Capelle*, 61 Mo. 578; *Garnett v. Berry*, 3 Mo. App. 197; *Duross v.*

*Broderick*, 78 Mo. App. 260; *Wilson v. Shabane* (Mo.), 138 S. W. 694. Nebraska: *Rust-Owen Lumber Co. v. Holt*, 60 Nebr. 80, 82 N. W. 112, 83 Am. St. 512. See *Central Loan &c. Co. v. O'Sullivan*, 44 Nebr. 834, 63 N. W. 5. New Jersey: *Johnson v. Parker*, 27 N. J. L. 239; *Washburn v. Burns*, 34 N. J. L. 18. New York: *Jones v. Walker*, 63 N. Y. 612. Ohio: *Spinning v. Blackburn*, 13 Ohio St. 131. Oklahoma: A materialman is entitled to a lien on house of wife where materials are ordered by the husband under oral contract. *Limerick v. Ketcham*, 17 Okla. 532, 87 Pac. 605; *Block v. Pearson*, 19 Okla. 422, 91 Pac. 714. Pennsylvania: *Steinman v. Henderson*, 94 Pa. St. 313; *Woodward v. Wilson*, 68 Pa. St. 208; *Barto's App.* 55 Pa. St. 386; *Dearie v. Martin*, 78 Pa. St. 55; *Lloyd v. Hibbs*, 81 Pa. St. 306; *Schriffer v. Saum*, 81 Pa. St. 385; *Bodey v. Thackara*, 143 Pa. St. 171, 22 Atl. 754, 24 Am. St. 526; *Wolfe v. Oxnard*, 152 Pa. St. 623, 25 Atl. 806; *Miller v. Anne*, 17 Lanc. Law Rev. 312. Rhode Island: *Bliss v. Patten*, 5 R. I. 376. Tennessee: *Knott v. Carpenter*, 3 Head (Tenn.) 542, 75 Am. Dec. 779; *Hughes v. Peters*, 1 Coldw. (Tenn.) 67; *Baker v. Stone* (Tenn.), 58 S. W. 761. Texas: *Warren v. Smith*, 44 Tex. 245, 247. Washington: *Cattell v. Ferguson*, 3 Wash. St. 541, 28 Pac. 750. Wisconsin: *Lauer v. Bandow*, 43 Wis. 556, 28 Am. Rep. 571; *Esslinger v. Huebner*, 22 Wis. 632. In several states there has been

special legislation on this subject:—In Kansas, the agreement of the husband binds the wife's estate, and her agreement binds the husband's estate. Gen. Stat. 1909, § 6244; *Bethell v. Chicago Lumber Co.*, 39 Kans. 230, 17 Pac. 813. In Maryland, when a building is erected on land of a married woman by her husband, or by some one employed by him, the lien does not attach unless notice thereof be given to her in writing within sixty days after doing such work or furnishing such materials. Pub. Gen. Laws 1904, ch. 63, § 10. But if it was built by him in the exercise of his own authority, and he acted solely in his capacity as husband, with only the authority implied from that capacity, then the notice must be given to the wife. *Conway v. Crook*, 66 Md. 290, 7 Atl. 402; *Jarden v. Pumphrey*, 36 Md. 361. Michigan: In case the title to such lands upon which improvements are made is held by husband and wife jointly, or in case the lands upon which such improvements are made are held and occupied as a homestead, the lien given by this act shall attach to such lands and improvements if the improvements be made in pursuance of a contract in writing signed by both the husband and wife. *Howell's Stats.* 1912, § 13767. In Minnesota, under Laws 1883, ch. 43, if the house be built by the husband as agent of his wife, notice to him is sufficient. As to the wife's power to contract, and to subject her property to mechanics' liens, under Gen. Laws of 1889, see *Althen v. Tarbox*, 48 Minn. 18, 50 N. W. 1018, 31 Am. St.

616. The present law is found in Gen. Stats. 1913, §§ 7020, 7024. New Jersey: Any married woman, upon whose lands any building or buildings shall hereafter be erected or repaired, or whereon any fixtures shall be put, shall be taken as consenting to the same, and such building or buildings and curtilages whereon the same are erected shall be subject to the lien hereby created; provided always that in case said married woman shall cause to be filed in the clerk's office of the county wherein such building or buildings are located a notice in writing describing the property, and that she does not consent to the erection or repairing of such building on her lands, and that the same is being done against her wishes and consent, then in such case, the building or buildings and curtilages whereon the same are erected, of any married woman, shall be free from the lien from the time she shall have filed such notice as aforesaid; and provided, further, that nothing in this act contained shall be so construed as to make the lands of any person liable for any building or repairs not authorized by the owner, or built or done without the knowledge of the owner. *Comp. Stat.* 1910, p. 3302, § 13. Otherwise before this statute. *Johnson v. Parker*, 27 N. J. L. 239. For a decision under the present statute, see *Kittredge v. Neumann*, 26 N. J. Eq. 195. Materials were furnished for a building on the land of a married woman whose husband had, without her knowledge, contracted to sell the land. The wife conveyed the

land according to the contract, after the construction of a building on it had commenced. It was held that it was not sufficient to show that no dissent in writing had been filed by the wife; and the fact that the wife confirmed the husband's contract to sell by subsequently conveying the land did not of itself establish his agency to authorize the erection of the building, so as to impute to her his knowledge of the fact that it was being erected. *Dodge v. Romain* (N. J. L.), 18 Atl. 114. North Carolina: A married woman's land is only subject to mechanic's lien for improvements made with her consent and procurement. It requires more than her knowledge. *Revisal 1905, § 2016. Healey Ice Mach. Co. v. Green*, 181 Fed. 890. Ohio: When a married woman is the owner of any property on which a mechanic's lien is given, and has knowledge of any construction, erection, alteration, repair, or removal for which a lien is given, the same being done under a contract with her husband, and without her express objection, such husband shall be held to be the duly authorized agent for his wife therein. *Gen. Code 1910, § 8323*. In Rhode Island, the written consent of the wife must be obtained to the husband's contract in order to bind her estate. *Gen. Laws 1909, p. 892, § 3; Bliss v. Patten*, 5 R. I. 380; *Cameron v. McCullough*, 11 R. I. 173. South Dakota: *H. C. Behrens Lumber Co. v. Lager*, 26 S. Dak. 160, 128 N. W. 698. Tennessee: The lien applies to and embraces the lands, both separate and general estate, of femes

covert, when the contract is made with the wife, and evidenced by writing signed by her. *Ann. Code 1896, § 3532*. If the work or improvement or materials be furnished for work done on the lands of any married woman, who has not signed the contract or agreement in writing, as provided in the statute, and in ignorance, on the part of said mechanic, laborer, or furnisher, of her right or claim, and if said married woman shall refuse to recognize or agree to said lien, said mechanic, laborer, or furnisher shall have the right, after giving ten days' notice, to take and remove such property, or the parts of the same on which his labor was performed, or materials, machinery, or other property was used. *Utah: Morrison v. Clark*, 20 Utah 432, 59 Pac. 235, 77 Am. St. 924. Vermont: The real estate of a married woman may be charged with a mechanic's lien when she assents to the contract. *Pub. Stats. 1906, § 2650*. Wisconsin: Under the Act of 1885, amending *Rev. Stat. § 23314*, which provides that the lien of a material-man "shall also attach to, and be a lien upon, the real property of any person on whose premises such improvements are made, such owner having knowledge thereof and consenting thereto," one furnishing material to a husband, to be used in the construction of a house which he is erecting on the land of his wife with her knowledge, has a lien on the land, though she did not know of, or consent to, their purchase on credit, or agree to pay for them. *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633; *Heath v. Solles*, 73

declarations,<sup>26</sup> as well as intentionally by expressly making him her agent. When a husband acts for his wife in superintending improvements upon her property, the presumption is that he is acting as her agent, rather than as a contractor to do the work and furnish the materials for the wife.<sup>27</sup> In a case where the wife furnished the money for the improvements, and the work was done by the direction of her husband, the trial court should not nonsuit the plaintiff upon the ground that the contract was with the husband, but should allow the case to go to jury upon the question whether the husband did not act as his wife's agent.<sup>28</sup> Again, a husband contracted for the sale of his wife's land, the vendee to build certain houses on it, and the vendor to advance money from time to time, the title did not pass until the completion of the buildings. The contract was made in the husband's name, but for the wife's benefit, and she afterwards took an assignment of it, and advanced all the moneys, and stipulated for the execution of mortgages to her on the completion of the buildings. It was held the work was done with her consent, and that her land was subject to a lien for the work.<sup>29</sup>

The wife's assent to her husband's contract for erecting a building on her land is sufficiently shown by evidence that she was present when he spoke to the architect about building it, that she constantly saw it while building, and after its completion drew her own check as payment on account of the work.<sup>30</sup>

Wis. 217, 40 N. W. 804; Coarsen v. Ziehl, 103 Wis. 381, 79 N. W. 562.

<sup>26</sup> Jones v. Pothast, 72 Ind. 158; Vail v. Meyer, 71 Ind. 159; Dame v. Coffman, 58 Ind. 345, overruled; Burdick v. Moon, 24 Iowa 418; Kidd v. Wilson, 23 Iowa 464; Lex v. Holmaes, 4 Phila. (Pa.) 10; Akers v. Kirke, 91 Ga. 590, 18 S. E. 366; Pinkston v. Cedar Hill &c. Co., 123 Ga. 302, 51 S. E. 387.

<sup>27</sup> Rand v. Parker, 73 Iowa 396, 35 N. W. 493.

<sup>28</sup> Farmilo v. Stiles, 52 Hun (N. Y.) 450, 5 N. Y. S. 579, 24 N. Y. St. 377.

<sup>29</sup> Schmalz v. Mead, 125 N. Y. 188, 26 N. E. 251, affg. 15 Daly (N. Y.) 223, 4 N. Y. S. 614, 23 N. Y. St. 117.

<sup>30</sup> Dennis v. Walsh, 16 N. Y. S. 257, 41 N. Y. St. 103.



§ 1263. **Wife's knowledge of improvements not enough to show her consent.**—The wife's knowledge of the improvements made by her husband on her land is not a sufficient consent on her part to subject her land to liens for such improvements.<sup>31</sup> The fact that the wife approved the plans, and knew that she was to live in the house with her husband and family, is not sufficient to make the husband's contract in his own name the basis of a lien upon her land. It is the duty of the husband to provide a home for his wife and family, and there is no obligation legal or equitable on the wife or her estate for the contract of the husband to build a house for his family home, though this be built on the land of the wife.

Moreover, the fact that the wife visited the house which her husband was having built upon her land, and gave directions about the arrangements of closets and the like, which did not, however, add to the cost of the building, can have no proper tendency to show an antecedent appointment by her of her husband as her agent.<sup>32</sup>

<sup>31</sup> Conway v. Crook, 66 Md. 290, 7 Atl. 402; Willard v. Magoon, 30 Mich. 273; Kansas City Planing Mill Co. v. Brundage, 25 Mo. App. 268; Garnett v. Berry, 3 Mo. App. 197, 202; Murphy v. Murphy, 15 Mo. App. 600; Bliss v. Patten, 5 R. I. 376, 380; Geary v. Hennessy, 9 Bradw. (Ill.) 17; Spinning v. Blackburn, 13 Ohio St. 131; Hughes v. Peters, 1 Coldw. (Tenn.) 67, 69; Fetter v. Wilson, 12 B. Mon. (Ky.) 90, 91; Lyon v. Champion, 62 Conn. 75, 25 Atl. 392; Huntley v. Holt, 58 Conn. 445, 20 Atl. 469; Gilman v. Disbrow, 45 Conn. 563; Groth v. Stahl, 3 Colo. App. 8, 30 Pac. 1051; Hoffman v. McFadden, 56 Ark. 217, 19 S. W. 753, 9 L. R. A. 111; Ziegler v. Galvin, 45 Hun (N. Y.)

44, 9 N. Y. S. 459; Copeland v. Kehoe, 67 Ala. 594; Jones v. Walker, 63 N. Y. 612; Woodward v. McLaren, 100 Ind. 586; Wendt v. Martin, 89 Ill. 139; Lauer v. Bandow, 43 Wis. 556, 28 Am. Rep. 571. But where the wife with knowledge that improvements were being made under her husband's contract, consents to their being made, under the provisions of the statute the materialmen are entitled to a lien on her property. McGeever v. S. H. Harris & Sons, 148 Ala. 503, 41 So. 930.

<sup>32</sup> Conway v. Crook, 66 Md. 290, 7 Atl. 402; Johnson v. Parker, 27 N. J. L. 239; Wright v. Hood, 49 Wis. 235, 5 N. W. 488; McCarthy v. Caldwell, 43 Minn. 442, 45 N. W. 723; Barker v. Berry, 8 Mo.

The fact that the wife with her husband was living in the house is not sufficient to charge her estate with a lien for repairs to the house which her husband contracted for in his own name.<sup>33</sup>

But if the wife participates in the negotiations for improvements upon her lands, and gives directions as to changes in the work during its progress, these facts, when proved, warrant a finding that the work was done for her and under her contract or consent; and a lien may be adjudged against her property.<sup>34</sup> If it appears that the wife

App. 446; *Kansas City Planing Mill Co. v. Brundage*, 25 Mo. App. 268, 276. Phillips, P. J., in giving judgment on this last case, forcibly says: "We do not deem it wise or politic, even in carrying out the true spirit of the lien law, to establish a precedent by which improvident husbands may contract away their wives' real estate by indirection and implication. The law, for her just protection, disables her husband from conveying away her real property, unless she join in the deed, duly acknowledged. And where it is attempted, as in this case, to create a burden on her estate, whereby she may, nolens, volens, lose it by reason of a mere contract made by the husband, in which she did not join, and was never asked to join, the evidence that she authorized him, as her agent, to make it, should be so clear, cogent and persuasive, as to leave no reasonable doubt of the fact in the mind of the court or jury." Where a husband contracted in his own behalf, and not as agent for the wife, for the erection of a house on land standing in her name, the fact "that she took a lively, wifely interest in the prog-

ress of the labor does not amount to that proof of agency which the law requires when the materialman seeks to charge it with a lien for supplies which were furnished under a contract entered into with one who was not the owner of the property." *Groth v. Stahl*, 3 Colo. App. 8, 30 Pac. 1051. Contra, see *McCormick v. Lawton*, 3 Nebr. 449. Even if a wife knows that her husband has contracted in his name to erect a house on her real estate, this is not sufficient to prove that she directed the improvement or authorized it. *Halliwel Cement Co. v. Elser*, 156 Mo. App. 291, 137 S. W. 626.

<sup>33</sup> *Willard v. Magoon*, 30 Mich. 273. In this case the building was a tavern, which had been injured by a recent fire, and the husband was individually interested in having the repairs made. *Lauer v. Bandow*, 43 Wis. 556, 28 Am. Rep. 571. But see *Tarr v. Muir*, 107 Ky. 283, 21 Ky. L. 988, 53 S. W. 663.

<sup>34</sup> *Leisse v. Schwartz*, 6 Mo. App. 413; *Collins v. Megraw*, 47 Mo. 495; *Brunold v. Glasser*, 25 Misc. (N. Y.) 285, 53 N. Y. S. 1021.

examined the plans for a house, watched the progress of the work, and personally and by letters urged the material-men to push the work, her land is liable to the lien of the material-men who furnished materials for building the house under her husband's contracts.<sup>35</sup>

If the wife is aware that such building is being erected, and has given directions to the workmen, the agency of the husband will be presumed, and the property will subject to a mechanic's lien.<sup>36</sup>

**§ 1264. Lien on married woman's estate under statutes, when she consents.**—Under statutes which allow a lien for work done with the owner's consent, the lien will attach to the property of a married woman for labor performed at the husband's request with her knowledge and consent.<sup>37</sup> The husband's agency may be inferred from the fact that he had been intrusted with the general management of her property. But the agency of the husband can not be inferred from the marital relation alone.<sup>38</sup> There must either be some express or implied authority conferred by the wife upon the husband to act for her, or a subsequent adoption and ratification of his acts, in order to bind the wife and impose a lien upon her property.<sup>39</sup> Perhaps, if a husband

<sup>35</sup> Bodey v. Thackara, 143 Pa. St. 171, 22 Atl. 754, 24 Am. St. 526; McGeever v. Harris, 148 Ala. 503, 41 So. 930.

<sup>36</sup> Bradford v. Peterson, 30 Nebr. 96, 46 N. W. 220.

<sup>37</sup> Wheaton v. Trimble, 145 Mass. 345, 5 N. Eng. 381, 14 N. E. 104, 1 Am. St. 463; Greenleaf v. Beebe, 80 Ill. 520; Schwartz v. Saunders, 46 Ill. 18; Anderson v. Armstead, 69 Ill. 452, 453; McCormick v. Lawton, 3 Nebr. 449; Scales v. Paine, 13 Nebr. 521, 14 N. W. 522; Bradford v. Peterson, 30 Nebr. 96, 46 N. W. 220; How-

ell v. Hathaway, 28 Nebr. 807, 44 N. W. 1136; Collins v. Megraw, 47 Mo. 495; Forrester v. Preston, 2 Pitts. (Pa.) 298; Heath v. Solles, 73 Wis. 217, 40 N. W. 804; North v. La Flesh, 73 Wis. 520, 41 N. W. 633.

<sup>38</sup> Gilman v. Disbrow, 45 Conn. 563; Fetter v. Wilson, 12 B. Mon. (Ky.) 90; Kansas City Planing Mill Co. v. Brundage, 25 Mo. App. 268; Knott v. Carpenter, 3 Head (Tenn.) 542, 75 Am. Dec. 779; Hoffman v. McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. 101.

<sup>39</sup> Kidd v. Wilson, 23 Iowa 464;

should contract in his wife's name for a building or improvements upon her land, with her knowledge, or under circumstances such that she would have good cause to know of such contract or to suspect it, she might be charged with the duty of notifying the contractor that she repudiated the assumed agency, and in default of such notification she might be bound, and her land subjected to a lien.<sup>40</sup> But she would be under no such obligation, and no lien would attach, in case the husband contracted in his own name.<sup>41</sup>

The fact that the repairs are necessary for the preservation of the property does not enable the husband to incur it by a mechanic's lien without the wife's authority.<sup>42</sup>

§ 1265. **Difference in statutory terms.**—Some contradiction in the cases is to be attributed to the differences in the terms of the statutes as regards the requirements of a contract or consent on the part of the owner. Under statutes which make a contract, express or implied, of the owner, a prerequisite to the attaching of a lien upon his property, a contract can not be implied from mere knowledge that some other person is making improvements upon his land, or even from consent to the making of such improvements.<sup>43</sup> But under statutes which provide that the owner and his property may be bound by his consent to improvements, knowledge on his part of such improvements will sometimes amount to consent.<sup>44</sup> Under statutes of the latter kind, the

Burdick v. Moon, 24 Iowa 418; Miller v. Hollingsworth, 36 Iowa 163; Bissell v. Lewis, 56 Iowa 231. 9 N. W. 177; Price v. Seydel, 46 Iowa 696; Nelson v. Cover, 47 Iowa 250; Conway v. Crook, 66 Md. 290, 7 Atl. 402; Geary v. Hennessey, 9 Bradw. (Ill.) 17; Hoffman v. McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. 101.

<sup>40</sup> Hoffman v. McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. 101, per Mansfield, J.

<sup>41</sup> Getty v. Tramel, 67 Iowa 288, 25 N. W. 245; Miller v. Hollingsworth, 36 Iowa 163; Coarsen v. Ziehl, 103 Wis. 562, 79 N. W. 562. See also, James v. Dalbey, 107 Iowa 463, 78 N. W. 51.

<sup>42</sup> Dearie v. Martin, 78 Pa. St. 55, 58.

<sup>43</sup> Jones v. Walker, 63 N. Y. 612. See Shreveport Nat. Bank v. Maples, 119 La. 41, 43 So. 905.

<sup>44</sup> Otis v. Dodd, 90 N. Y. 336; Burkitt v. Harper, 79 N. Y. 273;

consent of a married woman to the erection of buildings upon her land may be implied from her knowledge, and the absence of any objection on her part.<sup>45</sup> But under statutes which give a lien only by virtue of a contract of the owner or of his agent, her knowledge of improvements upon her land does not imply a contract by her; a contract by her, or by her authorized agent, must be proved in order to charge her land with liens.<sup>46</sup> Accordingly, where a husband, with the full knowledge, consent and approval of his wife, and in pursuance of her desire, entered into a contract for repairs and improvements upon her house, in which both resided at the time, and it appeared that she did not personally assume or intend to pay for any part of the improvements, but that her husband intended to carry out the contract himself, it was held that the husband was not the agent of the wife, and that her property could not be subjected to a lien under the contract.<sup>47</sup> So where the contract for the erection of a house on the land of the wife was made with the husband, and the labor of the carpenters was all paid for by him, and the materials purchased from the plaintiff and others were procured on the husband's order, and for aught that appeared to the contrary they were sold entirely on his personal credit, and moreover the wife testified that she objected to the erection of the house, and that her husband was not authorized to act as her agent, and that she was not consulted about the contract for the improvement, and had no knowledge of its terms, a mechanic's lien was not sustained against the wife's land.<sup>48</sup>

Husted v. Mathes, 77 N. Y. 388.

<sup>45</sup> Husted v. Mathes, 77 N. Y. 388; Nellis v. Bellinger, 6 Hun (N. Y.) 560; Anderson v. Mather, 44 N. Y. 249, 262; North v. La Flesh, 73 Wis. 520, 41 N. W. 633.

<sup>46</sup> Yale v. Dederer, 68 N. Y. 329; Ainsley v. Mead, 3 Lans. (N. Y.) 116; Jones v. Walker, 63 N. Y. 612;

Ziegler v. Galvin, 45 Hun (N. Y.) 44, 9 N. Y. St. 459.

<sup>47</sup> Ziegler v. Galvin, 45 Hun (N. Y.) 44, 9 N. Y. St. 459; Jones v. Walker, 63 N. Y. 612, resembles this case.

<sup>48</sup> Hoffman v. McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. 101.

§ 1266. **Husband's agency established under some circumstances.**—The husband's agency has been established under various circumstances. Where a wife conveyed land to a trustee in trust for herself for life, and the deed provided that the property might be built upon, and gave the husband and wife the general management of the premises, acting in concurrence with and with the approval of the trustee, the contracts of the husband made in his own name for the erection of buildings on the land, and made with full knowledge of the wife and the trustee, and without objection on their part, were held to authorize persons performing labor and furnishing materials to enforce a lien against the whole estate.<sup>49</sup>

The fact that materials were sold to the husband and charged to him upon account, and that his note was demanded in payment, tends to show that they were sold upon his personal credit, and not upon the credit of his wife's estate upon which they were used.<sup>50</sup>

Where the wife mortgaged her land to raise money with which to improve it by erecting a house, and the husband took the money, and with her knowledge and consent erected the building, employing various mechanics, he was held to be his wife's agent for the purpose, and her property was bound by liens of the mechanics employed.<sup>51</sup>

§ 1267. **Liens where wife's real estate is in husband's name.**—If the legal title is in the husband, though the property was purchased with the wife's money, so that there is a resulting trust in her favor, liens for improvements made

<sup>49</sup> Taylor v. Gilsdorff, 74 Ill. 354; Richards v. John Spry Lumber Co., 169 Ill. 238, 48 N. E. 63, affg. 64 Ill. App. 347; Frohlich v. Carroll, 127 Mich. 561, 86 N. W. 1034. See also, Jobe v. Hunter,

165 Pa. St. 5, 30 Atl. 452, 44 Am. St. 639.

<sup>50</sup> Wright v. Hood, 49 Wis. 235, 5 N. W. 488.

<sup>51</sup> Thompson v. Shepard, 85 Ind. 352. See Cattell v. Fergusson, 3 Wash. St. 541, 28 Pac. 750.

by his direction bind the property as against the secret resulting trust.<sup>52</sup>

Where the husband held the property as trustee for his wife, and he contracted in his own name for improvements, and these were made with the knowledge of the wife, and she gave directions about them, it was held that these facts tended to show authority on the part of the husband to act for her, and such a participation in the contract as might fix a lien on her interest in the property.<sup>53</sup>

**§ 1268. Lien either where title belongs to husband or taken by him to defraud.**—If the land really belongs to the husband, or he has taken a conveyance of it to his wife with intent to defraud a builder, it is bound by a lien for materials furnished and labor performed at his request in erecting a building upon the land. Thus, if the land was purchased by the husband with his own money and the conveyance taken to his wife, the transaction is equivalent to a voluntary conveyance, and is void as against existing creditors, and subsequent creditors also, where there is an intent to defraud them. The land is equitably subject to a lien under the contract of the husband.<sup>54</sup>

**§ 1269. Furnished on husband's credit.**—If a husband purchases materials for building or repairing a house belonging to his wife, and they are furnished to the husband solely on his credit without reference to his wife's property, no lien can be asserted upon the premises of the wife, but the material-man must look to the husband alone for payment.<sup>55</sup>

<sup>52</sup> Ivey v. White, 50 Miss. 142.

<sup>53</sup> Schmitt v. Wright, 6 Mo. App. 601.

<sup>54</sup> Hitchcock v. Kiely, 41 Conn. 611; Hooker v. McGlone, 42 Conn. 95; Weller v. McNabb, 4 Sneed (Tenn.) 422.

<sup>55</sup> Wendt v. Martin, 89 Ill. 139; Little v. Vredenburg, 16 Bradw. (Ill.) 189; Meyer v. Broadwell, 83 Mo. 571; Finley's App. 67 Pa. St. 453; North v. La Flesh, 73 Wis. 520, 41 N. W. 633.

§ 1270. **Lien on land held by joint tenancy.**—There may be a mechanic's lien upon land held in joint tenancy by husband and wife.<sup>56</sup> Where the written contract with the builder is signed by the husband, the wife's acquiescence and consent may be shown. Her consent is also sufficiently shown by her joining in the contract with her husband.<sup>57</sup>

But in some cases it has been held that the husband's contract would bind himself and his interest alone, and would not affect the rights of his wife.<sup>58</sup> Thus by statute in Michigan a wife must sign the contract to give a lien against land owned by herself and her husband jointly.<sup>58a</sup>

§ 1271. **Husband's estate by curtesy subject to lien.**—Where a husband in the actual possession of his wife's real estate employs mechanics to build a house upon the land, and by means of such employment a lien is created, his estate by the curtesy initiate may be sold to satisfy the lien.<sup>59</sup> But the interest of a husband in a lease owned by his wife for nine hundred and ninety-nine years is not one upon which a builder's lien can attach under a contract with the husband, for only an estate of inheritance is subject to the husband's curtesy initiate, and such a lease is only a chattel interest.<sup>60</sup>

<sup>56</sup> Washburn v. Burns, 34 N. J. L. 18; Mitchell v. Hodges, 87 Ind. 491; Jones v. Pothast, 72 Ind. 158; Vail v. Meyer, 71 Ind. 159; Fitch v. Baker, 23 Conn. 563. See Taggart v. Kem, 22 Ind. App. 271, 53 N. E. 651, where the wife's consent was shown by her conduct.

<sup>57</sup> Greenough v. Wiggington, 2 G. Greene (Iowa) 435; Nold v. Ozenberger, 152 Mo. App. 439, 133 S. W. 349.

<sup>58</sup> Washburn v. Burns, 34 N. J. L. 18; Johnson v. Parker, 27 N. J. L., 239.

<sup>58a</sup> McMillan v. Schneider, 147 Mich. 258, 110 N. W. 961; Bauer v. Long, 147 Mich. 351, 10 N. W. 1059.

<sup>59</sup> Kirby v. Tead, 13 Met. (Mass.) 149; Briggs v. Titus, 13 R. I. 136; Briggs v. Titus, 7 R. I. 441; Martin v. Pepall, 6 R. I. 92; Fitch v. Baker, 23 Conn. 563; Schnell v. Clements, 73 Ill. 613. See, however, Fetter v. Wilson, 12 B. Mon. (Ky.) 90; Woodward v. Wilson, 68 Pa. St. 208.

<sup>60</sup> Flannery v. Rohrmayer, 49 Conn. 27; Flannery v. Rohrmayer, 46 Conn. 558, 33 Am. Rep. 36.



§ 1272. Word "owner" includes leasehold estate.—The word "owner" in the statutes is comprehensive enough to include the owner of a leasehold estate, as well as the owner of a greater estate, so that the lien attaches to a leasehold estate without the aid of a special statute for that purpose.<sup>61</sup> It attaches to a leasehold estate not only in the hands of the

<sup>61</sup> California: *McGreary v. Osborne*, 9 Cal. 119; *Gaskill v. Trainor*, 3 Cal. 334. Colorado: *The Cary &c. Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744. Indiana: *McCarty v. Burnet*, 84 Ind. 23; *Wilkerson v. Rust*, 57 Ind. 172; *Baylies v. Sinex*, 21 Ind. 45; *Lynam v. King*, 9 Ind. 3. Pennsylvania: *Gaule v. Bilyeau*, 25 Pa. St. 521, 1 Phila. (Pa.) 466; *Mountain City &c. Assn. v. Kearns*, 103 Pa. St. 403. Ohio: *Hart v. Globe Iron Works*, 37 Ohio St. 75; *Dutro v. Wilson*, 4 Ohio St. 101; *Choteau v. Thompson*, 2 Ohio St. 114. In the latter case the court say: "If the ownership is in fee, the lien is upon the fee; if it is of a less estate, the lien is upon such smaller estate. To hold that an owner in fee only is meant, would be directly subversive of the policy of the act, and in a great degree render it useless." Tennessee: *Alley v. Lanier*, 1 Cold. (Tenn.) 540; *Burr v. Graves*, 4 Lea (Tenn.) 552; *Daniel v. Weaver*, 5 Lea (Tenn.) 392. Other states: *Judson v. Stephens*, 75 Ill. 255; *Mills v. Matthews*, 7 Md. 315; *Harman v. Allen*, 11 Ga. 45; *Rothe v. Bellingrath*, 71 Ala. 55; *Hathaway v. Davis*, 32 Kans. 693, 5 Pac. 29; *Laviolette v. Redding*, 4 B. Mon. (Ky.) 81. In several states there are special statutory provisions in relation to liens upon

leasehold estates:—In Rhode Island, Gen. Laws 1909, p. 892, § 2; Delaware, Rev. Code 1893, p. 819; Mississippi, Code 1906, § 3060, if the contract be made with the lessee or tenant, the written consent of the landlord must be obtained in order to bind his estate. In Indiana: The entire land upon which any such building, erection or other improvement is situated, including that portion not covered therewith, shall be subject to lien to the extent of all the right, title and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or material furnished; and where the owner has only a leasehold interest, or the land is encumbered by mortgage, the lien, so far as concerns the buildings erected by said lien-holder, is not impaired by forfeiture of the lease for rent or foreclosure of mortgage; but the same may be sold to satisfy the lien and [be] removed within ninety [days] after the sale by the purchaser. Burns' Ann. Stats. 1914, § 8296. Louisiana: If the buildings, improvements, or other works are caused to be erected by a lessee of the lot of ground, in that case the privilege shall exist only against the lease, and shall not affect the owner. Rev. Laws 1869, § 2874; Rev. Civ. Code 1900, § 3249. Build-

lessee, but also in the hands of his assignee.<sup>62</sup> It attaches even to the interest of one having only a verbal lease for a

ers who contract with tenants for alterations or repairs of the demised premises have no privilege as against the lessor. *Sewall v. Duplessis*, 2 Rob. (La.) 66; *Hoffman v. Laurans*, 18 La. 70. In Maryland, Pub. Gen. Laws, ch. 63, § 9, when a building is erected by a lessee or tenant, the lien attaches only to his interest. Though there is an agreement between a lessee and the owner that buildings should be erected at their joint expense, and that on a sale the proceeds should be divided between them, a lien for materials used in the construction of the buildings does not attach to the reversion, as against one who purchases it in good faith without notice of the agreement. *Beehler v. Ijams*, 72 Md. 193, 19 Atl. 646; *Gable v. Preacher's Fund Soc.*, 59 Md. 455. In District of Columbia: When a building shall be erected or repaired by a lessee or tenant for life or years, by a person having an equitable estate or interest in such building or land on which it stands, the lien hereby created shall only extend to and cover the interest or estate of such lessee, tenant, or equitable owner. District of Columbia Code 1901, § 1245. In New Jersey, if a building is erected by a tenant or other person than the owner of the land, then only the building and the estate of such tenant or other person so erecting such building is subject to a lien, unless it be erected with the con-

sent of the owner in writing, which may be acknowledged or proved and recorded. Comp. Stats. 1910, p. 3299, § 7. The written consent under this provision must be absolute. It can not be implied from a clause in a lease or other writing that the lessee shall make repairs at his own cost. *Hervey v. Gay*, 42 N. J. L. 168, revg. 41 N. J. L. 39. In Pennsylvania, any owner, not being a committee, guardian or trustee, as aforesaid, who shall knowingly suffer or permit any person, acting as if he were the owner, to make a contract for which a claim could be filed, without objecting thereto at the time, shall be treated as ratifying the act of such person acting as if he were the owner, and the claim may be filed against the real owner, with the same effect [as] if he himself had made the contract. Ratification shall also be presumed, and a like subjection to lien shall follow, if the owner, not being a committee, guardian or trustee, as aforesaid, subsequently learning of such contract or of work being done upon his property, shall not, within ten days thereafter, repudiate the same either by notice to the contractor and subcontractors or by posting such repudiation on the most public part of the structure or other improvement. *Purdon's Dig.* (13th ed.), p. 2472, § 12.

<sup>62</sup> *Daniel v. Weaver*, 5 Lea (Tenn.) 392.

term of years,<sup>63</sup> and to the interest which one has under an agreement for a lease.<sup>64</sup>

The right of a lessee under the covenants of his lease to secure payment for buildings erected by him on the leased premises at the expiration of his term is an interest in the land within the meaning of a statute giving a lien upon any interest which the owner may have in the land.<sup>65</sup>

**§ 1273. Effect of forfeiture of lease.**—A mechanic's lien attaches to a lessee's leasehold estate subject to all the conditions of the lease. Though the lessee has made valuable improvements, which are to become the property of the lessor at the end of the term, or which are to revert to him upon his failure to perform the covenants of the lease, upon the lessee's default the property reverts to the lessor free from the lien of mechanics, unless these are in some way protected by statute.<sup>66</sup>

If the lease has been forfeited, the holder of the lien, before he can acquire the rights of the lessee by purchasing the leasehold estate with the improvements, must pay the lessor all arrears of rent under the lease.<sup>67</sup> A mere failure

<sup>63</sup> Nordyke & Marmon Co. v. Hawkeye Woollen Mills, 53 Iowa 521, 5 N. W. 693; Mountain City Market, &c., Assn. v. Kearns, 103 Pa. St. 403; Webster City Steel Radiator Co. v. Chamberlin, 137 Iowa 717, 115 N. W. 504.

<sup>64</sup> Montandon v. Deas, 14 Ala. 33, 48 Am. Dec. 84.

<sup>65</sup> Watson v. Gardner, 119 Ill. 312, 10 N. E. 192.

<sup>66</sup> Cornell v. Barney, 26 Hun (N. Y.) 134, affd. 94 N. Y. 394.

<sup>67</sup> Rothe v. Bellingrath, 71 Ala. 55; Hathaway v. Davis, 32 Kans. 693, 5 Pac. 29; Gaskill v. Trainer, 3 Cal. 334; Wilkins v. Abell, 26 Colo. 462; Williams v. Eldora En-

terprise, &c., Co., 35 Colo. 127, 83 Pac. 780; The Morrell, &c. Co. v. Princess, &c. Co., 16 Colo. App. 54. In several states, statutes have been enacted for the protection of lien-holders in case of forfeiture of the lease:—Alabama: When the building or improvement is erected under or by virtue of any contract with a lessee in possession, and the erection thereof is not in violation of the terms or conditions of the lease, the lien shall attach to such building or improvement, and to the unexpired term of the lease, and the holder of the lien shall have the right to avoid a forfeiture of the lease by

to pay the rent does not work a forfeiture. There must be a demand to effect this. A forfeiture is never implied, and is

paying rent to the lessor, as it becomes due and payable, or by the performance of any other act or duty to which the lessee may be bound; and if the lien is enforced by a sale of the building or improvement, the purchaser may, at his election, become entitled to the possession of the demised premises, and to remain therein for the unexpired term, by paying rent to the lessor, or performing any other act or duty to which the lessee was bound, as if he were the assignee of the lease; or he may, within sixty days after the sale, remove such building or improvement from the premises; and if he elects to take possession and to remain therein until the expiration of the term of the lease, he may, within a reasonable time after the expiration of the term, remove such building or improvement from the premises. If, before a sale, the holder of the lien has made any payments of rent or other pecuniary compensation to the lessor, which ought to have been paid by the lessee, he shall be reimbursed for such payments from the proceeds of the sale. When a lien attaches under the preceding section, the lessor, at any time before a sale of the property, shall have the right to discharge the same, by paying to the holder the amount secured thereby, including costs and all moneys he may have paid to the lessor to prevent a forfeiture of the lease, and, after a sale, he shall have the right to prevent the removal of

the building or improvement from the premises by paying to the purchaser the value of such building or improvement; and upon such payment, either to the holder of the lien or to the purchaser, such building or improvement shall become the property of the lessor. Code 1907, §§ 4756, 4757. In Arkansas: Every building or other improvement erected or materials furnished, according to the provisions of this act, on leased lots or lands, shall be held for the debt contracted for on account of the same, and also the leasehold term for such lot and land on which the same is erected; and in case the lessee shall have forfeited his lease, the purchaser of the building and leasehold term, or so much thereof as remains unexpired, under the provisions of this act, shall be held to be the assignee of such leasehold term, and as such shall be entitled to pay to the lessor all arrears of rent or other money, interest and costs due under said lease, unless the lessor shall have regained possession of the leasehold land or obtained judgment for the possession thereof, on account of the non-compliance by the lessee with the terms of the lease, prior to the commencement of the improvements thereon; in which case the purchaser of the improvements under this act shall have the right only to remove the improvements within sixty days after he shall purchase the same, and the owner of the ground shall receive the

not favored by the rules of law. It can not take place by consent, though there may be a surrender by the lessee. But

rent due him payable out of the proceeds of the sale, according to the terms of the lease, down to the time of removing the buildings. Dig. of Stats. 1904, § 4973. Missouri: See ante, § 1211; Rev. Stat. 1909, § 8216, as amended by Laws 1911, p. 312. Iowa: The entire land upon which any such building, erection or other improvement is situated, including that portion not covered therewith, shall be subject to all liens created by this act to the extent of the interest therein of the person for whose benefit such labor was done or things furnished; and when such interest is only a leasehold the forfeiture of such lease for the nonpayment of rent, or for noncompliance with any of the other conditions therein, shall not forfeit or impair such lien upon such improvements, but the same may be sold to satisfy such liens, and be moved away by the purchaser within thirty days after the sale thereof. Code 1897, § 3090. North Dakota: The entire land upon which any such building, erection or other improvement is situated, or to improve which the labor was done or things furnished, including that portion of the same not covered therewith, shall be subject to all liens hereby created to the extent of all the right, title and interest owned therein by the owner thereof for whose immediate use or benefit such labor was done or things furnished and when the interest owned in such land by such owner

of such building, erection or other improvement is only a leasehold interest, the forfeiture of such lease for the nonpayment of rent or for noncompliance with any of the other stipulations therein shall not forfeit or impair such lien so far as it concerns such buildings, erections and improvements, but the same may be sold to satisfy such lien and be removed within thirty days after the sale thereof by the purchaser. Rev. Codes 1905, § 6243. In South Dakota: The lien attaches to the extent of the interest of the owner; and when this interest is a leasehold interest, the forfeiture of the lease shall not impair the lien so far as it concerns the buildings, erections, or improvements, but the same may be sold to satisfy the lien, and may be removed within thirty days. Rev. Code (Civ. Proc.) 1903, § 706. The owner of land sold a lot upon time payments, giving a bond for a deed, which provided for a forfeiture on default, at the obligor's election, and, further, that "under this agreement the interest of the obligee in said premises shall be only a leasehold interest until deed is made thereunder, and shall not be subject to any mechanic's lien, or other lien, by reason of any act of said obligee." The purchaser erected a dwelling-house on the lot, and a material-man filed a lien, after which a forfeiture was declared, and the vendor took possession and sold the property to another. The lien was

a surrender will not be allowed to defeat a mechanic's lien upon the lessee's estate, where the lien has accrued before the surrender took place.<sup>68</sup> If after such surrender the lessor or owner makes improvements upon the property, a mechanic's lien which has previously attached to the leasehold interest is not thereby impaired.<sup>69</sup>

A voluntary surrender by the lessee does not affect a lien which has already attached on the estate of the latter. If in such case the owner should neglect to discharge the lien, upon a sale under a decree establishing a lien he would be compelled to accept another tenant. The merger of the estate of the lessee with that of the owner would not destroy the previous lien.<sup>70</sup>

**§ 1274. Lien on leasehold estate may include buildings, fixtures, etc.**—The lien upon a leasehold estate may include buildings, fixtures and machinery placed upon the leased land by a tenant who has the right of removal.<sup>70a</sup> Such

held good, the prohibition against a lien being only as to the purchasers' interest in the land, and not as to the improvement thereon. *Oliver v. Davis*, 81 Iowa 287, 46 N. W. 1000. Kentucky: If labor be performed or materials furnished by contract with a lessee of real estate for a term of years, and if, before the expiration of the term by lapse of time, the lessee's interest therein shall, from any cause, become forfeited to the lessor, or shall be surrendered to him, and if the lessor shall refuse to pay for the same, the person performing the work or furnishing the materials shall have the right to remove the same from the leased premises, provided it can be done without material injury to any previous improvement on said leased premises. Stats. 1909,

§ 2466. Montana: When the interest in the land, building, structure or other improvement is a leasehold interest, the forfeiture of such lease does not forfeit or impair such liens so far as concerns the buildings, structure, and improvements put thereon by the persons charged with such lien, but may be sold to satisfy said lien, and be moved within twenty days after the sale thereof by the purchaser. Code (Civ. Proc.) 1895, § 2134. Oregon: See ante, § 1221.

<sup>68</sup> *Gaskill v. Trainer*, 3 Cal. 334. See *Winn v. Henderson*, 63 Ga. 365.

<sup>69</sup> *Gaskill v. Moore*, 4 Cal. 233.

<sup>70</sup> *Dobschuetz v. Holliday*, 82 Ill. 371; *Cheney v. Bonnell*, 58 Ill. 268; *Gaskill v. Trainer*, 3 Cal. 334.

<sup>70a</sup> *Ombony v. Jones*, 19 N. Y.

right of removal, instead of lessening the lien, enlarges it rather, and enables the lien-holder to obtain a greater interest in the leased premises. The fact that for some purposes and under some circumstances the buildings, fixtures and machinery placed upon the leased premises by the tenant may be considered as personal property, does not have the effect of preventing the attaching of the lien. For the purposes of the lien, in such a case the leasehold interest will include the right to the buildings, fixtures and machinery, and the right to remove them, and the lien will attach to the buildings, fixtures and machinery, as well as the lessee's interest in the land. If the materials furnished are used in repairs, and are so merged in the freehold as to be incapable of severance, the contractor has no lien thereon, but merely a lien on the leasehold estate.<sup>71</sup>

Under statutes which give mechanics a lien only on the lessee's interest in the land, or, in other words, a lien only on the leasehold estate, a mechanic can not enforce a lien on machinery and other fixtures which he has annexed to the land, or restrain the lessor from using the same after he has taken possession upon the surrender of the lease by the lessee. If the machinery is affixed to the land as a part of the realty, the lessor is in such case rightfully in

234, affg. 21 Barb. (N. Y.) 520; Dobschuetz v. Holliday, 82 Ill. 371; Stenberg v. Liennemann, 20 Mont. 457, 52 Pac. 84, 63 Am. St. 636; Zabriskie v. Exposition Co., 67 Nebr. 581, 93 N. W. 958, 62 L. R. A. 369. A mechanic's lien may be taken against the interest of a lessee. Chicago Smokeless Fuel Gas Co. v. Lyman, 62 Ill. App. 538; Hathaway v. Davis, 32 Kans. 693, 5 Pac. 29. This was under a statute expressly giving a lien upon buildings, fixtures and machinery. McCarty

v. Burnet, 84 Ind. 23. Contra, in Pennsylvania, before statutes giving such a lien. See Purdon's Dig. (13th ed.), pp. 2467, 2468; White's App. 10 Pa. St. 252; Church v. Griffith, 9 Pa. St. 117, 49 Am. Dec. 548; Hathworth v. Wallace, 14 Pa. St. 118; Schenley's App. 70 Pa. St. 98. The buildings must be removable as trade fixtures to have the lien attach to them. Stevens v. Burnham, 62 Nebr. 672, 87 N. W. 546.

<sup>71</sup> Rothe v. Bellingrath, 71 Ala. 55.

possession; and if the machinery is not a part of the realty, the mechanic has no right of lien.<sup>72</sup>

**§ 1275. Lien not extended beyond lessee's interest.—**

A statute authorizing a lien against a building erected by a lessee, and his interest under the lease, should not be extended in its operation by implication. It should be construed to embrace only such buildings as the lessee might himself, at common law, remove at any time during his term, before surrendering possession.<sup>73</sup> It will not be extended to engines, boilers and machinery erected by a tenant upon leased premises, unless the same were used in the construction of the building, or were connected with it so as to become a part of the building itself for some permanent object, so as to pass with it as a constituent part.<sup>74</sup>

**§ 1276. Interest of lessor not subjected by the lessee.—**

In general, the interest of a lessor can not be subjected by the lessee to a mechanic's lien for work done or materials furnished on the contract of the lessee, or of any one claiming under him. To bind the lessor's interest, his agreement or consent must be shown: neither his agreement nor consent can be implied from the relation existing between him and the lessee.<sup>75</sup>

<sup>72</sup> Chamberlin v. McCarthy, 59 Hun (N. Y.) 158, 13 N. Y. S. 217, 36 N. Y. St. 61; Ward v. Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674; Block v. Murray, 12 Mont. 545, 31 Pac. 550.

<sup>73</sup> Inverarity v. Stowell, 10 Ore. 261, 264, per Watson, C. J.; Caster v. McClellan, 132 Iowa 502, 109 N. W. 1020; Oregon Lumber Co. v. Becklein, 130 Iowa 42, 106 N. W. 260, 6 L. R. A. (N. S.) 485; Forbes v. Mosquito Fleet Yacht Club, 175 Mass. 432, 56 N. E. 615; Hoffman v. McColgan, 81 Md. 390, 32 Atl.

179; Moore v. Vaughn, 42 Nebr. 696, 60 N. W. 914; Snyder v. Sparks, 73 Nebr. 804, 103 N. W. 662.

<sup>74</sup> Richardson v. Koch, 81 Mo. 264.

<sup>75</sup> Alabama: Rothe v. Bellingrath, 71 Ala. 55. California: Phelps v. Maxwell's Creek Gold M. Co., 49 Cal. 336. Colorado: Wilkins v. Abell, 26 Colo. 462, 58 Pac. 612; Schweizer v. Mansfield, 14 Colo. App. 236, 59 Pac. 843; The Little Valeria, &c. Co. v. Ingersoll, 14 Colo. App. 240, 59 Pac. 970. Georgia: Harman v. Allen, 11 Ga.



In the absence of express permission in the lease to build, the owner's failure to dissent, and his assistance in the erection of the building as agent of the tenant, do not constitute consent, and no liens for labor or material attach to the land. The owner at most only acquiesced in the erection of the building by his lessee, but acquiescence is not consent.<sup>76</sup>

Where a building is erected or repaired under a contract with a lessee alone, his interest only in subject to the lien, inasmuch as a lessee for a term of years is an owner. The fact that the owner of the fee knew that the lessee was making improvements does not subject his interest to the lien, as he does not thereby become a party to the contract.<sup>77</sup>

45; *Gaskill v. Davis*, 61 Ga. 644; *Reppard v. Morrison*, 120 Ga. 28, 47 S. E. 554. Illinois: *Judson v. Stephens*, 75 Ill. 255. Indiana: *Wilkerson v. Rust*, 57 Ind. 172; *Baylies v. Sinex*, 21 Ind. 45; *Lynam v. King*, 9 Ind. 3; *Littler v. Friend*, 167 Ind. 36, 78 N. E. 238. Maryland: *Mills v. Matthews*, 7 Md. 315. Massachusetts: *Francis v. Sayles*, 101 Mass. 435; *Conant v. Brackett*, 112 Mass. 18. Nevada: *Gould v. Wise*, 18 Nev. 253, 3 Pac. 30. New York: *Mumford v. Brown*, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; *Sherwood v. Seaman*, 2 Bosw. (N. Y.) 127; *De Ronde v. Olmsted*, 5 Daly (N. Y.) 398, 47 How. Pr. (N. Y.) 175; *Howard v. Doolittle*, 3 Duer (N. Y.) 464; *Post v. Vetter*, 2 E. D. Smith (N. Y.) 248; *Jones v. Manning*, 53 Hun (N. Y.) 631, 6 N. Y. S. 338, 25 N. Y. St. 771, rehearing denied, 54 Hun (N. Y.) 636, 8 N. Y. S. 946, 26 N. Y. St. 986; *Ross v. Simon*, 8 N. Y. S. 2, 28 N. Y. St. 147, revd. 16 Daly (N. Y.) 159, 9 N. Y. S. 536, 30 N. Y. St.

545; *Carter v. Keeton*, 112 Va. 307, 71 S. E. 554; *Atlas Portland Cement Co. v. Main Line Realty Corp.*, 112 Va. 7, 70 S. E. 536; *McGuinn v. Federated Mines and Milling Co.*, 160 Mo. App. 28, 141 S. W. 467. Where the owner of premises agreed that his tenant should make repairs and that he would allow him a stipulated amount, the owners' premises are subject to a mechanic's lien for materials furnished. *McLean v. Sanford*, 26 App. Div. (N. Y.) 603, 51 N. Y. S. 678.

<sup>76</sup> *Havens v. West Side Electric Light Co.*, 17 N. Y. S. 580, 44 N. Y. St. 589; *Aetna Elevator Co. v. Deeves*, 125 App. Div. (N. Y.) 842, 110 N. Y. S. 124; *Luigart v. Lexington Turf Club*, 130 Ky. 473, 113 S. W. 814.

<sup>77</sup> *Jones v. Manning*, 53 Hun (N. Y.) 631, 6 N. Y. S. 338, 25 N. Y. St. 771, rehearing denied, 54 Hun (N. Y.) 636, 8 N. Y. S. 946, 26 N. Y. St. 986; *Block v. Murray*, 12 Mont. 545, 31 Pac. 550; *McNicholas v.*

The rule is otherwise under a statute which provides that, when the construction of a building upon land is known to the owner of any interest therein, such interest shall be subject to the contractor's lien. In such case, where the construction is at the instance of a leaseholder with the knowledge of the owner, not only the leasehold interest, but also the fee, is subject to such lien.<sup>78</sup>

The right to a lien against a leasehold estate is not lost by the purchase of such estate by the lessor. In equity the two estates will be preserved from a merger in order to effectuate the lien against the leasehold.<sup>79</sup>

At common law the burden of repairs was always cast on the tenant, and the landlord was under no implied obligation to keep the rented premises in repair; and a statute providing for a lien on rented lands must be construed in harmony with this principle, so far as the terms of the statute will permit.

Generally a lessor does not bind his estate for contracts made by his lessee in erecting improvements, although he makes advances to his less for this purpose, and by the terms of the lease the improvements are to belong to the lessor at the expiration of the term.<sup>80</sup>

When the repayment of advances to be made by the lessor is one of the conditions of the lease, claimants of liens for improvements made by the lessee are regarded as having constructive notice of the condition, and the lessor's

Tinsler, 127 Ill. App. 381; Pittsburgh Plate Glass Co. v. Peters Land Co., 123 Ga. 723, 51 S. E. 725; Carter v. Keeton, 112 Va. 307, 71 S. E. 554.

<sup>78</sup> As in California, Code Civ. Proc. 1906, § 1192, as amended by Stats. and Amends. to Code 1911, § 1192. West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231; Phelps v. Maxwells' Creek Gold Min. Co., 49

Cal. 336; Fuquay v. Stickney, 41 Cal. 583; Moore v. Jackson, 49 Cal. 109.

<sup>79</sup> Ellis v. Porter, 8 Utah 108, 29 Pac. 879.

<sup>80</sup> Mills v. Matthews, 7 Md. 315; Stuyvesant v. Browning, 1 J. & S. (N. Y.) 203; Wilkerson v. Rust, 57 Ind. 172; Johnson v. Dewey, 36 Cal. 623; Caldwell Institute v. Young, 2 Duv. (Ky.) 582; Shaw v. Young, 87 Maine 271, 32 Atl. 897.

claim for the repayment of the advances takes precedence of such liens.<sup>81</sup>

But the fact that the lessor has furnished the lessee with money to make improvements upon the demised premises may, with other evidence, tend to show that the lease was made with a view to such improvements, and to charge the lessor's estate with liens for them.<sup>82</sup>

**§ 1277. Lessee's interest only subject to lien for improvements he has agreed to make.**—A clause in a lease, authorizing or compelling the making of alterations and improvements at the expense of the lessee, is not such a consent as will subject the lessor's interest to a lien for repairs or improvements made by the lessee.<sup>83</sup> The consent intended is an absolute consent consistent with the right to do the work on the credit of the building. If the repairs or improvements are to be made at the cost of the lessee, the landlord's consent must be regarded as a qualified or conditional consent, the qualification or condition being that the tenant shall pay the cost. The circumstances that the tenant and not the landlord is to defray the expense of the repairs or

<sup>81</sup> *Mills v. Matthews*, 7 Md. 315. Such an agreement or condition in the lease need not be recorded, under a statutory provision requiring a "mortgage, incumbrance, or lien" to be recorded, in order to have priority over a mechanic's lien.

<sup>82</sup> *Allen v. Sales*, 56 Mo. 28.

<sup>83</sup> *Boteler v. Espen*, 99 Pa. St. 313; *McClintock v. Criswell*, 67 Pa. St. 183; *Newell v. Haworth*, 66 Pa. St. 363. These decisions were made under a statute, applicable to certain counties of the state, that property should not be liable to liens for repairs, alterations, or additions made by a lessee or tenant without the written

consent of the owner. *Mills v. Matthews*, 7 Md. 315; *Knapp v. Brown*, 45 N. Y. 207, 11 Abb. Pr. (N. S.) (N. Y.) 118; *Rice v. Culver*, 172 N. Y. 60, 64 N. E. 761, 68 N. Y. S. 24, 9 N. Y. Ann. Cas. 286, modifying 57 App. Div. (N. Y.) 552; *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619, 59 Pac. 507; *Atlas Portland Cement Co. v. Main Line Realty Corporation*, 112 Va. 7, 70 S. E. 536; *Garber v. Spivak*, 114 N. Y. S. (N. Y.) 762; *Armstrong Cork Co. v. Merchants' Refriger. Co.*, 184 Fed. 199; *Nat. Wall Paper Co. v. Sire*, 37 App. Div. (N. Y.) 405, 55 N. Y. S. 1009, revd. 163 N. Y. 122, 57 N. E. 293.

improvements is conclusive that neither the landlord nor the building is to be subject to the cost of the work.

§ 1278. Whether lessor's permission to lessee to make repairs subjects estate to lien.—Mere permission to a tenant to make repairs or improvements does not subject the owner's property to a lien.<sup>84</sup> A lease of a hotel for five years, which provides that the lessee shall make all necessary repairs, but shall make no alterations or improvements without the lessor's consent, and shall leave all alterations and improvements at the expiration of the term for the lessor's benefit, indicates no intention that the expense of the repairs is to be borne by the lessor, but on the contrary that they are to be borne exclusively by the lessee, and therefore that the lessor's estate is not subject to a lien for such repairs.<sup>85</sup>

A tenant under a written lease for the term of a year had the option to purchase the premises within the year, but in the event of his not purchasing he agreed to surrender the premises at the end of the year, with whatever improvements he had made upon them. During the year the lessee erected large buildings, and put into them valuable machinery, and at the end of the year surrendered possession to the lessor. It was held that the lease and contract to convey did not constitute such consent on the part of the owner as would subject his interest in the land to mechanics' liens; but that, if the lessee had at the time of filing the bill an equitable title or interest under the agreement to purchase, this interest would be subject to the liens, and the complain-

<sup>84</sup> Dietrich v. Crabtree, 8 Wkly. Notes Cas. (Pa.) 418; Boteler v. Espen, 99 Pa. St. 313; Johnson v. Dewey, 36 Cal. 623; Hankinson v. Vantine, 152 N. Y. 20, 46 N. E. 292, revg. 10 Misc. (N. Y.) 185; Aetna Elevator Co. v. Deeves, 125 App.

Div. (N. Y.) 842, 110 N. Y. S. 124; Oregon Lumber Co. v. Beckleen, 130 Iowa 42, 106 N. W. 260, 6 L. R. A. (N. S.) 495.

<sup>85</sup> Boteler v. Espen, 99 Pa. St. 313. But see Shaw v. Young, 87 Maine 271, 32 Atl. 897.

ants would be allowed to exercise the option to purchase, and thus enjoy the benefits of the lessee's contract.<sup>86</sup>

**§ 1279. Necessity that lessor authorize improvements.**—To charge a lessor's estate with the expense of repairs or improvements made by his lessee, there must be affirmative evidence that they were made by his authority, or that he accepted the work and agreed to pay for it. Where a lessor authorized and agreed to pay for certain repairs upon a house, and his tenant at the same time directed the building of a barn upon the premises, and the builder presented to the lessor a bill for the entire work, it was held that his retention of the bill, which was correct so far as it related to the repairs upon the house, was insufficient to show his acceptance and ratification of the work upon the barn.<sup>87</sup>

The consent of a corporation to the construction of a building upon its land by a tenant cannot be implied from the presence of a director on one occasion during the construction, unless he was specially intrusted with the management of the property.<sup>88</sup>

<sup>86</sup> *Currier v. Cummings*, 40 N. J. Eq. 145, 3 Atl. 174. Under the statute of the state, the written consent of the owner is necessary to subject his estate to liens for buildings erected by tenants. See ante, § 1216.

<sup>87</sup> *Engfer v. Roemer*, 71 Wis. 11, 36 N. W. 618. Per Cole, J.: "In our opinion, the fact that the defendant received and retained the plaintiff's bill for a long time, if such were the case, was entitled to but little weight. . . . Under some circumstances, the failure of a party to object to an account rendered raises a strong presumption of its correctness; but even that presumption may be rebutted by proof tending to establish a

contrary inference." Where lessees were to improve a mine for the benefit of the owner, the latter's interest is chargeable with a lien. *Higgins v. Carlotta &c. Co.*, 148 Cal. 700, 84 Pac. 758, 113 Am. St. 344. Where lessee under ninety-nine year lease is to erect improvements as a joint enterprise, the interest of the lessor is subject to a mechanic's lien. *Crandall v. Sorg*, 198 Ill. 48, 64 N. E. 769. And a covenant against liens does not release the interest of the lessor. *Carey-Lombard &c. Co. v. Jones*, 187 Ill. 203, 58 N. E. 347, revg. 87 Ill. App. 533.

<sup>88</sup> *Lothian v. Wood*, 55 Cal. 159. See, however, *Phelps v. Maxwell's Creek Gold Min. Co.*, 49 Cal. 336.

§ 1280. **Covenant to build or repair.**—The interest of the lessor is not subject to a lien for labor or materials furnished under a contract with a lessee, although the lease contains a covenant that the lessee shall erect a building, or shall make certain repairs or alterations of existing buildings, and provides that at the end of the term, or earlier determination of the lease by reason of the lessee's failure to perform his covenants, the building or improvements shall revert to and become the property of the lessor.<sup>89</sup> In such case a lien can not be enforced against the interest of the lessor, but only against that of the lessee, in the absence of evidence that the lessor had some connection with the contract for labor or materials other than that implied by the terms of the lease. Even if it be provided that at the termination of the lease the value of the improvements shall be paid by the lessor or deducted from the rent then due, this does not constitute, the lessee the agent of the lessor in contracting for labor or materials, nor does it make him liable to pay for them.<sup>90</sup>

The estate of a lessor is not subject to a lien for labor contracted for by his lessee who has covenanted to make all necessary repairs and improvements at his own expense.<sup>91</sup> It does not matter that the repairs and alterations made are apparent, and that the lessor lives in the immediate neighborhood.<sup>92</sup> But it has been held that if the improvements are ultimately to be at the expense of the lessor, though at the time paid for by the lessee, the lessor's estate is liable to a lien therefor. Thus, where the agreement was that the lessee should make certain improvements at his

<sup>89</sup> *Cornell v. Barney*, 94 N. Y. 394; *Rothe v. Bellingrath*, 71 Ala. 55; *Mills v. Matthews*, 7 Md. 315; *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572; *Dutro v. Wilson*, 4 Ohio St. 101.

<sup>90</sup> *Rothe v. Bellingrath*, 71 Ala. 55.

<sup>91</sup> *Francis v. Sayles*, 101 Mass. 435; *Conant v. Brackett*, 112 Mass. 18; *Grantwood Lumber & Supply Co. v. Abbott*, 80 N. J. L. 564, 78 Atl. 1046.

<sup>92</sup> *Francis v. Sayles*, 101 Mass. 435.

own expense, but the lessor as compensation for them was to give the lessee a lease for ten years, with the use and occupation of the property as improved, when the improvements should revert to the owner, it was held that the lessor's interest was subject to a lien therefor. "When the tenant, or the proposed tenant, contracts with the owner of the land to add to or to repair, compensation to be made by the owner, either in money or in the use and occupation of the premises, the contract falls in the category of the ordinary one to build, and the party adding to, or repairing, or constructing the building is doing it for the owner, and at his ultimate expense."<sup>93</sup>

**§ 1281. Statute under which lien is claimed.**—Much depends upon the language of the statute under which the lien is claimed, as regards the authority of the lessee to bind the estate of the lessor. Thus, under a statute which provided that, if the person who caused the building to be constructed owned less than a fee simple estate, then only his interest shall be subject to a lien, it was held that a lessee, who erected buildings in pursuance with a covenant in his lease, which were to revert to the lessor at the expiration of the term, could subject only his own interest in the premises to a lien for the improvements;<sup>94</sup> yet, under a statute which gave a lien upon a building erected upon land with the permission of the owner, it was in the same state held that the lessor's interest was subject to a lien for improvements made by a lessee under like provisions of a lease.<sup>95</sup>

<sup>93</sup> *Ness v. Wood*, 42 Minn. 427, 44 N. W. 313.

<sup>94</sup> *Cornell v. Barney*, 94 N. Y. 394. And so if the terms of the statutes are, "with the direction of the owner or his agent," no lien can attach to the lessor's interest under such a lease. *Knapp v. Brown*, 45 N. Y. 207, 11 Abb. Pr.

(N. S.) (N. Y.) 118; *Muldoon v. Pitt*, 54 N. Y. 269; *Burbridge v. Marcy*, 54 How. Pr. (N. Y.) 446. So where the terms of the statute are, "at the instance of the owner or of his agent." *Cornell v. Barney*, 26 Hun (N. Y.) 134, *affd.* 94 N. Y. 394.

<sup>95</sup> *Burkitt v. Harper*, 79 N. Y.

**1282. Rule in Pennsylvania.**—In Pennsylvania the decisions arising under building contracts of lessees are somewhat exceptional. Where the repairs or improvements made by a tenant are really made at the expense of the landlord, either in money or in the use of the premises, the tenant is regarded as the agent of the landlord in making them, and the landlord's interest or estate may be subject to a lien for such repairs or improvements. A lease providing that the tenant shall make such repairs or improvements, and that the lessee shall pay, for the whole or a part of the term, only a nominal rent, is a building contract as well as a lease, with all the incidents and liabilities of such a contract. The building is erected or the repairs are made by the tenant for the landlord, with his assent and at his ultimate expense, being paid for out of the rent, or from the use and profit of the premises.<sup>96</sup> It does not make any difference that the contract stipulates that the improvements are to be made by the tenant at his own expense. This is no more than is implied in every contract to build; for it is always contemplated that the contractor shall build at his own expense.<sup>97</sup>

But no lien attaches to the lessor's property for improvements made by the lessee which are not authorized by the lease. There is no implied authority in the tenant to make improvements subject to a lien on the landlord's property. Therefore, if the lessee goes beyond the terms of the lease, and for his own convenience and use erects buildings, or

273, affg. 14 Hun (N. Y.) 581; Otis v. Dodd, 90 N. Y. 336, affg. 24 Hun (N. Y.) 538; Jones v. Menke, 168 N. Y. 61, 60 N. E. 1053, revg. 36 App. Div. (N. Y.) 636, 56 N. Y. S. 1109. See Brokaw v. Tyler, 91 Ill. App. 148.

<sup>96</sup> Hall v. Parker, 94 Pa. St. 109, 8 Wkly. N. Cas. 325, 14 Phila. (Pa.) 619; Barclay v. Wainwright, 86 Pa. St. 191, 35 Leg. Int. 121;

Woodward v. Leiby, 36 Pa. St. 437; Leiby v. Wilson, 40 Pa. St. 63; Hopper v. Childs, 43 Pa. St. 310; Fisher v. Rush, 71 Pa. St. 40; Rush v. Perot, 12 Phila. (Pa.) 175; Wainwright v. Barclay, 12 Phila. (Pa.) 221; Amos v. Clare, 9 Phila. (Pa.) 35.

<sup>97</sup> Hall v. Parker, 94 Pa. St. 109, 8 Wkly. N. Cas. 325.



puts in steam power in place of water power, the owner's estate is not subject to liens therefore.<sup>98</sup>

It is not necessary that the lease should contain an express covenant to build to make it an improvement lease, under which the lessor's estate will be bound; it is sufficient if it appears that it was the intention of the parties, at the time of the execution of the lease, that the improvements should be made.<sup>99</sup>

<sup>98</sup> Long v. McLanahan, 103 Pa. St. 537. See also, Tenth Nat. Bank of Philadelphia v. Smith Const. Co., 218 Pa. 584, 67 Atl. 874, where it is held that the appointment of receiver with authority to make improvements

but which directs him to pay for the materials out of receipts, one who furnishes materials is not entitled to a lien therefor.

<sup>99</sup> Barclay v. Wainwright, 86 Pa. St. 191, 35 Leg. Int. 121.

## CHAPTER XXXII.

### MECHANICS' LIENS OF SUBCONTRACTORS.

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**§ 1283. Who are subcontractors as defined by statutes.—**

Subcontractors, as defined by statute in several states, are all persons except those who have contracts directly with the owner or his agent.<sup>1</sup> In most of the states, subcontractors equally with contractors are expressly given liens for labor done and materials furnished. In determining who are entitled to liens, reference must be had to the statute which confers the right. The statute by its terms will generally show whether mechanics, laborers, and materialmen who in any way contribute work or materials towards the construction of a building or other improvement, are equally entitled with subcontractors to claim a lien.

Aside from statutory definitions or provisions, it may be said in general that one who contracts directly with the owner for the construction or repair of a house or other improvement is an original contractor;<sup>2</sup> and that one who contracts with a person who has so contracted with the owner is a subcontractor.<sup>2a</sup> But one who furnishes mate-

<sup>1</sup> Arkansas: Dig. of Stats. 1904, § 4993; Buckley v. Taylor, 51 Ark. 302, 11 S. W. 281. North Dakota: Rev. Code 1905, § 6250. South Dakota: Code 1903, § 712. Iowa: Code 1897, § 3097. Utah: Comp. Laws 1907, § 1383. In Colorado, every person given a mechanic's lien, either express or implied, whose contract is with the owner or reputed owner or his agent or other representative, shall be a principal contractor and all others subcontractors. Mills Ann. Stat. 1912, § 4588.

<sup>2</sup> Ambrose Mfg. Co. v. Gapen, 22 Mo. App. 397; Sparks v. Butte County Grav. Min. Co., 55 Cal. 389; Matthews v. Brew. Assn., 83 Tex. 604, 19 S. W. 150; Hearne v. Chillicothe & Brunswick R. Co., 53 Mo. 324; Merchants' &c., M.

Sav. Bank v. Dashiell, 25 Grat. (Va.) 616; Wisconsin Planing Mill Co. v. Grams, 72 Wis. 275, 39 N. W. 531; La Grille v. Mallard, 90 Cal. 373, 27 Pac. 294; Knickerbocker Ice Co. v. Vandermark, 50 Ill. App. 231; Johnson v. Spencer, 49 Ind. App. 166, 96 N. E. 1041; Hermann v. New York, 130 App. Div. (N. Y.) 531, 114 N. Y. S. 1107; Hedden Const. Co. v. Proctor & Gamble Co., 62 Misc. (N. Y.) 129, 114 N. Y. S. 1103.

<sup>2a</sup> Duignan v. Montana Club, 16 Mont. 189, 40 Pac. 294; Eccleston v. Hetting, 17 Mont. 88, 42 Pac. 105; Travis v. Meredith, 2 Marv. (Del.) 376, 43 Atl. 176; South Side Lumber Co. v. Date, 156 Ill. App. 430; Hermann v. New York, 130 App. Div. (N. Y.) 539, 114 N. Y. S. 1107.

rials directly to the owner, to be used in the construction of a building which is being erected by him, is not an original contractor.<sup>3</sup> On the contrary a material-man who contracts directly with the owner and has no privity with the contractor for construction has been held an original contractor and entitled to sixty days to file his lien.<sup>3a</sup> The term "subcontractor" is sometimes used in a broader sense, and as including all persons employed directly or remotely under the contractor; but this use of the term is not warranted except by the plainest expressions of the statute.

In some states a subcontractor in the second or more remote degree is not entitled to a lien given to a subcontractor, and not in terms given to contractors under a subcontractor. The statutes do not generally extend the privilege to any but direct subcontractors; and to extend it beyond them the statute must give the privilege in the plainest terms. "If the right to the lien can be extended indefinitely, then it is very obvious there would be no safety in contracting for the erection of a building, and no prudent man would do it."<sup>4</sup>

<sup>3</sup> *Schwartz v. Knight*, 74 Cal. 432, 16 Pac. 235.

<sup>3a</sup> *Colorado Iron Works v. Rickenberg*, 4 Idaho 262, 38 Pac. 651.

<sup>4</sup> *West Virginia: McGugin v. Ohio River R. Co.*, 33 W. Va. 63, 10 S. E. 36, per English, J. *Illinois: Cairo & St. L. R. Co. v. Watson*, 85 Ill. 531; *Newhall v. Kastens*, 70 Ill. 156; *Rothgerber v. Dupuy*, 64 Ill. 452. *Kansas: Nixon v. Cydon Lodge*, 56 Kans. 298, 43 Pac. 236. *Minnesota: Merriman v. Jones*, 43 Minn. 29, 44 N. W. 526. *New Jersey: Carlisle v. Knapp*, 51 N. J. L. 329, 331, 17 Atl. 633, per McGill, Chancellor: "The persons intended to be benefited by the section are the persons

who have the right to demand payment from that contractor with whom the owner has an account. The construction of the statute contended for by the plaintiff in error, that there is no limit of the material-men who may resort to the owner, would lead to hardship and inconvenience by putting the owner and contractor upon inquiry, through successive dealers in the materials used in the building, to find who has or who has not been paid by his immediate debtor. Under such a construction, any unpaid dealer, however remote, may demand payment; and it admits of a situation that may be oppressive to the contractor, where an

Of course there may be several principal contractors for the erection of a building or other improvement; and there may be numerous subcontractors under each principal contractor. One contractor may undertake to lay the foundations of the building; another to build the walls; another to finish the interior; another to paint the building; and so on through all the trades whose services may be required in the work. One contracting to supply the marble mantels for a house is a contractor, through whom others employed to do the work or furnish a portion of the marble may acquire a lien.<sup>5</sup>

A contractor with whom a mill-owner has contracted for repairs to a mill can not, without the authority or knowledge of the mill-owner, by ordering machinery and having it charged directly to the mill-owner by the manufacturers, constitute the latter original contractors with the mill-owner, instead of subcontractors.<sup>6</sup> A person who agrees to set up a steam plant in a factory under a written contract is not a "contractor" where the only work to be done on the premises is incidental to the delivery of the machinery and placing it in position.<sup>7</sup> Where a railroad company sold and conveyed an unfinished railroad to another company, and bound itself to complete the road, the first company thereby became a principal contractor, and the persons contracting with that company to do work upon such road were subcontractors only, and could establish a lien only by complying with the statute relating to subcontractors.<sup>8</sup>

irresponsible subcontractor may, by extravagant purchase of material, which will be paid by the owner from the contractor's fund, so far exhaust the subcontractor's price that the remainder of it will not suffice to enable him to complete his work, or the principal contractor to do it without loss."

<sup>5</sup> *Derrickson v. Nagle*, 2 Phila.

(Pa.) 120; *Vogel v. Luitwieler*, 52 Hun (N. Y.) 184, 5 N. Y. S. 154, 23 N. Y. St. 313.

<sup>6</sup> *Stout v. McLachlin*, 38 Kans. 120, 15 Pac. 902.

<sup>7</sup> *Hinckley v. Field's Biscuit & Cracker Co.*, 91 Cal. 136, 27 Pac. 594.

<sup>8</sup> *Templin v. Chicago, B. & P. R. Co.*, 73 Iowa 548, 35 N. W. 634.

§ 1284. **Presumption of reliance on lien.**—A subcontractor, laborer, or material-man, in dealing with the contractor, is presumed to rely upon his lien upon the property.<sup>9</sup> It is not necessary for him to prove affirmatively that he relied upon the credit of the building, if his labor or materials actually entered into its construction. The burden is upon the landowner to show that he relied upon the credit of the contractor alone. The law gives the subcontractor the right of a lien if he complies with its requirements, and it is always to be presumed that he accepts the benefits the law confers. The fact that he brings himself within the requirements of the statute, and afterwards seeks to enforce his right, is sufficient proof that he intended to rely upon this right.

§ 1285. **Modes adopted by mechanic's lien statutes.**—There are two modes adopted by different mechanics' lien statutes for securing the benefits of the statutes to subcontractors and others employed by the principal contractor.<sup>9a</sup> The earlier method, sometimes called the Pennsylvania system, which is adhered to in many states,<sup>10</sup> was to give the

<sup>9</sup> *Wolf v. Batcheldor*, 56 Pa. St. 87; *Church v. Allison*, 10 Pa. St. 413; *Van Billiard v. Nace*, 1 Grant's Cases (Pa.) 233, 235; *Hommel v. Lewis*, 104 Pa. St. 465, 470. Per Green, J.: "The statute does not require either that the materials shall be charged against the owner, or that the claim of lien shall assert that they were furnished on the credit of the building, or that affirmative proof shall be made that such was the fact. Of course if the articles were charged against the contractor alone, it is some evidence, though slight only, that they were furnished on his credit, and of this the defendant had the full

benefit under the charge of the court, which left the whole question to the jury."

<sup>9a</sup> *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837.

<sup>10</sup> In *Hunter v. Truckee Lodge*, 14 Nev. 24, 41, Beatty, C. J., said: "It seems that the plan of conferring on subcontractors and material-men a right of lien for all sums which may be due them, irrespective of payments already made by the owner to the contractor, is passing out of favor, and that the tendency in the later legislation in the various states of the Union is to confine their right to what may be owing by the owners at the time of notice

subcontractor, as well as the contractor, a direct and absolute lien upon the property; and when a contractor and a subcontractor both sought to enforce liens upon the same property for the same services, the lien of the subcontractor was given precedence. Under this method the owner can protect himself only by retaining in his hands from the amount due the contractor a sum sufficient to pay whatever claims there may be on the part of laborers, mechanics, and material-men whom the contractor has employed. The owner is afforded some relief by provisions requiring that claims of liens shall be made within a short time after the completion of the building, or shall be wholly barred.

By the other mode, which is the mode adopted by other states, sometimes called the New York system, the subcontractor is allowed, by giving notice of his claim to the owner, to intercept the money due from him to the contractor, and cause it to be paid to him in place of the contractor. The subcontractor has no absolute lien upon the property. He can have no lien, if the contractor is not in a position to claim a lien. If nothing is due from the owner to the contractor, the owner has nothing to retain for the subcontractor, and consequently his claim can not be secured by a lien.

### § 1285a. Lien of subcontractor on bonds and warrants.—

A lien of subcontractor upon bonds and warrants due to the original contractor is not unconstitutional. The objection to a statute<sup>11</sup> giving this remedy was that it gave a privilege to the subcontractor which was denied the original contractor.<sup>12</sup> But it would be useless and inconsistent to give the original contractor a lien on bonds and war-

to him of their claims." In Montana, however, the direct lien was, in 1887, enacted in place of the lien by equitable subrogation which had previously prevailed. Code (Civ. Proc.) 1895, § 21230.

<sup>11</sup> Act of June 26, 1895.

<sup>12</sup> *West Chicago Park Com. v. Western Granite Co.*, 200 Ill. 527, 66 N. E. 37. See also, *Pirola v. W. J. Turner Co.*, 238 Ill. 210, 87 N. E. 354, 142 Ill. App. 657.

rants because he was entitled to an absolute transfer of them in payment for his work. On the other hand it had been recognized as against public policy to give contractors liens on public improvements. The statute gave a valid remedy to the subcontractor to secure his claims against the original contractor and was not in conflict with the constitution.

§ 1286. **Notice to the owner.**—The statutes of the states in which this system prevails provide in general that no subcontractor, or other person acting under the principal contractor, shall be entitled to a lien as against the owner unless he gives notice to the owner within a specified time of his claim of lien. The statutes differ in terms and in many minor details; but in the object sought, and in their general effect, they are the same.<sup>13</sup>

The statutes are founded upon the general principle that moneys due or to grow due from the owner on a building contract constitute a fund to which the liens of subcontractors attach when filed in conformity with the statute.<sup>14</sup> It is also the intent of the statutes, with relation to subcontractors, that they should be subrogated to the rights of the contractor with respect to the funds due or to become due under the contract.<sup>15</sup>

The object of the provision that a subcontractor shall give

<sup>13</sup> *Wightman v. Brenner*, 26 N. J. Eq. 489; *Frank v. Freeholders*, 39 N. J. L. 347; *Mayer v. Mutchler*, 50 N. J. L. 162, 13 Atl. 620; *Budd v. School-Dist. No. 4*, 51 N. J. L. 36, 16 Atl. 194; *Anderson v. Huff*, 49 N. J. Eq. 349, 23 Atl. 654. A subcontractor can not extend the time for filing a lien by furnishing better material for defective material before that time. *H. F. Cady Lumber Co. v. Reed*, 90 Nebr. 293, 133 N. W. 424.

<sup>14</sup> *Crane v. Genin*, 60 N. Y. 127;

*Payne v. Wilson*, 74 N. Y. 348, 355; *Post v. Campbell*, 83 N. Y. 279, 282; *Gibson v. Lenane*, 94 N. Y. 183; *Larkin v. McMullin*, 120 N. Y. 206, 24 N. E. 447.

<sup>15</sup> *Herbert v. Herbert*, 57 How. Pr. (N. Y.) 333; *Schneider v. Hohein*, 41 How. Pr. (N. Y.) 232; *Hofgesang v. Meyer*, 2 Abb. N. Cas. (N. Y.) 111; *Cheney v. Troy Hospital*, 65 N. Y. 282; *McMillan v. Seneca Lake Grape & Wine Co.*, 5 Hun (N. Y.) 12, revd. 67 N. Y. 215.



notice to the owner of his demand and claim of lien is, that the owner may be enabled to keep back from the amount payable to the contractor a sufficient sum to indemnify himself against the claims of subcontractors upon the property.<sup>16</sup> The failure of the subcontractor to give the required notice of his intention to claim a lien prevents his acquiring any lien,<sup>17</sup> or a lien for more than is actually due from the owner to the contractor at the time the notice is served.<sup>18</sup>

If a notice by one furnishing materials or rendering services is required to be given to the owner within sixty days after he shall have commenced to furnish material or render services, and he fails to give the notice within that time, he can not afterwards give a notice which shall relate back sixty days from the time of giving it, and secure a lien from such time.<sup>19</sup> If the statute requires the subcontractor to state in his notice the probable value of the work or materials which he intends to furnish, and he fails to specify any particular sum for their probable value, his notice is ineffectual.<sup>20</sup>

The notice takes effect from the time it is given or served in the manner prescribed. From that time the owner is required to retain money due, or to become due, upon the contract, and to apply it to the payment of the claim of which the subcontractor has notified him, if the subcontractor follows the requirements of the statute and establishes his right.<sup>21</sup>

<sup>16</sup> De Witt v. Smith, 63 Mo. 263.

<sup>17</sup> St. Louis Nat. Stock Yards v. O'Reilly, 85 Ill. 546; Butler v. Gain, 128 Ill. 23, 21 N. E. 350; Shafer v. Archbold, 116 Ind. 29, 18 N. E. 56; McMillan v. Phillips, 5 Dak. 294, 40 N. W. 349; Kinney v. Blackmer, 55 Conn. 261, 10 Atl. 568; Robbins v. Blevins, 109 Mass. 219; Gogin v. Walsh, 124 Mass. 516; Bametzrieder v. Canevin, 44 Pa. Super. Ct. 18.

<sup>18</sup> Cutler v. McCormick, 48 Iowa 406.

<sup>19</sup> Hill v. Mathewson, 56 Conn. 323, 15 Atl. 368.

<sup>20</sup> Whiteside v. Lebcher, 7 Mont. 473, 17 Pac. 548.

<sup>21</sup> Gridley v. Sumner, 43 Conn. 14; Wightman v. Brenner, 26 N. J. Eq. 489; Mayer v. Mutchler, 50 N. J. L. 162, 13 Atl. 620; McAlpin v. Duncan, 16 Cal. 126; Fullenwider

Where no notice is served on the owner and he is under no personal liability, no judgment can be rendered against him.<sup>21a</sup>

Whether the notice operates as a lien from the time it is served upon the owner, or simply confers a right of action against the owner,<sup>22</sup> or gives him a remedy by action in addition to a lien,<sup>23</sup> depends upon the terms of the statute.

An owner is not liable to subcontractors for money paid by him to the order of the original contractor before he was served with notice.<sup>24</sup>

A notice required to be given to the owner within a certain time can not be amended after that time has elapsed.<sup>25</sup>

**§ 1287. Extent of lien.**—Generally, a subcontractor, laborer, or material-man can acquire a lien only to the extent of the sum due from the owner to the contractor at the time of giving notice to the owner or of filing the lien.<sup>26</sup>

v. Longmoor, 73 Tex. 480, 11 S. W. 500. The lien attaches, not only to what may be due to the contractor at the time of the notice, but, whenever the period arises when the owner could be compelled to answer to the contractor for any portion of the contract price, he must respect the notice theretofore given. Mayer v. Mutchler, 50 N. J. L. 162, 13 Atl. 620; Budd v. School-Dist. No. 4, 51 N. J. L. 36, 16 Atl. 194.

<sup>21a</sup> Smith v. Frank Gardner Hdw. Co., 83 Miss. 654, 36 So. 9; Jones v. Balsley, 27 Okla. 220, 111 Pac. 942.

<sup>22</sup> Dunn v. Kanmacher, 26 Ohio St. 497.

<sup>23</sup> Bedsole v. Peters, 79 Ala. 133; Crawford v. Crockett, 55 Ind. 220; Colter v. Frese, 45 Ind. 96; O'Halloran v. Leachey, 39 Ind. 150.

<sup>24</sup> Fullenwider v. Longmoor, 73 Tex. 480, 11 S. W. 500; Burt v. Parker Co., 77 Tex. 338, 14 S. W. 335; Jones v. Balsley, 27 Okla. 220, 111 Pac. 942.

<sup>25</sup> Kenly v. Sisters of Charity, 63 Md. 306.

<sup>26</sup> Alabama: Trammell v. Hudson, 78 Ala. 222; Childers v. Greenville, 69 Ala. 103; Geiger v. Hussey, 63 Ala. 338; Willingham v. Long, 70 Ala. 587. California: O'Donnell v. Kramer, 65 Cal. 353; Turner v. Strenzel, 70 Cal. 28; Rosenkranz v. Wagner, 62 Cal. 151; Blythe v. Poultney, 31 Cal. 233, 234; Wiggins v. Bridge, 70 Cal. 437, 11 Pac. 754; Whittier v. Hollister, 64 Cal. 283, 30 Pac. 846; Renton v. Conley, 49 Cal. 185, 187; Wells v. Cahn, 51 Cal. 423; Dingley v. Greene, 54 Cal. 333; McAlpin v. Duncan, 16 Cal. 126, 127; Knowles

If the owner has, prior to such notice, at the request of the contractor, assumed an obligation to pay another subcon-

v. Joost, 13 Cal. 620; Bowen v. Aubrey, 22 Cal. 566; Dore v. Sellers, 27 Cal. 588; Latson v. Nelson, 11 Pac. Coast L. J. 589; Whittier v. Wilbur, 48 Cal. 175; Davis v. Livingston, 29 Cal. 283. But if the construction contract be not executed and recorded as required by statute, § 1190, the subcontractors, laborers, and material-men have their lien precisely as no contract had ever been made between the owner and contractor, and the material had been furnished and work done for the owner at his special instance and request. Kellogg v. Howes, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588, writ of error dismissed, 136 U. S. 639, 10 Sup. Ct. 1069, 34 L. Ed. 577. Though the legislature can not compel the owner to pay more than he contracted to pay, unless notified of the claims of subcontractors before payment to the contractor, yet the legislature has power to require a record of the contract as a condition of its validity, and to forbid payments to the contractor as against materialmen and laborers, unless the contract is recorded. The owner may maintain an action to bring in all interested parties claiming liens so that one decree may settle all rights and may offer to pay into court the amount due the contractor. Stimson v. Durham, &c., 146 Cal. 281, 79 Pac. 968. By thus paying the money into court the owner can avoid interest and costs. Hooper

v. Fletcher, 145 Cal. 375, 79 Pac. 418. Connecticut: Spaulding v. Thompson Eccl. Soc., 27 Conn. 573; White v. Washington School District, 42 Conn. 541; Waterbury Lumber, &c. Co. v. Coogan, 73 Conn. 519, 48 Atl. 204. Florida: Wylly Academy v. Sanford, 17 Fla. 162. Georgia: Guernsey v. Reeves, 58 Ga. 290; Rowell v. Harris, 121 Ga. 239, 48 S. E. 948. Illinois: Douglas v. McCord, 12 Bradw. (Ill.) 278; Prescott v. Maxwell, 48 Ill. 82. Iowa: Andrews v. Burdick, 62 Iowa 714, 16 N. W. 275; Sandval v. Ford, 55 Iowa 461, 8 N. W. 324; Stewart v. Wright, 52 Iowa 335, 3 N. W. 144; Smith v. Iowa City Loan & Building Assn., 60 Iowa 164, 14 N. W. 221; Cutler v. McCormick, 48 Iowa 406. Kansas: Main Street Hotel Co. v. Horton Hdw. Co., 56 Kans. 448, 43 Pac. 769. Kentucky: Terrell v. McHenry, 121 Ky. 452, 28 Ky. L. 402, 89 S. W. 306, applying to a case where the original contractor was not entitled to anything because of a breach of contract. Mississippi: Herrin v. Warren, 61 Miss. 509; Chamberlin-Hunt Academy v. Port Gibson Brick, &c., Co., 80 Miss. 517, 32 So. 116. New Hampshire: Bixby v. Whitcomb, 69 N. H. 646, 46 Atl. 1049. Cudworth v. Bostwick, 69 N. H. 536, 45 Atl. 408. New Jersey: Superintendent of Schools v. Heath, 15 N. J. Eq. 22; Reeve v. Elmen-dorf, 38 N. J. L. 125; Craig v. Smith, 37 N. J. L. 549; St. Peter's Catholic Church v. Vannote, 66 N. J. Eq. 78, 56 Atl. 1037. New York:

tractor or material-man, to the extent of such obligation it constitutes payment.<sup>27</sup> The acceptance of orders drawn upon the owner by the contractor, in favor of subcontractors or material-men, operates as an equitable assignment of so much of the fund as is required to satisfy such orders; and if these are accepted to the full amount of the owner's liability upon the contract, no lien can be acquired by other subcontractors or material-men.<sup>28</sup> It is also competent for the owner, upon accepting an order drawn upon him by the contractor, to make an arrangement with the payee for its future payment; and such extension of time of payment does not affect the character of the order or its effect as payment.<sup>29</sup>

Gibson v. Lenane, 94 N. Y. 183; Garrison v. Mooney, 9 Daly (N. Y.) 218; Crane v. Genin, 60 N. Y. 127; Carman v. McInerow, 13 N. Y. 70, 2 E. D. Smith (N. Y.) 689; Schneider v. Hobein, 41 How. Pr. (N. Y.) 232; Smith v. Coe, 2 Hilton (N. Y.) 365, affd. 29 N. Y. 666; Ferguson v. Burk, 4 E. D. Smith (N. Y.) 760; Lynch v. Cashman, 3 E. D. Smith (N. Y.) 660; Sullivan v. Brewster, 1 E. D. Smith (N. Y.) 681; Hofgesang v. Meyer, 2 Abb. N. Cas. (N. Y.) 111; Wright v. Roberts, 43 Hun (N. Y.) 413, 6 N. Y. S. 769, affd. 62 Hun (N. Y.) 619, 16 N. Y. S. 818, 43 N. Y. St. 20; Heckmann v. Pinkney, 81 N. Y. 211; Dart v. Fitch, 23 Hun (N. Y.) 361; Weyer v. Beach, 14 Hun (N. Y.) 231, affd. 79 N. Y. 409; Lombard v. Syracuse, B. & N. Y. R. Co., 55 N. Y. 491, affd. 62 N. Y. 290; Herbert v. Herbert, 57 How. Pr. (N. Y.) 333; Drake v. O'Donnell, 49 How. Pr. (N. Y.) 25; Larkin v. McMullin, 120 N. Y. 206, 24 N. E. 447, reversing 14 Daly (N. Y.) 311; Beardsley

v. Cook, 143 N. Y. 143, 38 N. E. 109; Brainard v. Kings, 155 N. Y. 538, affg. 84 Hun (N. Y.) 290, 32 N. Y. S. 311, 65 N. Y. St. 468. Ohio: Copeland v. Manton, 22 Ohio St. 398, 403, per Day, J.: "It seems to be the policy of the act to confer upon the subcontractor only the right to be subrogated to the claims of the contractor, under his contract with the owner, at the time the requisite notice is given. If, therefore, the contractor has then no claim against the owner, or there are no more payments due or to be made to him, the act does not in terms or effect bind the owner to retain anything for the benefit of the subcontractor, and he obtains no lien on the amount the owner is bound in law and equity to pay to another."

<sup>27</sup> As by indorsing note. Smith v. Merriam, 67 Barb. (N. Y.) 403.

<sup>28</sup> Garrison v. Mooney, 9 Daly (N. Y.) 218; Gibson v. Lenane, 94 N. Y. 183.

<sup>29</sup> Gibson v. Lenane, 94 N. Y. 183.

But a verbal guaranty by the owner to pay certain debts of the contractor does not amount to a payment of them, and can not be allowed as such in determining what is due from him to the contractor at the time he receives notice of the claim of a subcontractor.<sup>30</sup> The rights of the subcontractor being fixed at the time of the notice, it is immaterial that the owner afterwards, before suit is brought against him, pays the bills he has guaranteed.<sup>31</sup>

Yet it is held that payments made by the owner of just debts due to subcontractors on the order of the contractor, accepted verbally before notice of lien is served on the owner by other subcontractors, are good, though the payments be made after service of such notice.<sup>32</sup>

**§ 1288. Changes in the contract.**—The parties to the contract have in general the right to modify it as they deem best. But where subcontractors are presumed to have acted on the faith of the original contract, and it is afterwards changed in such a way as to effect the interests of subcontractors, their rights should be determined in accordance with the original contract.<sup>33</sup> Where several joint contractors, soon after the execution of the principal contract with the owner, made an agreement between themselves, apportioning the work and the compensation, which the owner verbally assented to, it was held that this agreement was not binding upon a subcontractor of one of the joint contractors.<sup>34</sup>

**§ 1288a. Notice by subcontractor as required by statute.**—Notice in accordance with the statute is essential to a lien by a subcontractor.<sup>34a</sup> If he has furnished materials to one

<sup>30</sup> Gridley v. Sumner, 43 Conn. 14.

<sup>31</sup> Gridley v. Sumner, 43 Conn. 14.

<sup>32</sup> St. Louis Nat. Stock Yards v. O'Reilly, 85 Ill. 546.

<sup>33</sup> Brown v. Lowell, 79 Ill. 484;

Shaw v. Stewart, 43 Kans. 572, 23 Pac. 616.

<sup>34</sup> Davis v. Livingston, 29 Cal. 283.

<sup>34a</sup> Schmelzer v. Chicago Ave. S. & D. Co., 85 Ill. App. 596.

who has possession of land under a contract for the purchase of it, unless the circumstances are such as to make the vendor personally liable for them, the material-man must give him notice of his intention to claim a lien. If the materials are not furnished till the vendor has conveyed the land to the purchaser, no notice to the vendee is necessary, because the materials are in that case furnished upon his order while owner of the land.<sup>35</sup> If the materials were not furnished until after the delivery of the deed to such purchaser, and the simultaneous delivery of the mortgage to the vendor, the latter was not entitled to notice of the lien.<sup>36</sup>

§ 1289. Subcontractor bound by contractor's contract. —The subcontractor is bound by the terms of the contract between the owner and the contractor.<sup>37</sup> The right of the subcontractor to any lien arises from the contract or con-

<sup>35</sup> *Ellenwood v. Burgess*, 144 Mass. 534, 11 N. E. 755.

<sup>36</sup> *Carew v. Stubbs*, 155 Mass. 549, 30 N. E. 219; *Allen, Holmes, and Knowlton, JJs.* were of opinion that no lien can be claimed against the vendor for materials furnished to the vendee without notice to the vendor, who was the owner when the contract was made; and that the vendors' right is no less in this respect for the protection of his title after his conveyance of the property, and his receipt of a mortgage back as a part of the same transaction.

<sup>37</sup> *Stewart v. Wright*, 52 Iowa 335, 3 N. W. 144; *Andrews v. Burdick*, 62 Iowa 714, 16 N. W. 275; *Roland v. Centerville, M. & A. R. Co.*, 61 Iowa 380, 16 N. W. 355; *Nash v. Chicago, M. & St. P. R. Co.*, 62 Iowa 49, 17 N. W. 106; *Sandval v. Ford*, 55 Iowa 461, 8 N. W. 324; *Robinson v. State Ins.*

*Co.*, 55 Iowa 489, 8 N. W. 314; *Stout v. Golden*, 9 W. Va. 231; *McKnight v. Washington*, 8 W. Va. 666; *Bowen v. Aubrey*, 22 Cal. 566; *Dingley v. Greene*, 54 Cal. 333; *Henley v. Wadsworth*, 38 Cal. 356; *Shaver v. Murdock*, 36 Cal. 293, 298; *Reeve v. Elmendorf*, 38 N. J. L. 125; *Frost v. Falgetter*, 52 Nebr. 692, 73 N. W. 12. In *Epeneter v. Montgomery*, 98 Iowa 159, 172, 67 N. W. 93, the court says: "We hold that the owner may make such a contract as he sees fit, so long as it is legal, and may make any provisions as to the time and manner of payment he chooses, and such contract he has the absolute right to comply with, in all respects, regardless of his knowledge of subcontractors, and that they have furnished labor or material which has gone into such building, and has not been paid for."

sent of the owner to his performance of the services which are the foundation of the lien. The owner contracts with a builder for the construction of a house, and by so doing consents to the services of laborers and material-men employed by the builder.<sup>38</sup> But the contract with the builder is in such case the basis of the indirect contract with those whom the builder employs; and it is only reasonable to require them to look to the principal contract, and to be bound by its terms.<sup>39</sup> If that contract provides that payment shall be made in property or services, the subcontractor is bound by the arrangement.<sup>40</sup> If the contract provides for the taking of the owner's note and mortgage for his indebtedness under the contract, the subcontractor can not claim a lien inconsistent with the exercise of such right.<sup>41</sup>

If the owner of land contracts with the builder to erect a house for a certain price, of which the owner is to pay a part, and a third person, for whom the house was intended, is to pay the remainder, and upon the completion of the building the owner tenders the amount he agreed to pay, but the third person refuses to pay his part, the builder can not maintain a lien against the property, because the owner has tendered payment according to the contract, and there is nothing outside the contract to invoke the aid of equity.<sup>42</sup>

A subcontractor is also bound by the terms and conditions of the contract with the owner, so far as these pre-

<sup>38</sup> *Donahy v. Clapp*, 12 Cush. (Mass.) 440.

<sup>39</sup> *Campbell v. Scaife*, 1 Phila. (Pa.) 187, 8 Leg. Int. (Pa.) 74; *Schroeder v. Gaeland*, 134 Pa. St. 277, 19 Atl. 632, 7 L. R. A. 711, 19 Am. St. 691; *Harlan v. Rand*, 27 Pa. St. 511, 514; *Tebay v. Kirkpatrick*, 146 Pa. St. 120, 23 Atl. 318; *Herrell v. Donovan*, 7 App. D. C. 322.

<sup>40</sup> *Kilbourne v. Jennings*, 38 Iowa 533; *Ewing v. Folsom*, 67 Iowa 65, 24 N. W. 595.

<sup>41</sup> *Jones & M. Lumber Co. v. Murphy*, 64 Iowa 165, 19 N. W. 898. The lien of a subcontractor is limited, both as to amount and the property to which it attaches, by what the principal contractor could enforce against the owner. *Cudworth v. Bostwick*, 69 N. H. 536, 45 Atl. 408.

<sup>42</sup> *Smith v. Iowa City Loan & Building Assn.*, 60 Iowa 164, 14 N. W. 221.

scribe the amount to be paid.<sup>43</sup> The original contract price for the erection of a building constitutes a fund from which all the subcontractors are to be paid for their labor and material furnished. If this fund be insufficient to pay the whole amount of their claims, then they must be paid from such fund *pro rata*.<sup>44</sup>

The owner can not refuse to pay the contractor money due by the terms of the contract, when he is not in default in his payments to subcontractors, merely on the ground that he might be in default before the work should be completed, unless so authorized by statute.<sup>45</sup>

A provision in a contract that the contractor shall not sublet any part of the work, prevents a subcontractor from acquiring any lien.<sup>46</sup> But a provision that the contractor shall not let, assign or transfer the contract or any interest therein without written consent is held not to forbid subcontracts. This merely prevented assignments of interests in the principal contract which are a different matter.<sup>47</sup>

A subcontractor must take notice of the requirements of the contract as to the kind and quality of materials required. Thus, where a subcontractor undertook to furnish a hotel through the contractor with heating apparatus, and furnished a boiler wholly inadequate to meet the terms of the contract, it was held that he could not maintain a lien for the price of such boiler.<sup>48</sup>

§ 1289a. Contractor no lien where he has agreed to turn over building free of liens.—If a principal contractor has agreed to erect a building and deliver it free of all liens

<sup>43</sup> *De Graff v. Wickham*, 89 Iowa 720, 52 N. W. 503, *affd.* 89 Iowa 720, 57 N. W. 420.

<sup>44</sup> *Clough v. McDonald*, 18 Kans. 114.

<sup>45</sup> *Carson Opera House Assn. v. Miller*, 16 Nev. 327.

<sup>46</sup> *Benedict v. Danbury & N. R. Co.*, 24 Conn. 320; *Tebay v. Kirk-*

*patrick*, 146 Pa. St. 120, 23 Atl. 318; *Whittier v. Hollister*, 64 Cal. 283, 30 Pac. 846; *Latson v. Nelson*, 11 Pac. Coast L. J. 589.

<sup>47</sup> *Perry v. Potashinski*, 169 Mass. 351, 47 N. E. 1022.

<sup>48</sup> *Boynton Furnace Co. v. Gilbert*, 87 Iowa 15, 53 N. W. 1085.



to the owner, he can not himself file a lien,<sup>49</sup> nor can a subcontractor under him file a lien, because the subcontractor is bound by the original contract, and is presumed to have notice of its terms.<sup>50</sup> But a provision that the last payment of the contract price need not be paid until "a complete release of liens shall have been furnished" the owner, and that there shall not "be any legal or lawful claims against him for work or materials furnished," do not preclude a subcontractor from enforcing a lien.<sup>51</sup> It is not necessary that the contract between the owner and the contractor, that no liens shall be filed against the building, be in writing, if it is definite, in order to make it binding on subcontractors and material-men.<sup>52</sup>

In an action by a subcontractor, where it appears that there is such a stipulation between the owner and the principal contractor, it is competent for the owner to show pay-

<sup>49</sup> Long v. Caffrey, 93 Pa. St. 526; Scheid v. Rapp, 121 Pa. St. 593, 1 Monag. (Pa.) 430, 15 Atl. 652. A contractor agreeing to indemnify the owner against all liens is liable to indemnify him on account of a personal judgment obtained against the owner by a material-man. Hughes v. Gibson, 15 Colo. App. 318, 62 Pac. 1037. See also Cote v. Schoen, 38 Wkly. N. Cas. (Pa.) 382.

<sup>50</sup> Dersheimer v. Maloney, 143 Pa. St. 532, 22 Atl. 813; Schroeder v. Galland, 134 Pa. St. 277, 19 Atl. 632, 7 L. R. A. 711, 19 Am. St. 691. See statutory provisions in Pennsylvania, ante, § 1222. The Pennsylvania cases are followed in Illinois: Brown Const. Co. v. C. I. Const. Co., 234 Ill. 397, 84 N. E. 1038; Von Platin v. Winterbotham, 203 Ill. 198, 67 N. E.

845; Seeman v. Biemann, 108 Wis. 365, 84 N. W. 490; Morris v. Ross, 184 Pa. St. 241, 38 Atl. 1084; Kelly v. Johnson, 251 Ill. 135, 95 N. E. 1068; Felin v. Locust Realty Co., 232 Pa. 123, 81 Atl. 158; Pennock v. Locust Realty Co., 224 Pa. 437, 73 Atl. 930. Contra, holding actual notice of the agreement must be brought home to subcontractor to bind him. Smalley v. Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; Miles v. Coutts, 20 Mont. 47, 49 Pac. 393; Stewart Contracting Co. v. Trenton, &c., R. Co., 71 N. J. L. 568, 60 Atl. 405; Cost v. Newport Builders', &c., Co., 85 Ark. 407, 108 S. W. 509.

<sup>51</sup> Loyd v. Krause, 147 Pa. St. 402, 23 Atl. 602.

<sup>52</sup> McElroy v. Braden, 152 Pa. St. 78, 25 Atl. 235.

ment to the contractor, and under what circumstances it was paid.<sup>53</sup>

Such an agreement made subsequently to the original contract, without the knowledge of the subcontractor, does not affect the right of the subcontractor to file a lien.<sup>54</sup>

**§ 1290. Effect of payment to contractor on lien of subcontractor.**—Payment in good faith to the principal contractor, pursuant to the terms of the contract, defeats a lien in behalf of a subcontractor who has given no notice of his claim.<sup>55</sup> But to have this effect the payment, if made within the time allowed the subcontractor for giving notice of his claim to the owner, must be made by the owner without knowledge of the claim of the subcontractor; and it must be made, too, without knowledge of the facts out of which grew the subcontractor's claim.<sup>56</sup> If the owner could in the exercise of reasonable diligence have discovered that the subcontractor was entitled to a lien, he is not protected in a settlement he has made with the contractor.<sup>57</sup>

<sup>53</sup> *McElroy v. Braden*, 152 Pa. St. 78, 25 Atl. 235.

<sup>54</sup> *Cook v. Murphy*, 150 Pa. St. 41, 24 Atl. 630; *Cook v. Williams* (Pa.), 24 Atl. 746.

<sup>55</sup> *Nash v. Chicago, M. & St. P. R. Co.*, 62 Iowa 49, 17 N. W. 106; *Roland v. Centerville, M. & A. R. Co.*, 61 Iowa 380, 16 N. W. 355; *Smith v. Merriam*, 67 Barb. (N. Y.) 403; *McMillan v. Seneca Lake, G. & W. Co.*, 5 Hun (N. Y.) 12 revd. 67 N. Y. 215; *McAlpin v. Duncan*, 16 Cal. 126; *Drake v. O'Donnell*, 49 How. Pr. (N. Y.) 25; *Smith v. Coe*, 2 Hilt. (N. Y.) 365, affd. 29 N. Y. 666; *Pinkston v. Young*, 104 N. Car. 102, 10 S. E. 133; *Fullenwider v. Longmoor*, 73 Tex. 480, 11 S. W. 500; *McKnight v. Washington*, 8 W. Va. 666; *Parker v. Scott*, 82 Iowa 266, 47 N. W.

1073; *Iowa Stone Co. v. Crissman*, 112 Iowa 122, 83 N. W. 794; *Lake v. Brannin*, 90 Miss. 737, 44 So. 65; *French v. Bauer*, 16 Daly (N. Y.) 309, 11 N. Y. S. 69, 32 N. Y. St. 326, affd. 134 N. Y. 548, 32 N. E. 77, 20 L. R. A. 560; *Rosenbaum v. Paletz*, 114 N. Y. S. 802.

<sup>56</sup> *Andrews v. Burdick*, 62 Iowa 714, 16 N. W. 275; *Winter v. Hudson*, 54 Iowa 336, 6 N. W. 541; *Othmer v. Clifton*, 69 Iowa 656, 29 N. W. 767; *Lucas Co. v. Roberts*, 49 Iowa 159; *Havighorst v. Lindberg*, 67 Ill. 463; *Tice v. Moore*, 82 Conn. 244, 73 Atl. 133; *Martens v. O'Neill*, 131 App. Div. (N. Y.) 123, 115 N. Y. S. 260.

<sup>57</sup> *Gilchrist v. Anderson*, 59 Iowa 274, 13 N. W. 290; *Martin v. Morgan*, 64 Iowa 270, 20 N. W. 184; *Fay v. Orison*, 60 Iowa 136,

Where the owner knows that subcontractors are furnishing labor or materials, and knows who they are, he can not defeat their liens by paying the contractors in disregard of their claims. The owner in such case is bound to take notice that the subcontractors may be acquiring claims against the contractor for which liens are given by the statute.<sup>58</sup>

After the expiration of the time allowed a subcontractor for serving notice of his claim upon the owner, no notice having been served, the latter may proceed to pay off the contractor, whatever his knowledge may be as to the claims of the subcontractor. He is then justified in presuming that the right to a lien has been waived.<sup>59</sup>

If the contractor has been paid in full before he makes an agreement with the subcontractor for materials, the latter can not have a lien as against the owner of the property.<sup>60</sup>

**§ 1290a. Rule in Georgia.**—In Georgia the owner is bound to see that sums paid to the contractor are applied to the claims of material-men and laborers. If the owner pays to the contractor any sum of money which is not applied to the discharge of claims of material-men and laborers, then the owner would be liable to the extent of the

14 N. W. 213; *Cutler v. McCormick*, 48 Iowa 406; *Brooks v. Burlington & S. W. R. Co.*, 101 U. S. 443, 25 L. Ed. 1057. In the *Barlow Bros. Co. v. Gaffney*, 76 Conn. 107, 55 Atl. 582, a subcontractor had sublet the plumbing to the plaintiff. Before the plaintiff gave notice of his claim for a lien the original contractor had paid the subcontractor in full. Held such payment did not defeat the plaintiff's lien.

<sup>58</sup> *Chicago Lumber Co. v. Woodside*, 71 Iowa 359, 32 N. W. 381; *Hug v. Hintrager*, 80 Iowa

359, 45 N. W. 1035; *Chicago Lumber, etc., Co. v. Garmer*, 132 Iowa 282, 109 N. W. 780; *Page v. Grant*, 127 Iowa 249, 103 N. W. 124; *Wheelock v. Hull*, 124 Iowa 752, 100 N. W. 863; *Iowa Brick Co. v. Des Moines*, 111 Iowa 272, 82 N. W. 922; *Merritt v. Hopkins*, 96 Iowa 652, 65 N. W. 1015.

<sup>59</sup> *Jones, &c., Lumber Co. v. Murphy*, 64 Iowa 165, 19 N. W. 898; *Lounsbury v. Iowa. M. & N. P. R. Co.*, 49 Iowa 255.

<sup>60</sup> *Mallory v. Marion Water-Works Co.*, 77 Iowa 715, 42 N. W. 521.

amount not so applied, in the event any material-man or laborer had an unsatisfied claim against the contractor and asserted his lien in due time and in the proper manner.<sup>61</sup> This requires that the word lien shall be construed to mean not the perfected and recorded liens, but the inchoate liens, or claims arising by the mere furnishing of material or the performance of labor.

**§ 1290b. Rule in Michigan.**—Where the cost of the building exceeds the contract price, subcontractors and material-men can only claim liens to an amount bearing the same relation to their entire bill that the contract price bears to the cost of the building, so that the sum total of all lien claims will equal the contract price.<sup>62</sup>

**§ 1291. Whether premature payment to contractor will defeat lien of subcontractor.**—But if the owner pay the contractor before payment is actually due under the contract, with notice of the claims of subcontractors and material-men, the lien of a subcontractor will not be defeated, if it would otherwise be good.<sup>63</sup> Thus, if the contractor has

<sup>61</sup> *Green v. Farrar Lumber Co.*, 119 Ga. 30, 46 S. E. 62.

<sup>62</sup> *Blitz v. Fields*, 118 Mich. 85, 76 N. W. 119.

<sup>63</sup> *Walsh v. McMenomy*, 74 Cal. 356, 16 Pac. 17; *Barton v. Grand Lodge*, 70 Ark. 613, 71 Ark. 35, 70 S. W. 305; *Daley v. Somers Lumber Co.*, 70 N. J. Eq. 343, 61 Atl. 730; *Slingerland v. Binns*, 56 N. J. Eq. 413, 39 Atl. 712; *Smith v. Dodge*, 59 N. J. Eq. 584, 44 Atl. 639. Otherwise in Texas. *Fullenwider v. Longmoor*, 73 Tex. 480, 11 S. W. 500. Where a subcontractor is surety on the contractor's bond and is liable to the owner thereon, he can not enforce a lien on such property as against

the owner. *Leach v. Thompson*, 138 Ill. App. 85. Provision is made by statute in several states to prevent payments in advance or by collusion for the purpose of evading obligations to subcontractors. In California and Colorado it is provided that no part of the contract price shall be paid in advance of the commencement of the work, and that no payment shall be made before it is due by the contract. Payments made in advance or before they are due are invalid for the purpose of defeating or diminishing any lien in favor of any person except the contractor, California: *Code Civ. Proc.* 1906, § 1184; Colorado:

agreed to finish a house by a stated time, at which he is to receive his final payment, and the work is not then finished, but with the consent of the owner it is finished at a later day, then the last payment is not due until the work is actually finished; and it would seem that, if payment in such case is made before the actual completion of the work, a subcontractor would be entitled to his lien notwithstanding such payment.<sup>64</sup> Thus, it is held that a subcontractor is entitled to his lien where the owner, in order to enable the contractor to go on with his work, and in consideration that he would not abandon his contract, in good faith made payments to the contractor faster than the original contract required, and also bound himself to other persons in consideration that they would contribute labor and materials toward the completion of the work.<sup>65</sup>

Other authorities hold that an owner is protected in paying the contractor before the payment is due under the contract, as for instance in paying him before the completion of the building a sum due after such completion, if the payment is made in good faith.<sup>66</sup>

**§ 1292. Estoppel of owner.**—The owner may be estopped by his acts and declarations from claiming that he has paid

Mills' Ann. Stats. 1912, § 4581. Louisiana: If, by collusion or otherwise, the owner of any building erected by contract, as aforesaid, shall pay to his contractor any money in advance of the sum due on said contract, and if the amount still due the contractor, after such payment has been made, shall be insufficient to satisfy the demand for work and labor done and performed, or materials furnished, the owner shall be liable to the amount that would have been due at the time of his receiving the amount of such

work, in the same manner as if no payment had been made. Rev. Civ. Code 1900, art. 2772. See provisions of the statute, of New York and the decisions under it. Birdseye C. & G. Consol. Laws 1909, p. 3161, § 7.

<sup>64</sup> Andrews v. Burdick, 62 Iowa 714, 16 N. W. 275.

<sup>65</sup> Schneidhorst v. Luecking, 26 Ohio St. 47. And see Bullock v. Horn, 44 Ohio St. 420, 428, 7 N. E. 737.

<sup>66</sup> Spaulding v. Thompson Eccl. Soc. 27 Conn. 573.

the contractor in full. Thus, where a subcontractor requested the owner to inform him of the original contract, and the owner neglected to do so, but promised the subcontractor to see him paid for his work, and the latter performed the work on the faith of such promise, the owner was estopped from setting up the defense that he had paid the principal contractor in full. Moreover, the owner having given the subcontractor to understand that payment was to be made in money, he was estopped to set up as against such subcontractor a provision in the contract for payment partly in land.<sup>67</sup>

§ 1293. **Estoppel of subcontractor.**—A subcontractor is estopped from claiming a lien by standing by in silence and seeing the owner pay the principal contractor in full.<sup>68</sup> His silence in such case is equivalent to saying to the owner that he has no claim for a lien. But a subcontractor is not estopped by a statement in regard to the financial credit of the contractor which did not mislead the owner, or induce him to make a payment to the contractor. Thus, where it appeared that the supervising architect, before giving the principal contractors an estimate for payment, asked a subcontractor if he was satisfied with the principal contractors, and that he answered that they were perfectly good, there was no statement sufficient to estop the subcontractor from claiming a lien.<sup>69</sup> In like manner a subcontractor is not estopped from claiming a lien by reason of his having given a false receipt for the amount due him, whereby the architect was induced to certify that a payment was due the contractor, if the owner has paid out no money, and has suffered no loss thereby.<sup>70</sup>

<sup>67</sup> Welch v. Sherer, 93 Ill. 64.

<sup>68</sup> Vreeland v. Ellsworth, 71 Iowa 347, 32 N. W. 374; Doughty v. Devlin, 1 E. D. Smith (N. Y.) 625.

<sup>69</sup> Simonsen v. Stachlewicz, 82

Wis. 338, 52 N. W. 310. See Green Bay Lumber Co. v. Adams, 107 Iowa 672, 78 N. W. 699, where statements by a subcontractor were not sufficient to estop him.

<sup>70</sup> Washburn v. Kahler, 97 Cal.

§ 1294. Subcontractor's lien limited to the indebtedness of contractor to him.—A laborer employed by a subcontractor can enforce a lien only to the extent of the indebtedness of the contractor to the subcontractor, even though the owner be still indebted to the principal contractor.<sup>71</sup> But where any sum is still owing from the owner to the contractor, as for extras outside the original account, the subcontractor can enforce a lien against the owner to that amount.<sup>72</sup>

A person furnishing materials or doing work for a subcontractor, relying upon the lien given by the statute, should not only examine the contract with the owner, but also that with the subcontractor; for if the latter fails to perform his contract so that nothing becomes payable under it, or if he is paid in full according to its terms in case of performance, there can be no lien. A material-man furnishing a subcontractor material used in a building is entitled to a lien to the amount of money due such subcontractor. But in such a case, money paid to the subcontractor on his contract may be used by him to pay the material-man for debts which had no relation to the contract, and the material-man may apply the same to such debts and still maintain his lien, if there are at that time no liens filed against the property. In such case the material-man violates the rights or equities of no one in receiving it to apply upon his antecedent debt. It

58, 31 Pac. 741. See *Mivalaz v. Genovely*, 121 Ky. 235, 28 Ky. L. 203, 89 S. W. 109.

<sup>71</sup> *Utter v. Crane*, 37 Iowa 631; *Stubbs v. Clarinda*, C. S. & S. W. R. Co., 62 Iowa 280, 17 N. W. 530; *Crane v. Genin*, 60 N. Y. 127; *Hagan v. American, &c., Missionary Soc.*, 14 Daly (N. Y.) 131; *Larkin v. McMullin*, 120 N. Y. 206, 24 N. E. 447; *Lumbard v. Syracuse, B. & N. R. Co.*, 55 N. Y. 491; *French v. Bauer*, 134 N. Y. 548, 32 N. E.

77, 20 L. R. A. 560; *Upton v. United Engineering & Contracting Co.*, 72 Misc. (N. Y.) 541, 130 N. Y. S. 726. *Contra*, *Heard v. Holmes*, 113 Ga. 159, 38 S. E. 393. But the laborer is limited to the amount due from the owner to the contractor at the time the notice is filed. *Allen v. Schweigert*, 113 Ga. 69, 38 S. E. 397.

<sup>72</sup> *Shope v. Mitchell*, 116 Iowa 636, 88 N. W. 813.

is well settled that material-men and workmen have no lien upon or equity in money due or paid under a building contract until they have filed their liens pursuant to the lien law.<sup>73</sup>

There is no reason for protecting an owner, who has paid the contractor in full pursuant to the contract, which is not equally applicable to a contractor who in like manner has paid his subcontractor.<sup>74</sup>

**§ 1295. Right of owner to limit his liability to a subcontractor by agreement.**—Where the owner proposed to a lumber dealer who was supplying materials to a subcontractor that if he would furnish a specified quantity of lumber he would pay a specified sum, and the proposition was accepted, the lumber furnished, and the money paid as agreed by the owner, it was held that the material-man was not entitled to a lien for the balance due from the subcontractor for the lumber, as for materials furnished by the direction of the owner. The owner's direction was a specific and limited one, and, its terms being fulfilled, the owner was under no further liability.<sup>75</sup>

On the other hand the owner may by contract increase his liability to the subcontractors and bind himself to pay

<sup>73</sup> Mack v. Colleran, 136 N. Y. 617, 32 N. E. 604, revg. 18 N. Y. S. 104, 44 N. Y. St. 636. Earl, C. J., said: "It would lead to great embarrassment, uncertainty and inconvenience if a person receiving money from a builder would have to ascertain whether he obtained it under a building contract before he could safely take it for property sold or apply it upon an antecedent debt justly due. The authorities in this court are against the defendant's contention. Payne v. Wilson, 74 N. Y. 348; McCorkle v. Herrman,

117 N. Y. 297, 22 N. E. 948; Stevens v. Ogden, 130 N. Y. 182, 29 N. E. 229. Besides, in this case the evidence and the findings of the trial judge show that there was money enough earned by Andrews [the subcontractor], which became payable to him under his contract to satisfy Mack's [the material-man's] lien, as well as all the other liens against the property."

<sup>74</sup> Lumbard v. Syracuse, B. & N. Y. R. Co., 55 N. Y. 491; Carman v. McInerow, 13 N. Y. 70, 2 E. D. Smith (N. Y.) 689.

<sup>75</sup> Crane v. Genin, 60 N. Y. 127.



them on presentation of itemized bills for labor and materials. In such case the subcontractors may enforce a lien for the amounts due them.<sup>76</sup>

**§ 1296. Subcontractor can only look to indebtedness due contractor.**—A subcontractor can only look to the indebtedness of the owner under the contract out of which his own claim arose. If there be distinct jobs under separate contracts, though under contracts between the same owner and contractor, the liens of the subcontractors are respectively confined to the amount unpaid on the particular contract each one aided the contractor to perform.<sup>77</sup>

An indebtedness of the owner to the contractor for extra work, which is performed under the original contract as a part of it, may be reached by the subcontractors in the same manner as if it had in terms been included in the original contract.<sup>78</sup>

When a contract for a building provides for changes in the plans and specifications, and extra work is done in completing the building without a new contract, a subcontractor of any part of the work may perfect a lien on the amount due from the owner to the contractor for such extra work.<sup>79</sup>

A subcontractor's lien must, however, be strictly limited to the amount that is due or may become due to the contractor under his contract with the owner.<sup>80</sup> He can not reach by his lien money which the owner has agreed to loan to the contractor.<sup>81</sup>

<sup>76</sup> *Shorthill Co. v. Bartlett*, 131 Iowa, 259, 108 N. W. 308.

<sup>77</sup> *Dunn v. Rankin*, 27 Ohio St. 132, per Day, J.

<sup>78</sup> *Morgan v. Stevens*, 6 Abb. N. Cas. (N. Y.) 356.

<sup>79</sup> *Dunn v. Rankin*, 27 Ohio St. 132.

<sup>80</sup> *Miner v. Hoyt*, 4 Hill (N. Y.) 193, affd. 7 Hill 525; *Kirschner v. Mahoney*, 96 N. Y. S. 195; *Wexler*

*v. Rust*, 144 App. Div. (N. Y.) 296, 128 N. Y. S. 977.

<sup>81</sup> *Loonie v. Hogan*, 9 N. Y. 435, 440, 2 E. D. Smith (N. Y.) 681, 61 Am. Dec. 683. Per Denio, J.: "The remedy which the statute gives is against money due to the principal contractor for the work which he agreed to do, but which the subcontractor or mechanic has actually performed for him. It

§ 1297. **Set-off not arising out of the contract.**—The owner having knowledge that a mechanic has performed work upon a building, under employment of the principal contractor, can not set off against a claim for work so done a claim against such contractor not arising out of the contract under which the building is constructed, or in any way having relation thereto, and acquired by such owner after the labor was performed by the mechanic, but before the owner had notice that the mechanic had not been paid.<sup>82</sup>

§ 1298. **Burden on subcontractor.**—The burden is upon the subcontractor to prove an indebtedness from the owner to the contractor under the same contract by which the subcontractor claims his lien, before he can be allowed to recover against the owner or establish his lien against his property.<sup>83</sup> But the subcontractor having shown that an indebtedness under the contract had accrued from the owner to the contractor, the burden is upon the owner to show payment made by him which would extinguish the lien.<sup>84</sup>

does not extend to money payable to the contractor on any other account. It is quite reasonable that the party meritoriously entitled to be paid for the work should be allowed to intervene between the owner for whom the house was built and the person who had contracted to build it, and to divert the course of the payments, which would have passed into the hands of such contractor, to his own. It is a form of equitable subrogation regulated by statute, but it is limited by the act to the plain case of money due upon a contract for performing the work."

<sup>82</sup> Bullock v. Horn, 44 Ohio St. 420, 422, 7 N. E. 737; Hoyt v. Miner, 7 Hill (N. Y.) 525, affg. 4 Hill (N. Y.) 193; Mack v. Colleran, 18

N. Y. S. 104, 44 N. Y. St. 636, revd. 136 N. Y. 617, 32 N. E. 604; Develin v. Mack, 2 Daly (N. Y.) 94; Hagan v. Missionary Soc., 14 Daly (N. Y.) 131.

<sup>83</sup> Cox v. Broderick, 4 E. D. Smith (N. Y.) 721; Cronk v. Whitaker, 1 E. D. Smith (N. Y.) 647; Cronkright v. Thomson, 1 E. D. Smith (N. Y.) 661; Preusser v. Florence, 51 How. Pr. (N. Y.) 385, 4 Abb. N. Cas. (N. Y.) 136; Martin v. Morgan, 64 Iowa 270, 20 N. W. 184; Ball & Wood Co. v. Clark & Sons Co., 31 App. Div. (N. Y.) 356, 52 N. Y. S. 443.

<sup>84</sup> Smith v. Merriam, 67 Barb. (N. Y.) 403; McMillan v. Seneca Lake, G. & W. Co., 5 Hun (N. Y.) 12, revd. 67 N. Y. 215; Hunter v. Truckee Lodge, 14 Nev. 24.

The owner may offset any actual damages he has sustained by reason of the contractor's failure to complete the building in time, in a suit by a subcontractor to enforce a lien.<sup>85</sup>

**§ 1299. Right of subcontractor where contractor abandons the work.**—If the contractor abandons the work after collecting all that is due him from the owner, a subcontractor can enforce no lien for work done or materials furnished.<sup>86</sup> Even where the contract provides that the owner may reserve twenty-five per cent. of the contract price until the completion of the building, and the contractor abandons the work after having collected all that was due him except the amount reserved under this provision, a subcontractor can enforce no lien for materials.<sup>87</sup>

The premises are not liable to mechanics' liens after the work has been abandoned by the contractor who has received in full the instalments due according to the contract, whether or not the cost of completing the work would be less than the balance of the contract price, in case there is no provision for the completion of the work by the owner, nor any understanding that he should proceed with it.<sup>88</sup>

<sup>85</sup> *Fossett v. Rock Island, &c.*, 76 Kans. 428, 92 Pac. 833.

<sup>86</sup> *Preusser v. Florence*, 4 Abb. N. Cas. 136, 51 How. Pr. (N. Y.) 385; *Miller v. Calumet L. & M. Co.*, 111 Ill. App. 651; *Rice v. Rhone*, (Colo.) 111 Pac. 585. Contra, where the contract price has been fixed unreasonably low by the owner and contractor for the purpose of defrauding subcontractors. *Mantonya v. Reilly*, 184 Ill. 183, 56 N. E. 425, affg. 83 Ill. App. 275. In claiming benefit of expense in completing abandoned work, owner must show he did the work according to the original specifica-

tions. *Cost v. Newport Builders', &c., Co.*, 85 Ark. 407, 108 S. W. 509.

<sup>87</sup> *Blythe v. Poultney*, 31 Cal. 233; *Dingley v. Greene*, 54 Cal. 333.

<sup>88</sup> *Larkin v. McMullin*, 120 N. Y. 206, 24 N. E. 447, revg. 14 Daly (N. Y.) 311. A subcontractor where the contractor abandons the work before it is completed is not entitled to a lien. *Lemieux v. English*, 19 Misc. (N. Y.) 545, 43 N. Y. S. 1066. Contra, see *Red River Lumber Co. v. Children of Israel*, 7 N. Dak. 46, 73 N. W. 203; *Mantonya v. Reilly*, 83 Ill. App. 275, affd. 184 Ill. 183, 56 N. E. 425.

But if the contractor is to be paid in instalments as the work progresses, and at the time of abandoning the work he has partially earned an instalment, subcontractors are entitled to have the amount so earned applied to their claims, less the cost of completing the work, so that such instalment would be payable. A claim for defective work would first be set off against the amount of such instalment.<sup>89</sup> Where the owner and contractor agreed to rescind their contract and the owner completed the building at an increased cost over the contract price, this did not defeat the lien of a material-man who had given notice of his claim before the contract was rescinded.<sup>90</sup>

In one case the Court of Appeals of New York said: "We think that the following rules determine the extent to which a mechanic's lien filed by a subcontractor or a material-man, attaches to the locus in quo: (1) If anything is due to the contractor, pursuant to the terms of the contract, when the lien is filed, it attaches to that extent. (2) If nothing is due to the contractor according to the contract, when the lien is filed, but a certain amount subsequently becomes due thereunder, the lien attaches to the extent of that sum. (3) If nothing is due to the contractor pursuant to the contract, when the lien is filed and he abandons the undertaking without just cause, but the owner completes the building according to the contract and under a provision thereof permitting

<sup>89</sup> *Foshay v. Robinson*, 62 Hun (N. Y.) 619, 16 N. Y. S. 817, 43 N. Y. St. 20, *affd.* 137 N. Y. 134, 32 N. E. 1041. "The referee has found that at the time the contractor left the work he had earned the sum of \$1,031 more than he had received pay for, after allowing for bad work which had to be repaired, and which was deducted before this balance of \$1,031 was reached. \* \* \* The case falls within the case of *Van Clief v. Van*

*Vechten*, 43 Hun (N. Y.) 304, 1 N. Y. S. 99, 15 N. Y. St. 896, *affd.* 62 Hun (N. Y.) 617, 16 N. Y. S. 818, 43 N. Y. St. 20, and *Wright v. Roberts*, 43 Hun (N. Y.) 413, 6 N. Y. St. 769, *affd.* 118 N. Y. 672, 23 N. E. 1145. *Per* Barnard, P. J. See also *Alabama, &c., Lumber Co. v. Tisdale*, 139 Ala. 250, 36 So. 618; *Murphy v. Hardiman*, 112 App. Div. 670, 99 N. Y. S. 6.

<sup>90</sup> *Rosenbaum v. Carlisle*, 78 Miss. 882, 29 So. 517.

it, the lien attaches to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed."<sup>91</sup>

It is sometimes provided that the owner shall pay, to those entitled to liens in such case, so much as the work and materials are reasonably worth according to the contract price after deducting all payments rightfully made, and damages, if any, occasioned by the non-performance of the contract.<sup>92</sup> If the contractor has been fully paid, the subcontractor can not recover anything.<sup>93</sup>

It is no defense to a lien, claimed by one employed by a contractor in the erection of a house upon the land of another, that, before the labor was performed under the contract, the time had expired within which it was to be completed, if such time had been enlarged by a parol agreement or otherwise.<sup>94</sup>

**§ 1300. Subcontractor has no lien for damages and expenses.**—A subcontractor is not entitled to a lien for damages and expenses incurred through idleness enforced, or on account of work made necessary by the default or negligence of the principal contractor,<sup>95</sup> though he may recover

<sup>91</sup> Van Clief v. Van Vechten, 130 N. Y. 571, 29 N. E. 1017, per Vann, J., citing Larkin v. McMullin, 120 N. Y. 206, 24 N. E. 447; Powers v. Yonkers, 114 N. Y. 145, 21 N. E. 132; New York v. Crawford, 111 N. Y. 638, 19 N. E. 501; Graf v. Cunningham, 109 N. Y. 369, 16 N. E. 551, Taylor v. Mayor, 93 N. Y. 625; Heckmann v. Pinkney, 81 N. Y. 211; Gibson v. Lenane, 94 N. Y. 183; Rodbourn v. Seneca Lake Grape & Wine Co., 67 N. Y. 215; Lumbard v. Syracuse, &c. R. Co., 55 N. Y. 491; DeRay Lumber Co. v. Keohane, 132 Mich. 17, 92 N. W. 489; Stringfellow v. Coons,

51 Fla. 158, 49 So. 1019. See post, §§ 1513, 1514.

<sup>92</sup> Rodbourn v. Seneca Lake, G. & W. Co., 67 N. Y. 215, revg. 5 Hun (N. Y.) 12; Sheffield v. Loeffler, 50 Hun (N. Y.) 606, 3 N. Y. S. 150, 20 N. Y. St. 890; Morehouse v. Moulding, 74 Ill. 322, Biggs v. Clapp, 74 Ill. 335.

<sup>93</sup> Schultz v. Hay, 62 Ill. 157.

<sup>94</sup> Rockwood v. Walcott, 3 Allen (Mass.) 458.

<sup>95</sup> Tabor v. Armstrong, 19 Colo. 285, 12 Pac. 157; Miner v. Hoyt, 4 Hill (N. Y.) 193, affd. 7 Hill (N. Y.) 525; Houghton v. Blake, 5 Cal. 240; Taggard v. Buckmore, 42

for his loss against the contractor. He can recover against the owner, or enforce a lien against his property, only for labor actually performed or services actually rendered upon the building or other improvement.

But a subcontractor may include in his lien claim any labor which is directly connected with the erection of a building, though this may have been rendered necessary by the mistake or negligence of the contractor, or of some of the men employed by him. Thus, where a contractor has failed to distribute the cut stone to be used in a building in convenient order and places about the building, a mechanic may have a lien for labor in removing stone furnished for the second story in order to reach that required for the first story, and in transferring stone from one front of the building to another front where it belonged. Such labor can not be deemed extra work wholly outside the principal contract.<sup>96</sup>

**§ 1301. Lien defeated by assignment of debt.**—The lien of a subcontractor is defeated by an assignment of the debt due from the owner by the original contractor, made in good faith before the notice is served;<sup>97</sup> and it does not matter that the owner may have known, when he paid the assignee, that the subcontractors held unpaid claims.<sup>98</sup> “The position of the subcontractors in this respect is much the same as if

Maine 77; Siebrecht v. Hogan, 99 Wis. 437, 75 N. W. 71. See also, Andrews & Johnson Co. v. Atwood, 167 Ill. 249, 47 N. E. 387; Caulfield v. Polk, 17 Ind. App. 429, 46 N. E. 932.

<sup>96</sup> Tabor v. Armstrong, 19 Colo. 285, 12 Pac. 157.

<sup>97</sup> Garrison v. Mooney, 9 Daly (N. Y.) 218; Copeland v. Manton, 22 Ohio St. 398, 403; Superintendent of Schools v. Heath, 15 N. J. Eq. 22; Reeve v. Elmendorf, 38 N. J. L. 125; Craig v. Smith, 37 N.

J. L. 549; Dorestan v. Kreig, 66 Wis. 604, 29 N. W. 576; Ryerson v. Smith, 152 Ill. 641, 38 N. E. 1032.

<sup>98</sup> Hall v. Banks, 79 Wis. 229, 48 N. W. 385. Where the contractor pledged the contract to raise money, a subcontractor was entitled to receive payment from the owners, on his privilege, in preference to the pledgee. Pullis Bros., &c., Co. v. Natchitoches Parish, 51 La. Ann. 1377, 26 So. 402.

they had garnished the owner by proceeding in attachment. Both forms of proceeding are statutory remedies to subject a claim due to a debtor to the payment of his debt, and whenever available are, in effect, substantially alike. It is a fundamental principle that an attaching creditor can stand on no better footing, as against bona fide purchasers or assignees of his debtor, than the latter does at the time of the attachment or garnishment. And it is well settled that where an assignment of a chose in action is made on good consideration and bona fide, the creditors of the assignor can not avoid or defeat it by garnishment or other similar process, although the debtor had no notice of the assignment previous to the attachment, if it be given to him in time to enable him to bring it to the attention of the court before judgment is rendered against him as garnishee. . . . It would seem, then, upon the principles established in analogous cases, that the assignees in this case must prevail."<sup>99</sup>

The lien of the subcontractor is not saved by the fact that both the contractor and his assignee had given bonds with sureties to indemnify the owner against the claims of subcontractors.<sup>1</sup>

An assignment by a contractor of all the moneys to become due under his contract will not defeat a subcontractor's lien filed before the owner has actually paid the money to the assignee.<sup>2</sup> This principle was applied in a contest between lien claimants and purchasers of county warrants from a contractor who had received them in payment for construction work for the county. The warrants were an equitable assignment of the money due the contractor, but

<sup>99</sup> Copeland v. Manton, 22 Ohio St. 398, per Day, J.

<sup>1</sup> Hall v. Banks, 79 Wis. 229, 48 N. W. 385.

<sup>2</sup> Bourget v. Donaldson, 83 Mich. 478, 47 N. W. 326; followed

in Carter v. Brady, 51 Fla. 404, 41 So. 539; Texas Building Co. v. National Loan & Investment Co., 22 Tex. Civ. App. 349, 54 S. W. 1059; Jennings v. Willer, (Tex. Civ. App.), 32 S. W. 24.

the lien claimants took precedence over the equitable assignee.<sup>3</sup>

Where a lien attaches only from the filing of a claim of lien, the contractor may, before the filing of such claim, while acting in good faith, dispose of the indebtedness which may accrue to him under his contract, in the same way that he may dispose of any other maturing indebtedness, and may thereby defeat the lien of a subcontractor.<sup>4</sup>

An exception to this rule, that the subcontractor can acquire no lien where at the time of filing the notice there is nothing due to the contractor, arises in case of an assignment by the contractor of his property in trust for the benefit of his creditors.<sup>5</sup> And the reason for the exception there is, that, as such assignees stand in the place of the contractor, and act substantially for his benefit, if they perform the contract for him, or become entitled to any payments under it, the subcontractor may acquire a lien to the same extent as if the assignment had not been made.<sup>6</sup>

An order by a contractor upon the owner to pay a certain amount to a subcontractor is an assignment pro tanto of the fund in the owner's hands. Though he refuses to accept or pay the order, and shortly afterwards other liens are claimed against the property, the right of the subcontractor holding the order is not defeated. The owner would have been protected in paying the order upon its presentation. After notice of this order given to the owner prior to the filing of any other lien, the owner was bound to apply the fund to its payment, and for no other purpose.<sup>7</sup>

§ 1302. **Lien defeated by garnishment of owner.**—The lien of a subcontractor is also defeated by a garnishment

<sup>3</sup> Haynes v. County of Coles, 234 Ill. 137.

<sup>4</sup> Oates v. Haley, 1 Daly (N. Y.) 338.

<sup>5</sup> Oates v. Haley, 1 Daly (N. Y.) 338, 343; Henderson v. Sturgis, 1 Daly (N. Y.) 336.

<sup>6</sup> Oates v. Haley, 1 Daly (N. Y.) 338, 343, per Hilton, J.

<sup>7</sup> Lauer v. Dunn, 115 N. Y. 405, 22 N. E. 270, affg. 52 Hun (N. Y.) 91, 5 N. Y. S. 161, 23 N. Y. St. 374; Stevens v. Ogden, 130 N. Y. 182, 29 N. E. 229.



of the owner as a debtor of the principal contractor before notice is given that the subcontractor claims a lien.<sup>8</sup> But if the notice is given before adverse claims attach the lien when completed relates back to and takes effect from the time of the commencement of the labor so as to exclude any other lien created in the meantime.<sup>9</sup>

**§ 1303. Duty of subcontractor who holds disputed account.**—A subcontractor who holds an open, unsettled, or disputed account against the principal contractor should obtain an adjudication of this before seeking to establish a lien against the owner, or at the same time that he seeks to do so.<sup>10</sup> He should either obtain a judgment against the contractor before bringing an action to enforce the lien, or he should make the contractor a party to that action. "The burden of ascertaining whether there is any defense to the action ought not to be put upon the owner of the property. He is not presumed to have any knowledge upon the subject. Further than this, if the subcontractor establishes his lien against the property, and the owner is compelled to pay it, he has recourse on the principal contractor. He ought to be furnished with an adjudicated claim, and not with a mere open account."<sup>11</sup>

**§ 1304. Subcontractor's direct lien under statutes.**—Under statutes which give to subcontractors a direct lien, the amount for which the property may be charged is not limited by the amount that may be due from the owner to the contractor, nor does it in any way depend upon the state of the account between them.<sup>12</sup> It is sufficient that the liens

<sup>8</sup> Dorestan v. Krieg, 66 Wis. 604, 29 N. W. 576; Herrin v. Warren, 61 Miss. 509.

<sup>9</sup> Fenck, &c., Co., v. Mehler, 102 Ky. 111, 19 Ky. L. 1146, 43 S. W. 403, 766.

<sup>10</sup> Vreeland v. Ellsworth, 71 Iowa 347, 33 N. W. 374; Reeve v. Elmendorf, 38 N. J. L. 125.

<sup>11</sup> Per Rothrock, J., in Vreeland v. Ellsworth, 71 Iowa 347, 33 N. W. 374.

<sup>12</sup> In the following named states the lien seems to be a direct and absolute lien, rather than one worked out through an equitable subrogation to the contractor's lien by means of a notice to the

are created through the owner's contract, from which his consent is implied. It is upon the ground of the owner's

owner. Some of the states are included in this list because there seems to be no provision for any but a direct lien. There are no decisions directly in point in some of the states. Delaware: See ante, § 1194. District of Columbia: See ante, § 1195. Georgia: "There has not always been an adherence to the Pennsylvania system or the New York system, but our lien laws have sometimes approximated one and sometimes the other, and have sometimes included special and peculiar provisions. In the beginning they were more like the Pennsylvania system, then they changed into a greater similarity to the New York system, and again changed so as to more nearly approximate the Pennsylvania system." *Prince v. Neal-Millard Co.*, 124 Ga. 884, 53 S. E. 761. Kansas: All payments made to the contractor prior to the expiration of the sixty days after the completion of the building allowed for filing the lien are at the risk of the owner. *Delahay v. Goldie*, 17 Kans. 263; *Clough v. McDonald*, 18 Kans. 114; *Shellabarger v. Thayer*, 15 Kans. 619. See ante, § 1202. Kentucky: The last statute is radically different from former laws. Preceding acts practically provided a process of garnishment for money due the contractor from the owner. Under the present law the only limitation on the lien is that it shall not exceed the original contract price for the entire

building. The owner need not be indebted to the original contractor. *Browinski v. Pickett*, 113 Ky. 420, 24 Ky. L. 305, 68 S. W. 408; *Hightower v. Bailey*, 108 Ky. 198, 22 Ky. L. 88, 56 S. W. 147, 49 L. R. A. 255. See ante, § 1203. Maine: *Atwood v. Williams*, 40 Maine 409. See ante, § 1205. Maryland: *Sodini v. Winter*, 32 Md. 130; *Treusch v. Shryock*, 51 Md. 162, 173, per Robinson, J.: "The right of the materialman to his lien, does not depend on, nor is it in any manner affected by the question whether the owner has or has not money in his hands due the builder, nor whether the former has performed his part of the contract with the latter. . . . The lien attaches upon the delivery of the materials, and this irrespective of the contract or dealings between the owner and builder." *Massachusetts: Bowen v. Phinney*, 162 Mass. 593, 39 N. E. 283, 44 Am. St. 391; *Parker v. Bell*, 7 Gray (Mass.) 429, 432, per Merrick, J.: "The object of the provisions of the statute is to create and preserve to the laborer security for the payment of the wages which he earns. It is manifest, from a consideration of the provisions of the successive statutes in relation to the lien of mechanics upon the estates upon which their labor has been expended, that the legislature have regarded it as a sound and just principle, that all those who have by consent of the owner, or in pursuance of contracts with him

consent through such contract that such legislation is supported; for the question has been raised whether the own-

for that purpose, contributed to increase the value of his property, should have an interest in it until their respective claims for such services shall have been paid and discharged." Minnesota: The intention of the mechanics' lien law is to give a lien for labor or materials to their full value, and the owner must adjust the terms of his contract, and the modes of payment under it, at the risk of additional payments to the lienholders. *Laird v. Moonan*, 32 Minn. 358, 362, 20 N. W. 354. Missouri: *Morrison v. Hancock*, 40 Mo. 561; *De Witt v. Smith*, 63 Mo. 263; *Henry & C. Co. v. Evans*, 97 Mo. 47, 10 S. W. 868, 13 L. R. A. 332, overruling *Henry v. Hinds*, 18 Mo. App. 497. See ante, § 1211. Montana: *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837. See ante, § 1212. Nebraska: Payments made by the owner to the original contractor, within the time limited for filing liens, do not absolve him from liability to subcontractors, laborers, and others. *Ballou v. Black*, 21 Nebr. 131, 31 N. W. 673; *Ballou v. Black*, 17 Nebr. 389, 23 N. W. 3; *Foster v. Dohle*, 17 Nebr. 631, 24 N. W. 208; *Marrener v. Paxton*, 17 Nebr. 634, 24 N. W. 209. Nevada: Subcontractors and materialmen have direct liens upon the property for the value of their labor and materials, regardless of payments on the principal contract made prior to the time within which the law required a notice of their claim to be recorded.

*Lonkey v. Cook*, 15 Nev. 58; *Hunter v. Truckee Lodge*, 14 Nev. 24; *Carson Opera House Assn. v. Miller*, 16 Nev. 327. New Hampshire: See ante, § 1215. New Mexico: See ante, § 1217. North Dakota: See ante, § 1219a. South Dakota: The risk of all payments made to the original contractor, up to sixty days after such work is performed and material furnished, is upon the owner. *Albright v. Smith*, 2 S. Dak. 577, 51 N. W. 590. See ante, § 1224a. Oregon: No payment by the owner to any original or subcontractor, made before thirty days from the completion of the building, is valid for the purpose of defeating or discharging any lien in favor of any workman, laborer, lumber merchant, or materialman, unless such payment so made by the owner has been distributed among such workmen, laborers, lumber merchants, or materialmen, or, if distributed in part only, then the same shall be valid only to the extent the same has been so distributed. See ante, § 1221. Pennsylvania: *White v. Miller*, 18 Pa. St. 52, 54, per *Gibson, C. J.*: "Nor does the rule of the legislature bear hard on the owner. He has it in his power to detain the price of the building while there are outstanding charges against it, or to stipulate for security against those that might afterwards turn up; and if he use common prudence, any loss which occurs will eventually fall on the author of it. If he do not,

er's property can be forfeited to persons with whom he never contracted, for failure to pay them a sum in excess of the price for which he has contracted for the entire work, or to pay them, perhaps, after he has paid the contractor in full. Under such statutes it is no defense to such lien that the aggregate amount of the liens entered against the building, together with the cost of completing the same, exceed the contract price, if the materials furnished were of the quantity and quality needed for its construction.<sup>13</sup>

**§ 1304a. Constitutionality of lien statutes.**—The constitutional validity of such statutes securing liens to subcontractors, and others furnishing labor or materials for a contractor, irrespective of the state of the account between the owner and the contractor, as regards transactions after the statute has taken effect, is well established; and it is established upon the ground that such statutes annex the lien as an incident to the contract of the owner with the contractor, such contract being the evidence of the authority of the

he can not charge the mechanic or material-man with the consequences of his own supineness." Rhode Island: See ante, § 1223. South Carolina: See ante, § 1224. Tennessee: See ante, § 1225. Utah: See ante, § 1227. Vermont: Lien given only to contractors. See ante, § 1228. Washington: Material-men and laborers have a lien notwithstanding the owner has paid the principal contractor in full. The statute makes every contractor, subcontractor, or other person in charge of the construction or repair of a building the owners' agent. This statute is declared constitutional. *Spokane Lumber Co. v. McChesney*, 1 Wash. St. 609, 21 Pac. 198. See, however, § 1235, for a decision in

Michigan which should be given great weight. See ante, § 1230. Wisconsin: The laws of 1889 do away with the restrictions formerly existing as to the amount of recovery by subcontractors, and make the owner absolutely liable for the full amount of their claims without regard to the contract price, or the amount of the owner's indebtedness to the contractor. This law changed the system or theory of mechanic's lien law in this state. *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385; *Mallory v. Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071. See ante, § 1232.

<sup>13</sup> *Taylor v. Murphy*, 148 Pa. St. 337, 23 Atl. 1134, 33 Am. St. 825.

contractor to charge the owner's property with liabilities incurred by him in performing his contract.<sup>14</sup>

The constitutionality of the statute of Tennessee was questioned upon the grounds: (1) that it undertakes to appropriate the property of the owner for the benefit of a person with whom he has made no contract; (2) that this result may be accomplished though the owner have no notice of the claim until after he has paid the original contractor in full; and (3) that the aggregate of the claims of subcontractors and material-men may exceed the amount agreed to be paid the original contractor, in which case the owner will be compelled to pay more than the contract price for the advantages received.

To the first objection answer was made by the court that "the right of lien to subcontractors and material-men is, by operation of law, incorporated into and made a part of the owner's contract as much as if expressly included and written therein. He contracts about a subject in which the law declares certain advantages to all persons concerned, whether by direct contract with him or by the employment of his contractor."

To the second objection the reply was that "in every instance the owner may fully protect himself by withholding the whole or a sufficiency of the price agreed upon from the original contractor until after the expiration of the thirty days, or he may see to it that the subcontractor and mate-

<sup>14</sup> Laird v. Moonan, 32 Minn. 358, 20 N. W. 354; Bohn v. McCarthy, 29 Minn. 23, 11 N. W. 127; O'Neil v. St. Olaf's School, 26 Minn. 329, 4 N. W. 47; Spokane Lumber Co. v. McChesney, 1 Wash. St. 609, 21 Pac. 198; Hunter v. Truckee Lodge, 14 Nev. 24; Bal-lou v. Black, 21 Nebr. 131, 147, 31 N. W. 673; Lonkey v. Cook, 15 Nev. 58; Merrigan v. English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A.

837, quoting text; Cole Mfg. Co. v. Falls, 90 Tenn. 466, 16 S. W. 1045, quoting text; Merritt v. Pearson, 58 Ind. 385; Barrett v. Millikan, 156 Ind. 510, 60 N. E. 310, 83 Am. St. 220; Smith v. New-baur, 144 Ind. 95, 42 N. E. 40, 33 L. R. A. 685; Ainslie v. Kohn, 16 Ore. 363, 371, 19 Pac. 97; Henry & C. Co. v. Evans, 97 Mo. 47, 10 S. W. 868; Prince v. Neal-Millard Co., 124 Ga. 884, 53 S. E. 761.

rial-man are paid as the work progresses, or he may indemnify himself by bond, as prescribed in the third section of this act."

The other objection is met by the assertion that the liability of the owner is limited to the amount he has agreed to pay in his original contract, an old statute to this effect never having been repealed.<sup>15</sup>

A similar question of constitutional law was before the Supreme Court of Wisconsin. A statute of 1889 amended the previous statute so as to do away with the restriction as to the amount of recovery by subcontractors, but made it the duty of the original contractor to defend all actions by subcontractors; and when their claims exceeded the amount of his contract price, it gave the owner of the property a right of action against the contractor for the amount of liens over and above the contract price. The act was held not unconstitutional.<sup>16</sup>

<sup>15</sup> *Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045.

<sup>16</sup> *Mallory v. Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071; *Cassoday, J.*, dissenting. Mr. Justice Lyon, delivering the opinion of the majority of the court, said: "When the statute restricted the lien of a subcontractor to the amount which the owner of the property owed the principal contractor when the claim for a lien was served upon such owner, and to any indebtedness of the owner to such principal contractor accruing after such service, there was no room to question its perfect fairness and justice to the owner of the property sought to be charged with the lien. But when these restrictions for the protection of the owner were swept away, and his property subjected to a lien charge for the amount of any

claim of a subcontractor against the principal contractor for labor or material used in the building or improvement, without regard to the state of the account between such principal contractor and the owner, it must be conceded that there is much room to question the reasonableness and justice of the statute which thus adds to the responsibility of the owner. But statutes which the courts may think are opposed to a sound public policy, or which may operate unjustly in certain cases, may not always be invalid. Before they can be so declared, it must clearly appear that they violate some fundamental principle of constitutional law." Upon examination the learned judge concludes that the amended statute does not violate any such principle. In *Wright v. Pohls*, 83 Wis.

§ 1305. **Burden on owner to protect his property from liens.**—Under such statutes the burden is upon the owner to protect himself from the liens that may be incurred by the person with whom he contracts. It thus becomes incumbent upon him to see that the contractor is financially responsible for the contracts he may make in the prosecution of the work. His rights are affected only so far as is necessary for the security of those who are presumed to have added something to the value of the owner's property.<sup>17</sup> The owner may always protect himself by withholding from the contractor such part of the contract price as will be sufficient to protect the property from all liens for work or materials.<sup>18</sup>

That the owner has paid the contractor, before the expiration of the time for filing liens by subcontractors, is no defense to such liens if they are filed in due time. The subcontractor is bound to give no other notice of his claim than that required by the lien law<sup>19</sup>

§ 1306. **Lien of subcontractor limited to value of work.**—The lien of a subcontractor, or of any one claiming under him, is limited to the reasonable value of the labor and the fair market price of the materials furnished.<sup>20</sup> As between

560, 53 N. W. 848; Lyon, C. J., referring to this decision, said: "It must be conceded that the law of 1889 is a harsh one, and will frequently operate unjustly against owners who improve their real estate, as it did in the case last referred to. Its tendency must necessarily be to discourage such improvements, and it would seem that by its enactment the legislature has established an objectionable public policy. The majority of the court, being unable to find any sufficient constitutional objection to it, were constrained to

hold it a valid law. The court is not now disposed to overrule that decision."

<sup>17</sup> Laird v. Moonan, 32 Minn. 358, 20 N. W. 354; Albright v. Smith, 2 S. Dak. 577, 51 N. W. 590.

<sup>18</sup> Colter v. Frese, 45 Ind. 96, 103, per Worden, J.; White v. Miller, 18 Pa. St. 52, 54, per Gibson, C. J.

<sup>19</sup> Ward v. Kelly, 7 Mo. App. 565; Albright v. Smith, 2 S. Dak. 577, 51 N. W. 590.

<sup>20</sup> Lee v. Burke, 66 Pa. St. 336; Cattanaeh v. Ingersoll, 1 Phila. (Pa.) 285; Laird v. Moonan, 32

the immediate parties to a contract, the contract price is, of course, the measure of liability. But when one with whom the landowner has no contract seeks to enforce against his property a lien for labor done or materials furnished, the value of such labor or materials is open to inquiry. Though the owner's contract implies his consent that others may supply labor and materials to his contractor, and that they shall have a lien therefor upon his property, yet his contract does not carry with it an implied consent that the contractor may bind him to pay whatever the contractor may promise for labor or materials, or that he may bind him for anything more than their reasonable value or price. In the absence of evidence that the price agreed upon between the contractor and subcontractor is more than the reasonable value of the materials, that price will govern in a suit to enforce a lien against the owner.<sup>21</sup>

But, on the other hand, if it be shown that the contract price agreed to be paid to the contractor was inadequate to cover the cost of the labor and materials furnished under the contract, it is only equitable that the owner, who has had the benefit of the labor and materials, should pay for them.<sup>22</sup>

**§ 1307. Payments by original contractor to laborer to be applied to account.**—Payments made by the original contractor to a laborer or material-man, without any specific application, must be applied to the account of the building or improvement against which the claim might be a lien.<sup>23</sup> As against the owner, such payments can not be applied to

Minn. 358, 20 N. W. 354; *Kling v. Railway Const. Co.*, 7 Mo. App. 410; *Deardorff v. Everhartt*, 74 Mo. 37; *Basham v. Toors*, 51 Ark. 309, 11 S. W. 282.

<sup>21</sup> *Hilliker v. Francisco*, 65 Mo. 598; *McMahon v. Bridwell*, 3 Mo.

App. 572; *Deardorff v. Everhartt*, 74 Mo. 37.

<sup>22</sup> *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354, per *Vanderbergh, J.*

<sup>23</sup> *Mack v. Colleran*, 18 N. Y. S. 104, 44 N. Y. St. 636, revd. 136 N. Y. 617, 32 N. E. 604.



the satisfaction of general debts or demands not connected with that building or improvement<sup>24</sup> "If that could be done, it would have the effect of subjecting the owner to payment of other debts between the contractor and his employes, outside of his building contract."

Partial payments made by a contractor to a subcontractor on general account, when this covers lien claims and other claims for which there is no lien, in default of application by the parties, will be applied by the courts as justice and equity may require; and generally they would be applied to the debts for which there is no lien,<sup>25</sup> or to the oldest items of the account.<sup>26</sup>

But if a mechanic or material-man has claims against a contractor for labor or materials used in erecting several buildings, and the contractor in making a payment does not designate on what particular demand it is to be credited, the creditor may apply it to the account of other buildings than that upon which he sought to enforce a lien.<sup>27</sup>

Whether there has been an appropriation of payment by either debtor or creditor, is a question of fact for the jury.<sup>28</sup>

**§ 1308. Payments made by owner upon account.**— Payments made by the owner upon account, in the absence of an appropriation by the parties, will generally be applied to the earlier items of the account, although for some of these the creditor has a lien, but for others has none.<sup>29</sup> A promissory note taken upon account of a lien

<sup>24</sup> *Goss v. Strelitz*, 54 Cal. 640; *Mack v. Colleran*, 18 N. Y. S. 104, 44 N. Y. St. 636, revd. 136 N. Y. 617, 32 N. E. 604; *Mills v. Olsen*, 43 Mont. 129, 115 Pac. 33.

<sup>25</sup> *Gantner v. Kemper*, 58 Mo. 567.

<sup>26</sup> *Jefferson v. Church of St. Matthew*, 41 Minn. 392, 43 N. W. 74; *Steenbergen v. Gowdy*, 93 Ky. 146, 14 Ky. L. 88, 19 S. W. 186;

*Crane Mfg. Co. v. Keck*, 35 Nebr. 683, 53 N. W. 606.

<sup>27</sup> *Waterman v. Younger*, 49 Mo. 413; *Gantner v. Kemper*, 58 Mo. 567. See also, *Upson v. United Engineering & Contracting Co.*, 72 Misc. (N. Y.) 541, 130 N. Y. S. 726.

<sup>28</sup> *Stewart v. McQuaide*, 48 Pa. St. 191.

<sup>29</sup> *Sexton v. Weaver*, 141 Mass.

claim will be applied in the same way to the earliest items.<sup>30</sup>

Some courts, however, adopt the rule that unappropriated payments will be applied by the court to the payment of claims which are not secured by any lien.<sup>31</sup>

A partial payment made by the owner upon an entire contract for labor and materials may be applied generally upon the contract, or by agreement of the parties may be applied either in payment for labor or materials. In the absence of any agreement, a partial payment operates to diminish the contract debt, and to discharge a lien for such debt pro tanto. If the contractor has no lien for the materials furnished by reason of having given no notice of his intention to claim such lien, but can distinctly show what the labor was worth, he may, under the statute of Massachusetts,<sup>32</sup> enforce a lien for the labor alone; and in case of a partial payment upon the contract, if the worth of the labor performed is less than the amount due on the contract debt after deducting the partial payment, the lien can be enforced for the whole worth of the labor.<sup>33</sup>

Where the owner sells a part of several lots of land on which buildings have been constructed, and separate liens have been filed against each building, the purchaser having no actual notice of the liens, a general payment by the owner made on the lien claims should be applied to the satisfaction of the liens on the lots sold,<sup>34</sup> if this does not interfere with the security of the lienholder.

273, 6 N. E. 367; *Worthley v. Emerson*, 116 Mass. 374; *The Dunlap*, 1 Lowell (U. S.) 350; *Briggs v. Titus*, 7 R. I. 441; *Bean v. Brown*, 54 N. H. 395.

<sup>30</sup> *Dey v. Anderson*, 39 N. J. L. 199; *Beckel v. Petticrew*, 6 Ohio St. 247.

<sup>31</sup> *McQuaide v. Stewart*, 48 Pa. St. 198; *Foster v. McGraw*, 64 Pa. St. 464, 469; *McKelvey v. Jarvis*, 87 Pa. St. 414; *Nichols v. Culver*, 51 Conn. 177; *Christnot v. Mon-*

*tana G. & S. M. Co.*, 1 Mont. 44; *Capron v. Strout*, 11 Nev. 304.

<sup>32</sup> See ante, § 1207.

<sup>33</sup> *Casey v. Weaver*, 141 Mass. 280, 6 N. E. 372. Otherwise before the statute of 1872, ch. 318, allowing the worth of the labor to be shown and a lien given for that. *Driscoll v. Hill*, 11 Allen (Mass.) 154.

<sup>34</sup> *Dungan v. Dollman*, 64 Ind. 327.

**§ 1309. Payments to subcontractor.**—Payments made by the owner to a subcontractor will be applied by the law to items for which the subcontractor has a right of lien upon the owner's property.<sup>35</sup> If the builder intended a payment to a material-man, to be applied to a debt due him for building material, and the latter knew that the payment was so intended, he can not apply it towards an earlier debt of the builder.<sup>36</sup>

<sup>35</sup> Nelson v. Withrow, 14 Mo. App. 270.

<sup>36</sup> Hanson v. Cordano, 96 Cal. 441. 31 Pac. 457.

## CHAPTER XXXIII.

### MECHANICS' LIENS: FOR WHAT LABOR AND MATERIALS GIVEN.

Sec.		Sec.	
1309a.	Building the subject of liens.	1322.	Distinct alterations or repairs not recovered for under one lien.
1309b.	Foundation constitutes a building.	1323.	Mingling of lienable accounts with those for which there is no lien.
1309c.	Terms "Structure" and "Improvement."	1324.	Lien for work done away from the premises.
1309d.	"Building" not inclusive of every species of erection on land.	1325.	No lien for articles furnished.
1310.	Lien confined to the particular building.	1326.	Materials furnished with reference to their use.
1311.	Lien on the structure upon which the labor or material is bestowed.	1327.	Materials intended for a particular use.
1312.	Houses on distinct lots.	1328.	Rule of some states that material furnished must be actually used in construction of the building.
1313.	Labor under one contract, upon several buildings.	1329.	Rule in other states.
1314.	Buildings erected under separate contracts.	1330.	No lien for materials furnished solely on the credit of the purchaser.
1315.	Labor upon lots belonging to different owners.	1331.	Evidence of purpose for which materials were furnished.
1316.	Building projecting upon land of another.	1332.	Material-man not precluded from showing that materials were furnished on the credit of the building by charging them to the buyer.
1317.	Contract to erect two or more buildings for entire sum.	1333.	Materials charged to building.
1318.	Apportionment of liens.	1334.	Materials sold by purchaser.
1319.	Apportionment of liens without particular statute.		
1320.	Apportionment by agreement of parties.		
1321.	Contract for work on several houses divided so as to give separate liens on each.		

Sec.		Sec.	
1335.	No lien for machinery furnished for a mill unless done as part of its construction.	1352.	No lien for lumber furnished and used in erecting a scaffold.
1336.	Machinery purchased.	1353.	When lien does not arise for labor in pulling down a building.
1337.	No lien for machinery furnished for the manufacture of materials.	1354.	Lien may exist for taking down a building.
1338.	Work in making slight changes incidental to placing machinery.	1355.	No lien for removing a building.
1339.	Lien for repair work.	1356.	No lien for labor in hauling lumber.
1340.	Reservation of title till materials are paid for.	1357.	No lien for labor in cooking for workman.
1341.	Whether a fixture.	1358.	No lien on a claim for breach of contract.
1342.	Fixtures unsuitable or not accepted.	1359.	No lien for loan of money.
1343.	Lien for furnaces, ranges, and heaters.	1360.	Surety has no right to a lien for materials furnished.
1344.	A drain pipe, a part of a house.	1361.	Artisans and mechanics equally entitled to liens.
1345.	Lien for putting mirrors into the walls of a house.	1362.	Owner can have no lien on his own property.
1346.	Repairs in refitting a theatre.	1363.	General manager not a laborer.
1347.	Materials furnished for upholstering a hall.	1364.	Book-keeper not a laborer.
1347a.	Powder used in construction of a railroad.	1365.	No lien for superintending the construction of a building.
1348.	Grading about a building not construction work.	1366.	Superintendent of a mine who also works entitled to a lien.
1349.	Lien for constructing a sidewalk.	1367.	Architect not entitled to a lien.
1350.	Fences and sodding.		
1351.	Furnace stack.		

§ 1309a. **Buildings, the subject of liens.**—Buildings may be the subject of liens if they are sufficiently substantial to entitle them to the character of buildings. Thus the buildings constituting the plant of an oil refinery, consisting of a boiler-house, pump-house, tool-house, barrel-house, filter-house, and tank-houses, may be the subject of a lien. Though a building may not be absolutely required for any

of these purposes, such as to protect an engine and boiler from the weather, yet if one be erected, a lien will attach for the labor and materials used in its construction.<sup>1</sup>

**§ 1309b. Foundation constitutes a building.**—The foundation of a house or barn constitutes a “building” within the meaning of a statute giving a mechanic’s lien upon a “building,” and upon the lot of land upon which it stands. It is immaterial that the building was never erected, or was never completed, or that the purpose to erect it was abandoned. “Laborers and material-men, who are employed to do work, or furnish material, with the purpose of the employer, then formed, to continue the work to the completion of a building for which the foundation is thus being prepared, are entitled to acquire a lien under the statute.”<sup>2</sup>

**§ 1309c. Terms, “structure” and “improvement.”**—The terms “structure” and “improvement” have a very broad meaning, and include almost any permanent erection upon land intended for its improvement. Even a mine or pit sunk in a mining claim has been held to be within the meaning of a statute giving a lien on a building, improvement, or structure.<sup>3</sup> The laying of water-pipes for a water company is an improvement for which a lien is given.<sup>4</sup>

**§ 1309d. “Buildings” not inclusive of every species of erection on land.**—The word “building” does not include every species of erection on land. “Taken in its broadest

<sup>1</sup> Short v. Miller, 120 Pa. St. 470, 14 Atl. 374; Short v. Ames, 121 Pa. St. 530, 15 Atl. 607; Titusville Iron Works v. Keystone Oil Co., 130 Pa. St. 211, 18 Atl. 739.

<sup>2</sup> Scott v. Goldinghorst, 123 Ind. 268, 24 N. E. 333; McCristal v. Cochran, 147 Pa. St. 225, 23 Atl. 444; Baker v. Waldron, 92 Maine 17, 42 Atl. 225, 69 Am. St. 473.

<sup>3</sup> Helm v. Chapman, 66 Cal. 291, 5 Pac. 352.

<sup>4</sup> Eufaula Water Co. v. Addyston Pipe & Steel Co., 89 Ala. 552, 8 So. 25. The furnishing of a furnace or range and the work done in attaching them and putting them into a house is the performance of labor and the furnishing of material in the erection of a building

sense," say the Supreme Court of Massachusetts, "it can mean only an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament or use, constituting a fabric or edifice, such as a house, a store, a church, a shed."<sup>5</sup> In this case it was held that a wall built around three sides of the stack of an iron furnace at the distance of a few feet from it, in order to protect it from earth slides, was not a building within the meaning of such a law.

A coke-oven is not a building within the meaning of the mechanic's lien law.<sup>6</sup> Neither is a lime-kiln.<sup>7</sup>

**§ 1310. Lien confined to the particular building.**—The lien is specific, that is, it is confined to the particular building or structure upon which the labor was done, or for which the materials were furnished.<sup>8</sup> Thus, a single lien for materials furnished for repairing a house, and also for materials furnished for constructing a fence, can not be enforced upon both the house and the fence. The claimant may have a lien upon the house for the materials furnished for the repairs upon the house, and he may have another lien for materials used in the construction of the fence; but

for which a mechanic's lien will attach. *Union Stove Works v. Klingman*, 164 N. Y. 589, 58 N. E. 1093. Lead furnished for connecting a house with pipes in the highway is a part of a building on which a lien will attach. *Feeny v. Rothbaum*, 155 Mo. App. 331, 137 S. W. 82. No lien for planting a hedge fence on land. *Eastern Ark. Hedge Fence Co. v. Tanner*, 67 Ark. 156, 53 S. W. 886.

<sup>5</sup> *Truesdell v. Gay*, 13 Gray (Mass.) 311.

<sup>6</sup> *Central Trust Co. v. Cameron Iron & Coal Co.*, 47 Fed. 136.

<sup>7</sup> *Cowdrick v. Morris*, 9 Pa. Co. Ct. 312.

<sup>8</sup> *Simmons v. Carrier*, 60 Mo. 581; *Fitzpatrick v. Thomas*, 61 Mo. 512; *McGrew v. McCarty*, 78 Ind. 496; *Hill v. Braden*, 54 Ind. 72; *Hill v. Ryan*, 54 Ind. 118; *Wilkinson v. Rust*, 57 Ind. 172; *Chapin v. Persse, &c., Paper Works*, 30 Conn. 461, 79 Am. Dec. 263; *Landers v. Dexter*, 106 Mass. 531; *Morris County Bank v. Rockaway Mfg. Co.*, 16 N. J. Eq. 150; *Gorgas v. Douglas*, 6 S. & R. (Pa.) 512; *Barker v. Maxwell*, 8 Watts (Pa.) 478; *Treusch v. Shryock*, 55 Md. 330; *Plummer v. Eckenrode*, 50 Md. 225, 234; *Wilson v. Merryman*, 48 Md. 328; *Lambert v. Williams*, 2 Tex. Civ. App. 413, 21 S. W. 108.

he has no lien upon the house for materials used in building the fence, and he has no lien upon the fence for materials used upon the house.<sup>9</sup>

Where materials are furnished for one or more of several buildings upon a large tract of land, used together in the general business of a manufacturing firm or corporation, a mechanic's lien must be filed against the particular building or buildings only to which the materials were supplied, and the lots and curtilages appurtenant thereto; but not against the entire premises, including the old buildings as well as the new.<sup>10</sup> And so where two or more houses are built upon a large lot of land, which the owner has never indicated orally, by a plan or by anything done on the land, a purpose to divide, but rather an intention to keep as a single lot and to let to tenants, the builder may maintain a lien upon the entire lot.<sup>11</sup>

**§ 1311. Lien on the structure upon which the labor or material is bestowed.**—Labor and materials applied to one house can not be a lien upon another. Labor and materials applied to repairing an old house can not be made a lien upon a new house erected in its place after it had been found that the old house was too far gone to warrant the repairs.<sup>12</sup> But any materials furnished for the old house which are afterwards used in the new, or labor upon such materials, may be embraced in a lien on the new house. In such case the lien on the new house may be said to have

<sup>9</sup> *Kezartee v. Marks*, 15 Ore. 529, 16 Pac. 407, per Strahan, J. But see *O'Neil v. Taylor*, 59 W. Va. 370, 53 S. E. 471.

<sup>10</sup> *Girard Storage Co. v. Southwark Co.*, 105 Pa. St. 248; *Nelson v. Campbell*, 28 Pa. St. 156; *Parish's App.*, 83 Pa. St. 111; *Wharton v. Douglas*, 92 Pa. St. 66; *Long v. McLanahan*, 103 Pa. St. 537.

<sup>11</sup> *Quimby v. Durgin*, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514; *Whalen v. Collins*, 164 Mass. 146, 41 N. E. 124; *Sprague Inv. Co. v. Mouat Lumber & Invest. Co.*, 14 Colo. App. 107, 60 Pac. 179.

<sup>12</sup> *Nichols v. Culver*, 51 Conn. 177.



begun with the beginning of the work upon such materials, and from the time of furnishing of materials.<sup>13</sup>

A lumber dealer sold lumber for the repairing of three paper mills belonging to the same owner, two of them being upon one parcel of land, and the other upon a separate parcel; but a separate account was kept by the dealer of the lumber furnished to each mill. In the certificate of lien filed, the claimant described the three mills together, and claimed a single lien upon all the mills, stating the whole amount due him as the amount of his lien. It was held that the certificate was void. The premises described were not the premises upon which the lien existed. If there were a lien, it existed upon the separate mills. The amounts for which liens existed, if they existed at all, were the amounts due for each separate and distinct mill.<sup>14</sup>

**§ 1312. Houses on distinct lots.**—Where houses are built upon distinct lots of land, a separate lien must generally be filed against each house and lot for the work and materials used thereon. A single lien against the entire premises for the aggregate charge is invalid.<sup>15</sup> It is immaterial

<sup>13</sup> *Nichols v. Culver*, 51 Conn. 177.

<sup>14</sup> *Chapin v. Persse, &c.*, Paper Works, 30 Conn. 461, 79 Am. Dec. 263; *Rose v. Persse &c. Paper Works*, 29 Conn. 256. See *Dalles Lumber & Mfg. Co. v. Wasco Woolen Mfg. Co.*, 3 Ore. 527. In Iowa it is held that where lumber has been furnished for two buildings owned by the same person, a mechanic's lien may be established against one of them, without showing that the particular materials for which the suit is brought went into the particular building on which the lien is sought to be established. But it is not meant that a lien may be es-

tablished upon one building for materials which are shown to have gone into another, but only that, if such showing is deemed of any consequence to the defendant, the burden is upon him to make it. *Lewis v. Saylors*, 73 Iowa 504, 35 N. W. 601; *Bowman Lumber Co. v. Newton*, 72 Iowa 90, 33 N. W. 377.

<sup>15</sup> *Fitzgerald v. Thomas*, 61 Mo. 499, 502; *Fitzpatrick v. Thomas*, 76 Mo. 513, affg. 7 Mo. App. 343; *Meyers v. Thomas*, 3 Mo. App. 604; *Steigleman v. McBride*, 17 Ill. 300; *James v. Hambleton*, 42 Ill. 308; *Major v. Collins*, 11 Bradw. (Ill.) 658; *Culver v. Elwell*, 73 Ill. 536; *Metzger v. McCann*, 92 Ill. App. 109; *Aurand v. Martin*, 87 Ill. App.

that at the time of the contract all the houses and lots belonged to the same owner, and that in a suit to foreclose the lien he is the sole defendant; and it is also immaterial that the lots are contiguous, and in a compact body of land, and are without division fences. Nor does it aid the lien in such case that the whole work is done under one contract for all the buildings.<sup>16</sup> The Minnesota law on this point is otherwise.<sup>17</sup>

§ 1313. **Labor under one contract, upon several buildings**—When labor is performed or materials furnished under one contract upon several buildings, all situate upon one lot of land belonging to the contracting owner, the lien attaches to all the land for the whole value of the labor performed, and it is immaterial whether the contract specifies one sum for all the work, or separate amounts for each building.<sup>18</sup> Thus, where one furnished lumber to the owner of a lot for three separate houses which were built at the same time, and when partly finished were mortgaged separately, and all the lumber was furnished under one contract, and no separate account was kept of what went

337; *Aurand v. Martin*, 188 Ill. 117, 58 N. E. 926, affg. 87 Ill. App. 337; *Blanchard v. Fried*, 162 Ill. 462, 44 N. E. 880, revg. 58 Ill. App. 622; *Rathbun v. Hayford*, 5 Allen (Mass.) 406; *Dalles Lumber & Mfg. Co. v. Wasco Woolen Mfg. Co.*, 3 Ore. 527; *Small v. Foley*, 8 Colo. App. 435; *Morris County Bank v. Rockaway Mfg. Co.*, 16 N. J. Eq. 150; *James v. Van Horn*, 39 N. J. L. 353. But in this state the lien claim may be amended under a provision of the statute.

<sup>16</sup> *Fitzgerald v. Thomas*, 61 Mo. 499; *Buckley v. Commercial Nat. Bank*, 171 Ill. 284, 49 N. E. 617, affg. 62 Ill. App. 202. See, however, post, § 1317.

<sup>17</sup> *Johnson v. Salter*, 70 Minn. 146, 72 N. W. 974, 68 Am. St. 516.

<sup>18</sup> *Phillips v. Gilbert*, 101 U. S. 721, 25 L. ed. 833. Arkansas: *Tenney v. Sly*, 54 Ark. 93, 14 S. W. 1091. Connecticut: *Brabazon v. Allen*, 41 Conn. 361; *Marston v. Kenyon*, 44 Conn. 349; *Fitch v. Baker*, 23 Conn. 563; *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325. On the same state of facts it has been held valid to file a lien claim against a structure as a single building; *Cronan v. Corbett*, 78 Conn. 475, 62 Atl. 662; or as three separate buildings. *Halsted & Co. v. Arick*, 76 Conn. 382, 56 Atl. 628. Illinois: *Orr v. N. W. Mut. L.*

into the building of each house, it was held that the lumber dealer was entitled not only to a separate lien on each house

Ins. Co., 86 Ill. 260; James v. Hambleton, 42 Ill. 308; Christian v. Illinois Malleable Iron Co., 92 Ill. App. 320. Indiana: Crawford v. Anderson, 129 Ind. 117, 28 N. E. 314; Premier Steel Co. v. McElwaine-Richards Co., 144 Ind. 614, 43 N. E. 876. Iowa: Bowman Lumber Co. v. Newton, 72 Iowa 90, 33 N. W. 377. Kansas: Carr v. Hooper, 48 Kans. 253, 29 Pac. 398; Mulvane v. Chicago Lumber Co., 56 Kans. 675, 44 Pac. 613. Maryland: Maryland Brick Co. v. Spilman, 76 Md. 377, 25 Atl. 297, 17 L. R. A. 599, 35 Am. St. 431; Fulton v. Parlett, 104 Md. 62, 64 Atl. 58. Massachusetts: Worthley v. Emerson, 116 Mass. 374; Dall v. Robinson, 115 Mass. 429; Whitford v. Newell, 2 Allen (Mass.) 424; Batchelder v. Rand, 117 Mass. 176. Minnesota: Lax v. Peterson, 42 Minn. 214, 44 N. W. 3; Glass v. St. Paul Carriage Co., 43 Minn. 228, 45 N. W. 150; Carpenter v. Leonard, 5 Minn. 155. New Hampshire: Cole v. Colby, 57 N. H. 98. New York: Hall v. Sheehan, 69 N. Y. 618; Moran v. Chase, 52 N. Y. 346; McAuley v. Mildrum, 1 Daly (N. Y.) 396, 400. North Carolina: Chadbourn v. Williams, 71 N. Car. 444, 448. Texas: Lyon v. Logan, 68 Tex. 521, 5 S. W. 72, 2 Am. St. 511. In California: Code Civ. Proc. 1906, § 1188. Nevada: Rev. Laws 1912, art. 2218. Idaho: Rev. Codes 1908, § 5116. New Mexico: Comp. Laws 1897, § 2222, it is provided that when one claim is filed against two or more buildings [mines in Idaho], mining claims, or other im-

provements, owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise the lien of such claim is postponed to other liens; and the lien of such claimant [claim, in Idaho] does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage ["mortgage" is not given in Nevada statute], or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated [constructed in Nevada]. In Maryland in every case in which one claim for materials shall be filed by the person preferring the same against two or more buildings owned by the same person, the person filing such joint claim shall at the same time designate the amount he claims to be due him on each of said buildings, otherwise such claim shall be postponed to other lien creditors; and the lien of such claimant shall not extend beyond the amount so designated as against other creditors having liens by judgment, mortgage or otherwise. Pub. Gen. Laws 1904, ch. 63, § 21. Under this statute the failure of the mechanics' liens, filed against two houses on the same lot, to specify how much of the material and labor were furnished for each, merely gives precedence to other liens, and can not be complained of by the owner, who is not there-

for the lumber used in its construction, but to one lien on all the houses for the lumber used in the construction of all.<sup>19</sup> The petition in such case must be for the enforcement of the lien upon all the land upon which the labor was performed. There can be no lien for labor performed under such a contract, partly on the land described in the petition and partly on adjoining land not described in the petition, whether the latter is owned by the respondent or not.<sup>20</sup>

Whether labor and materials were furnished for several houses under an entire contract, or under separate contracts

by affected. *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101; *Dickinson v. Bolyer*, 55 Cal. 285. This provision applies only to cases where the buildings or other improvements are separate and distinct, and not to cases where all the work was performed upon one and the same piece of property, although upon different portions of it. *Dickinson v. Bolyer*, 55 Cal. 285. This provision does not apply where several mining claims have been consolidated, and are owned and worked as one mine, under a common name. *Tredinick v. Red Cloud Consol. Min. Co.*, 72 Cal. 78, 13 Pac. 152. So in Delaware, Rev. Code 1893, p. 819. In New Jersey the lien may be apportioned between the buildings. Comp. Stats. 1910, p. 3307, § 22. In Missouri, when the improvement consists of two or more buildings united together and situated upon the same lot or contiguous lots, or separate buildings upon contiguous lots, and erected under one general contract, it shall not be necessary to file a separate lien upon each building or lot for the work done or materials furnished in the erection of such improve-

ments. Rev. Stats. 1909, § 8237. *Schroeder v. Mueller*, 33 Mo. App. 28.

<sup>19</sup> In South Dakota: A lienholder who has contributed to the erection, alteration, removal, or repair of two or more buildings or other improvements situated upon or removed to one lot, or upon or to adjoining lots, under or pursuant to the purposes of one general contract with the owner, may file one statement for his entire claim, embracing the whole area so improved; or, if he so select, he may apportion his demand between the several improvements, and assert a lien for a proportionate part upon each, and upon the ground appurtenant to each respectively. Sess. Laws 1913, p. 387, § 8. *Wilcox v. Woodruff*, 61 Conn. 578, 24 Atl. 521, 1056, 17 L. R. A. 314, 29 Am. St. 222.

<sup>20</sup> *Rice v. Nantasket Co.*, 140 Mass. 256, 5 N. E. 524; *Foster v. Cox*, 123 Mass. 45; *Stevens v. Lincoln*, 114 Mass. 476; *Rathbun v. Hayford*, 5 Allen (Mass.) 406; *Landers v. Dexter*, 106 Mass. 531. See *Schulenburg v. Vrooman*, 7 Mo. App. 133.

for each house, is a question of fact to be determined by the jury, or by the judge who tries the case without a jury.<sup>21</sup>

Of course, if the buildings constitute a solid block, and are built together under one contract for the same owner, a single lien may cover the whole improvement.<sup>22</sup> The block in such case is really one building. Under like circumstances, a lien may attach to two blocks of houses, though they are separated by a private alley;<sup>23</sup> and a lien may attach for the construction of two houses under one contract, though they are upon lots on opposite sides of a street.<sup>24</sup> In Pennsylvania, however, which allows a lien to be filed for materials furnished for two or more "adjoining houses or other buildings," a single lien claim can not be filed for blocks of houses separated by public streets.<sup>25</sup>

A lien may be maintained for work upon a double wooden house under a contract to labor and furnish labor by the day, though the building is arranged for two dwelling-houses and the labor is performed on each of the houses. The two houses in such case are regarded as one building.<sup>26</sup> Where work and labor have been done in repairing a dwelling-house and outbuildings being appurtenant to the dwelling, a joint lien may be taken on the dwelling-house and the outbuildings.<sup>27</sup>

<sup>21</sup> *Turner v. Wentworth*, 119 Mass. 459.

<sup>22</sup> *Fitzgerald v. Thomas*, 61 Mo. 499; *Fitzpatrick v. Thomas*, 76 Mo. 513, affg. 7 Mo. App. 343; *Worthley v. Emerson*, 116 Mass. 374; *James v. Hambleton*, 42 Ill. 308; *Orr v. N. W. Mut. L. Ins. Co.*, 86 Ill. 260; *Culver v. Elwell*, 73 Ill. 536; *Tenney v. Sly*, 54 Ark. 93, 14 S. W. 1091.

<sup>23</sup> *Goldheim v. Clark*, 68 Md. 498, 13 Atl. 363; *Fitzpatrick v. Allen*, 80 Pa. St. 292.

<sup>24</sup> *Sergeant v. Denby*, 87 Va. 206, 12 S. E. 402; *Chadbourn v. Williams*, 71 N. Car. 444.

<sup>25</sup> *Lucas v. Hunter*, 153 Pa. St. 293, 25 Atl. 827; *Schultz v. Asay*, 2 Penny. (Pa.) 411.

<sup>26</sup> *Getchell v. Moran*, 124 Mass. 404.

<sup>27</sup> *Crawford v. Anderson*, 129 Ind. 117, 28 N. E. 314. Even though the outbuilding is on a different lot from the house. *Northwestern & C. Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130.

**§ 1314. Buildings erected under separate contracts.**—Where separate buildings, thought in one block, are erected under separate and independent contracts, no lien can attach under such contracts to all the houses.<sup>28</sup> The owner of two lots of land entered into separate contracts with the same person for the construction of a house on each lot, for different prices. A plumber contracted with the original contractor to do the plumbing for both houses for one entire price. It was held that the plumber was not entitled to a lien upon both lots for what was done under his contract.<sup>29</sup> But if the contract for all the buildings is an entire contract for an entire price, though a different price for the work to be done is put upon different buildings, a lien attaches upon the whole estate for the whole value of the work upon all the buildings.<sup>30</sup>

**§ 1315. Labor upon lots belonging to different owners.**—Where, however, labor and materials are furnished under a contract for an entire price, in the erection of several distinct buildings on lots of land owned separately by several persons, a lien can not be enforced for labor performed upon one house and lot, though the claimant was able to show what the labor upon such house was worth.<sup>31</sup> And so if

<sup>28</sup> *Landers v. Dexter*, 106 Mass. 531; *Larkins v. Blakeman*, 42 Conn. 292; *Chapin v. Persse & Co. Paper Works*, 30 Conn. 461, 79 Am. Dec. 263. It has been held otherwise in California. The court say: "It seems to be conceded that a joint lien may be filed against two buildings erected at the same time and under the same contract. We think there can be no doubt that such is the case; and whatever may be the rights of an original contractor having constructed two separate buildings under two separate and valid contracts, we think that in the case at bar [which was

a suit by material-men or sub-contractors] the only effect of the failure to state how much labor and material was furnished one building, and how much the other, is to postpone the liens of these claimants, and give precedence to the liens of others." *Booth v. Pendola*, 88 Cal. 36, 25 Pac. 1101.

<sup>29</sup> *Knauff v. Miller*, 45 Minn. 61, 47 N. W. 313, citing *Landers v. Dexter*, 106 Mass. 531.

<sup>30</sup> *Wall v. Robinson*, 115 Mass. 429. See *Whitford v. Newell*, 2 Allen (Mass.) 424; *Cole v. Colby*, 57 N. H. 98.

<sup>31</sup> *Childs v. Anderson*, 128 Mass.

labor and materials be furnished and used under an entire contract in the erection of a fence upon the land of several different owners, with no stipulation for a separate price from either, a lien can not be enforced upon several lots of land collectively, nor can a lien for the whole amount due be enforced upon either of the lots.<sup>32</sup>

The decisions are not, however, altogether in accord upon this point, and there is a tendency in some states to allow a lien to be enforced upon several lots, even if they belong to different owners, in case the buildings in effect constitute a single structure and are erected under a single and entire contract. Thus, if the several owners of two contiguous lots unite in a joint contract for the construction of one building to be situated in part on each lot, both lots may be treated as one tract, and a single claim for a lien for labor or material performed or furnished for the construction of the building may be filed against both lots.<sup>33</sup>

Even under a statute which says that the lien shall attach to the lot of ground upon which the building is erected, the word "lot" is not necessarily limited to a city or platted lot. It may include more or less than a platted lot. It may also include land belonging to different owners in severalty. Such owners of contiguous lots may by their acts connect them so that they will constitute one lot; and they so connect them when they join in the construction of a single building on both lots. Such will also be the case where the owner of one of the lots constructs such single building on

108; Cahill v. Capen, 147 Mass. 493, 18 N. E. 419; Gorgas v. Douglas, 6 Serg. & R. (Pa.) 512; Harmon v. San Francisco & S. R. R. Co. (Cal.), 23 Pac. 1024; Bartlett v. Bilger, 92 Iowa 732, 61 N. W. 233. But see Williams v. Judd-Wells Co., 91 Iowa 378, 59 N. W. 271, 51 Am. St. 350; Badger Lumber Co. v. Holmes, 55 Nebr. 473,

76 N. W. 174, holding the entire debt could be made a charge on all the land.

<sup>32</sup> Rathbun v. Hayford, 5 Allen (Mass.) 406.

<sup>33</sup> Miller v. Shepard, 50 Minn. 268, 52 N. W. 894; Fullerton v. Leonard, 3 S. Dak. 118, 52 N. W. 325; Kinney v. Mathias, 81 Minn. 64, 83 N. W. 497.

both lots, with the knowledge and consent of the owner of the other lot. In such case, one who does work or furnishes material upon a part of the building situate on one of the lots may claim a lien on the whole building and both lots.<sup>34</sup>

**§ 1316. Building projecting upon land of another.**—No lien can be maintained for labor performed or materials furnished, under an entire contract, partly on the land described in the petition and partly on adjoining land,<sup>35</sup> though it belongs to the same person.<sup>36</sup> The lien can not be maintained even where the building projects an inch over the land of an adjoining owner, though the foundation is wholly on the land described in the petition.<sup>37</sup> Of course there could be no lien upon the land to which the person supposed to be the owner of the premises had no title, and there could be no lien upon the part to which he had title, because it would be impossible to apportion the labor to the two parts.

**§ 1317. Contract to erect two or more buildings for entire sum.**—Under a contract to erect two or more houses for an entire sum, though situate upon different lots, the lien is upon all the buildings and lots, and not upon each separately.<sup>38</sup> If one of the lots be sold while it is subject to the

<sup>34</sup> *Menzel v. Tubbs*, 51 Minn. 364, 53 N. W. 653, 1017, 17 L. R. A. 815.

<sup>35</sup> *Foster v. Cox*, 123 Mass. 45; *Stevens v. Lincoln*, 114 Mass. 476.

<sup>36</sup> *Rice v. Nantasket Co.*, 140 Mass. 256, 5 N. E. 524.

<sup>37</sup> *McGuinness v. Boyle*, 123 Mass. 570, 25 Am. Rep. 123.

<sup>38</sup> *Phillips v. Gilbert*, 101 U. S. 721, 25 L. ed. 833; *Hall v. Sheehan*, 69 N. Y. 618; *Paine v. Bonney*, 4 E. D. Smith (N. Y.) 734; *Doolittle v. Plenz*, 10 Nebr. 153, 20 N. W. 116; *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *Peck*

*v. Standart*, 1 Bradw. (Ill.) 228; *Bowman Lumber Co. v. Newton*, 72 Iowa 90, 33 N. W. 377; *Lax v. Peterson*, 42 Minn. 214, 44 N. W. 3; *Orr v. Fuller*, 172 Mass. 597, 52 N. E. 1091; *Sprague Inv. Co. v. Monat Lumber & Investment Co.*, 14 Colo. App. 107, 60 Pac. 179. See, however, ante, § 1312. A single declaration should be filed in which the debts are apportioned among the various buildings. *Culver v. Lieberman*, 69 N. J. L. 341, 55 Atl. 812, overruling *Johnson v. Algor*, 65 N. J. L. 363, 47 Atl. 571.



right of lien, the purchaser takes it subject to the lien, and has no greater rights than his grantor, though in a suit to foreclose the lien in such case it may be proper to apportion the lien among all the lots according to the value of the labor and materials expended upon each.<sup>39</sup> Though the contractor releases one of the houses from his lien under an agreement with the owner that he should retain a lien on the other for the balance due on his contract, he can enforce his lien on the remaining house and lot for the entire balance due him, where there were no third parties whose interests were prejudicially affected by the release of the other house and lot.<sup>40</sup>

It is immaterial that the land was conveyed to the owner in separate lots, and was so designated upon a plan; that the buildings were separate and upon separate lots; and that, after the contract was made, the different parcels were conveyed in mortgage to different persons.<sup>41</sup> It is immaterial also that the owner holds one portion of the land in fee and another by lease, in case one building is built over both parcels, and both parcels are subjected to one use; as where a coal-shed was built over such pieces of land, and a wharf constructed along their water front. There was unity of title, of plan, and of use, and the former divisional line between the parcels ceased to be, in law as well as in fact. A lien for work done and materials furnished for the coal-shed under one contract covered both parcels of land.<sup>42</sup>

§ 1318. **Apportionment of liens.**—In Pennsylvania the statute formerly gave an apportionment of liens between several buildings built by the same owner. However, a

<sup>39</sup> Doolittle v. Plenz, 16 Nebr. 153, 20 N. W. 116; Cole v. Colby, 57 N. H. 98.

<sup>41</sup> Batchelder v. Rand, 117 Mass. 176.

<sup>42</sup> Marston v. Kenyon, 44 Conn.

<sup>40</sup> Reilly v. Williams, 47 Minn. 349, 50 N. W. 826.

more recent statute now declares that there shall be no apportionment of liens.<sup>42a</sup>

§ 1319. **Apportionment of liens without particular statute.**—A lien claim may be apportioned when practicable without the aid of any special statute for the purpose. In an action to enforce a lien for labor performed on two houses, the fact that the petitioner is not able to state the precise share of the labor performed on each house does not necessarily defeat altogether his recovery. The jury may sustain his lien against each house for such certain amount of labor as they are satisfied he performed thereon, although they may not be satisfied that he did not perform more.<sup>43</sup>

If the labor and materials can be apportioned between the different buildings, the release of one building does not affected the lien upon the others; but in that case the claim filed against the unreleased buildings should not include any item for labor or materials furnished to the released building.<sup>44</sup> The release of one building from the operation of the lien has the effect of releasing the other buildings from any liability for materials furnished or labor done for the building released, either before or after the release.<sup>45</sup> It is for the lien claimant to show affirmatively what part or proportion of the materials entered into each building.<sup>46</sup>

<sup>42a</sup> Purdon's Dig. (13th ed.) p. 2483, § 22.

<sup>43</sup> Shaw v. Thompson, 105 Mass. 345; Hayden v. Logan, 9 Mo. App. 492. And see Edwards v. Edwards, 24 Ohio St. 402.

<sup>44</sup> Nickel v. Blanch, 67 Md. 456, 10 Atl. 234.

<sup>45</sup> Wilson v. Wilson, 51 Md. 159, 160.

<sup>46</sup> Miller v. Shepard, 50 Minn. 268, 52 N. W. 894. In this case the lien claim was upon a barn built partly upon two contiguous lots owned by different persons, though

they joined in one contract for the building. "Had it appeared that both parts of the barn were built and finished alike, and that half stood on each lot, then the court would have been fully justified in adjudging one-half the amount of the claim to be a lien on the premises [of each owner]. But it appears not only that the two parts were finished differently, but also that five feet more of the building (which for anything that appears might have been a very considerable part of it) stood on one

If the lien claim can be properly apportioned between the buildings, the judgment should be for the specific sums due on each of them.<sup>47</sup>

**§ 1320. Apportionment by agreement of parties.**—Where work is done upon different parcels under one contract, an apportionment of the work between them agreed upon by the parties is not necessarily binding upon mortgagees, or others having interests in the property. Thus, where a contractor agreed to do work in erecting and repairing a quartz mill, and in opening and developing a quartz mine in Montana for a stipulated sum a year, and it was a part of the contract that one-half the contractor's time should be devoted to each, it was held that the apportionment agreed upon did not determine the extent of the lien upon the different parcels as against other parties in interest.<sup>48</sup> "A lien," said Mr. Justice Field, "did not, however, arise from this contract of apportionment, or from the special contract under which the work was done; it arose from the work which was performed upon the property. It is the work of mechanics and laborers, or the materials furnished by them or others, by which value is added, or supposed to be added, to property, which creates the lien under the statute, upon notice claiming it being seasonably filed."

**§ 1321. Contract for work on several houses divided so as to give separate liens on each.**—A contract for work on two or more houses may be so divided as to give a separate lien upon each. This is the case where the contract is to do certain work on one house and the same work on another

lot than on the other, and there is no evidence as to what part or portion of the material went into either. Consequently there was no basis whatever furnished by the evidence for the court's apportionment. It was mere guess-work." Per Mitchell, J.

<sup>47</sup> Treusch v. Shryock, 55 Md. 330; Plummer v. Eckenrode, 50 Md. 225.

<sup>48</sup> Davis v. Alford, 94 U. S. 545, 24 L. ed. 283. See Doolittle v. Plenz, 16 Nebr. 153, 20 N. W. 116; Ballou v. Black, 17 Nebr. 389, 23 N. W. 3.

house, both being under one roof, and the contract price for the whole work is a certain sum, and the price for work on each of the two is one half that sum, and the work is done accordingly.<sup>49</sup>

But if the contract does not apportion the lien, one who has furnished materials for four houses can not, upon the payment to him of half of his demand, release two of the houses and maintain his lien against the remaining two, founded on an account made up by taking one half of each of the items composing the original contract. This is an assumption that exactly one-half of the items went into the houses upon which the lien is claimed. Such an assumption is not warranted, in the absence of further evidence that the division is a just and proper one, even if it would be sufficient to show the approximate amount of materials used in each house.<sup>50</sup>

**§ 1322. Distinct alterations or repairs not recovered for under one lien.**—Several distinct alterations or repairs made

<sup>49</sup> *Hannon v. Gibson*, 14 Mo. App. 33, 38. *Bakewell, J.*, in illustration, said: "If ten men own contiguous houses in a row, each owning one house, and the man who has the contracts for building these houses agrees with a painter, the houses being in all respects alike, to paint each house for \$100, or the whole row for \$1,000, and the subcontractor files a lien against one house for \$100 for painting under this contract, and shows by actual measurement that one-tenth of the whole work went into this house, that the painting was reasonably worth \$100, and was worth \$100 under the contract, no reason appears why he may not then establish his lien against the one house. The owner

can not be prejudiced. If the contract was an entirety and the contractor can defeat the claim, and the owner the lien, for any failure as to any other house of the ten, that is to the advantage of the owner. If the work can be done cheaper on each house where there are ten together, and the contract is to paint ten, that is also to the advantage of the owner. If there was a contract to do a certain piece and definite amount of work on the owner's house for a defined and reasonable price, and that work was done, the owner is not hurt because other work on other houses was done under the same contract."

<sup>50</sup> *Schulenburg v. Vrooman*, 7 Mo. App. 133.

in a building at different times can not be covered by one single lien, so as to entitle the claimant to a lien judgment for the whole.<sup>51</sup> This lien is given for a definite piece of work, and, though this may be of long continuance, it must be a continuous and separate job. After a particular work has been finished the claim of lien must be filed, and the action to enforce the lien must be brought within the respective times allowed therefor. The making of a second repair or alteration can not serve to revive or suspend the running of the time in which the claimant must enforce his lien for a prior repair or alteration.

§ 1323. **Mingling of lienable accounts with those for which there is no lien.**—When matters for which there may be a lien are mingled with others for which no lien is given, they can not be separated by a jury in accordance with oral evidence. It is not sufficient that the amount of the lien can be ascertained by extrinsic evidence, but the owner of the property is entitled to be informed of that fact from the account or statement of the lien filed in accordance with the statute.<sup>52</sup>

If a contract be made to do the carpenter's work on certain houses, and to superintend such work for a sum named, and there be no specification of the sum to be paid for work, or of the sum to be paid for superintending the work, no lien can be acquired under the contract. The objection is not obviated by filing an account for work alone without

<sup>51</sup> *Baker v. Fessenden*, 71 Maine 292.

<sup>52</sup> *St. Paul Labor Exchange Co. v. Eden*, 48 Minn. 5, 50 N. W. 921, per Collins, J.; *Nelson v. Withrow*, 14 Mo. App. 270; *Murphy v. Murphy*, 22 Mo. App. 18; *Gauss v. Hussmann*, 22 Mo. App. 115; *Edgar v. Salisbury*, 17 Mo. 271, 273, per Gamble, J.: "When he [the contractor] charges a single

sum for different services, and any of them are of a character for which the law would give no lien, he can not proceed under the statute, because he has filed no proper account, and because it is impossible to ascertain the amount of his lien from the account filed." See, however, *Willamette Falls &c. Co. v. Remick*, 1 Ore. 169.

mentioning the matter of superintendence; for when the contract is put in evidence, it will appear that the entire charge was not for work, but a part of it for superintendence, and that there is no means of determining how much is due for work for which there might be a lien, and how much is due for superintendence, for which there can be no lien.<sup>53</sup>

If a subcontractor, in his dealings with the contractor, mingles in a note for his account lien claims with matters for which no lien is given, the owner will not be subjected to the burden of inquiring into the state of the account. The subcontractor can not enforce a lien for a claim which has lost its unity. "The lien-claimant is presumed to keep his lien in mind; and if he is to seek its enforcement, the law requires him to preserve its unity as a claim against particular property. If he does not, but so mingles it with other claims as to necessitate a process of separation by the courts, it may well be held that he has waived his lien. In the present case, in order to make out in the same suit a cause of action at the same time against the contractors and owner, the plaintiff, instead of producing for cancellation a note covering the present demand, was forced to go into a series of transactions which had nothing to do with the issues here involved. With the state of accounts between the contractors and subcontractors, relating to materials furnished for other buildings than his own, the present owner had, of course, nothing to do; and he was not liable to have the burden and expense of investigating them imposed upon him. It is no hardship upon the subcontractor, in such cases, that he should keep his accounts in such condition as to be able to make out his case consistently against contractor and owner, and without bringing into the suit, as against the former, issues with which the latter has properly no concern."<sup>54</sup>

<sup>53</sup> Nelson v. Withrow, 14 Mo. App. 270.

<sup>54</sup> Schulenburg v. Robison, 5 Mo. App. 561, 564, per Hayden, J.

§ 1324. **Lien for work done away from the premises.**—A lien may sometimes be established for work done away from the premises, if it be done upon articles which are intended for use in the building, and are actually used in its construction or repair.<sup>55</sup> In such case the labor is to all intents and purposes performed in the erection, alteration or repair of a building within the terms of the statute. Where, for instance, the inside finish for a house is sawed, planed, or moulded at a mill, or the doors or windows are made at a carpenter shop, or the iron-work is prepared at a blacksmith's shop, away from the premises, but really as a part of the work of construction, and the material upon which such work is done actually becomes a part of the building, a lien arises for such labor equally with the labor performed upon the land on which the house is erected. But it is essential that such labor be performed under an agreement that the articles upon which the work is done are to be used in the construction of the building against which it is sought to enforce the lien. Thus, if the owner of a planing-mill saws lumber for a builder without any agreement for its use in any particular building, though the lumber is in fact used in the construction of a building which the builder was erecting at the time under a contract for another person, the mill-owner is not entitled to a lien on such building.<sup>56</sup> Where work is done by a laborer cutting granite according to building specifications and the granite is used in the building, he is entitled to a lien for his wages, although the work is done away from the premises.<sup>57</sup>

§ 1325. **No lien for articles furnished.**—No lien can be maintained for finished articles of merchandise which have

<sup>55</sup> *Wilson v. Sleeper*, 131 Mass. 177; *Dewing v. Wilbraham Congregational Society*, 13 Gray (Mass.) 414; *Sweet v. James*, 2 R. I. 270; *Singerly v. Doerr*, 62 Pa. St. 9; *Howes v. Reliance Wire-*

*Works Co.*, 46 Minn. 44, 48 N. W. 448.

<sup>56</sup> *Bennett v. Shackford*, 11 Allen (Mass.) 444.

<sup>57</sup> *Daley v. Legate*, 169 Mass. 257, 47 N. E. 1013.

been sold without reference to their use, at a fixed price, to a contractor,<sup>58</sup> or to the owner, when the seller has nothing to do with the erection or repair of the building.<sup>59</sup> Thus, if a dealer in sash, blinds, and doors sells such articles in the usual course of trade to a contractor who is building a house, the dealer has no lien upon the house and land upon which it is situated, although he does some incidental work in fitting or attaching these articles to the house, or in glazing the doors after they are hung, instead of doing this before their delivery.<sup>60</sup> And so, if a lumber dealer sells lumber on credit to a purchaser without reference to the use the purchaser shall make of it, and the purchaser afterwards uses it in constructing a building on his own land, the lumber dealer can not acquire a lien upon the land or building for

<sup>58</sup> *Donaher v. Boston*, 126 Mass. 309; *Tracy v. Wetherell*, 165 Mass. 113, 42 N. E. 497. A wrongful refusal by the owner to allow the specially prepared material to be used in construction does not defeat the lien. *Berger v. Turnblad*, 98 Minn. 163, 107 N. W. 543, 116 Am. St. 353; *Esslinger v. Huebner*, 22 Wis. 632; *Duncan v. Bateman*, 23 Ark. 327, 79 Am. Dec. 109; *Boutner v. Kent*, 23 Ark. 389; *Lanier v. Bell*, 81 N. Car. 337; *Hill v. Bishop*, 25 Ill. 349, 79 Am. Dec. 333; *Cotes v. Shorey*, 8 Iowa 416; *Jones v. Swan*, 21 Iowa 181; *Stockwell v. Carpenter*, 27 Iowa 119; *Miller v. Hollingsworth*, 33 Iowa 224; *Springfield & Co. v. Best*, 63 Kans. 187, 65 Pac. 239; *Van Cleave Glass Co. v. Erratt*, 110 Mich. 689, 68 N. W. 978, 64 Am. St. 383; *Horton v. Carlisle*, 2 Disney (Ohio) 184, 13 Ohio Dec. 113; *Choteau v. Thompson*, 2 Ohio St. 114, 126, per Thurman, J.: "If a material-man sells his wares with no understanding, express or implied, as to

their application, he can assert no lien upon the building or vessel in which they may be placed. He trusts to the responsibility of the buyer alone and takes no security. He sells, not for the special purpose named in the statute of 'constructing, altering, or repairing,' but for any purpose that may seem best to the buyer. But it is only where the materials are furnished for a purpose named in the act that a lien is acquired. That they are so furnished may be proved by evidence of an express agreement, or by proof of circumstances from which the purpose may be inferred. A tacit understanding may be as good as an express one."

<sup>59</sup> *Chapin v. Persse & Co. Paper Works*, 30 Conn. 461, 79 Am. Dec. 263; *Ryan Drug Co. v. Rowe*, 66 Minn. 480, 69 N. W. 468; *Forman v. St. Germain*, 81 Minn. 26, 83 N. W. 438.

<sup>60</sup> *Arnold v. Budlong*, 11 R. I. 561.



the price of his lumber. To entitle the lumber dealer to a lien, he must have furnished it with the intention and understanding that it should be used in constructing the building.<sup>61</sup>

A subcontractor who furnishes finished material for a building, such as hammered granite, for an entire sum, and gives no notice to the owner that he should claim a lien for materials, so that he has no lien for the stone, can have no lien under the provision of the statute giving a lien for labor performed, when the value of this can be distinctly shown; for the subcontractor in fact sold the stone wrought in a stipulated manner to the contractor. The labor performed by the subcontractor was performed merely in completion of his contract to furnish the hammered granite.<sup>62</sup>

If a builder abandons his contract, and leaves materials on the ground, which the owner accepts and uses, the relation of seller and buyer is created, and the builder is entitled to a lien for the price.<sup>63</sup>

### § 1326. Materials furnished with reference to their use.

—Materials must be furnished with special reference to their use in a particular building in order to secure the protection of a mechanic's lien law.<sup>64</sup> In an Ohio case *Storer*,

<sup>61</sup> *Weaver v. Sells*, 10 Kans. 609; *Pittsburg Plate Glass Co. v. Sisters of Sorrowful Mother*, 83 Minn. 29, 85 N. W. 829; *Miller v. Fosdick*, 26 Ind. App. 293, 59 N. E. 488.

<sup>62</sup> *Donaher v. Boston*, 126 Mass. 309.

<sup>63</sup> *Wollreich v. Fettretch*, 51 Hun (N. Y.) 640, 21 N. Y. St. 56, 4 N. Y. S. 626.

<sup>64</sup> *Choteau v. Thompson*, 2 Ohio St. 114, 124, per Thurman, J.: "The particular building, or craft, may not be in the minds of the parties when the contract is made, and yet

a lien may arise; as if a builder should be employed to erect a house, the plan, or site, of which was not determined; or, to construct such building or watercrafts as the employer might thereafter wish constructed; or, to make such alterations, or repairs, as might be required; or, as if a material-man agree to furnish materials, or a laborer to perform work under similar contracts; in all these cases, and perhaps others that might be mentioned, the statute gives a lien, although the particular building, or vessel, may not

J., said: "The contractor who agrees to paint a building, may purchase the constituent parts of the materials he uses, of different persons: one may have furnished the oil, the other the pigment, but when all are combined, there certainly ought not to be a lien in behalf of each vendor. The brickmaker may have been supplied with the clay, from which he has manufactured his brick, by one party, and another have furnished the fuel to burn the kiln, but it can not be said a right exists for both to be enforced under the statute. And so with the ironmonger; he may sell the raw material to the founder and the machinist, but when it is worked up, whether it is changed from pig-iron into the bloom, or from the bloom into the bar, or from the bar into the steam-engine or the sugar-mill, the right to follow it through all these changes ought not to be permitted, else no vendee would ever acquire title to the manufactured article."<sup>65</sup> A lien can not be maintained against the owner of a building for materials used in its construction that were furnished the contractor in his own name, when the material-man had no knowledge of any contract relations existing between the contractor and owner, nor of the particular building to be constructed, but intended to hold a lien upon whatever building the materials were used in.<sup>66</sup>

§ 1327. **Materials intended for a particular use.**<sup>67</sup>—A lumber merchant, for instance, has no right under the lien

have been designated when the contract was made. For though not mentioned, it is nevertheless embraced by the agreement, and the agreement relates to the 'constructing, altering, or repairing named in the act.'"

<sup>65</sup> *Horton v. Carlisle*, 2 *Disney* (Ohio) 184, 186, 13 *Ohio Dec.* 113.

<sup>66</sup> *Whittier v. Banking Co.*, 4 *Wash.* 666, 30 *Pac.* 1094, 31 *Am. St.* 944; *Eisenbeis v. Wakeman*, 3

*Wash. St.* 534, 28 *Pac.* 923; *Mills v. Terry Mfg. Co.*, 91 *Tenn.* 469, 19 *S. W.* 328.

<sup>67</sup> *Alabama*: *Eufaula Water Co. v. Addyston Pipe & Steel Co.*, 89 *Ala.* 552, 8 *So.* 25; *Tyler v. Jewett*, 82 *Ala.* 93, 100, 2 *So.* 905. *California*: *Bottomly v. Grace Church*, 2 *Cal.* 90; *Houghton v. Blake*, 5 *Cal.* 240; *Holmes v. Richet*, 56 *Cal.* 307, 38 *Am. Rep.* 54. *Colorado*: *The Tabor-Pierce & Co. v. The In-*

laws to follow the lumber he has sold to another in general terms, and obtain a lien therefor upon any building to the construction or repair of which the lumber has been applied. The allegation and the proof must be that the materials were furnished to be used and were used in the building upon the premises against which it is sought to enforce the lien. Though the contract under which materials are purchased be silent as to the purpose for which they were intended to be used, parol evidence is admissible to show what the purpose was, and to establish thereby a mechanic's lien.<sup>68</sup> It is the furnishing of the material under a contract, with the intention and understanding that it shall be used in erecting the building, that creates the lien.<sup>69</sup>

ternational Trust Co., 19 Colo. App. 108, 75 Pac. 150. Idaho: Colorado Iron Works v. Riekenberg, 4 Idaho 705, 43 Pac. 681. Indiana: Crawford v. Crockett, 55 Ind. 220; Crawfordsville v. Barr, 45 Ind. 258; Talbott v. Goddard, 55 Ind. 496; Hill v. Braden, 54 Ind. 72; Crawfordsville v. Brundage, 57 Ind. 262; Crawfordsville v. Lockhart, 58 Ind. 477; Manor v. Heffner, 15 Ind. App. 299, 43 N. E. 1011; Potter Mfg. Co. v. Meyer, 171 Ind. 513, 86 N. E. 837. Iowa: Cotes v. Shorey, 8 Iowa 416. Kansas: Wilson v. Howell, 48 Kans. 150, 29 Pac. 151; Weaver v. Sells, 10 Kans. 609. Maine: Fuller v. Nickerson, 69 Maine 228. Maryland: Blake v. Pitcher, 46 Md. 453. Massachusetts: Rogers v. Currier, 13 Gray (Mass.) 129; Tyler v. Currier, 13 Gray (Mass.) 134. Ohio: Choteau v. Thompson, 2 Ohio St. 114. Pennsylvania: Hills v. Elliott, 16 Serg. & R. (Pa.) 56. Washington: Whittier v. Puget Sound, &c. Bank Co., 4 Wash. 666, 30 Pac. 1094.

<sup>68</sup> In Iowa two things are essential before one may avail himself of the benefits of the lien statute. (1) Material must be furnished; and (2) for the particular building. It is not necessary that they be actually used in the building. Hobson v. Townsend, 126 Iowa 453, 102 N. W. 413; Frudden Lumber Co. v. Kinnan, 117 Iowa 93, 90 N. W. 515; Lee v. Hoyt, 101 Iowa 101, 70 N. W. 95; Donahue v. Cromartie, 21 Cal. 80; Hunter v. Blanchard, 18 Ill. 318, 68 Am. Dec. 547.

<sup>69</sup> Deatherage v. Henderson, 43 Kans. 684, 23 Pac. 1052, per Horton, C. J.: "Where materials are furnished and placed in a building, if there be nothing showing a different intention, a jury would be warranted in finding that they were furnished to be used in such building. So if it appear that materials furnished were used in the erection of the building on which a lien is claimed, unless it is shown that they were intended for another purpose, it will be pre-

Where there is an understanding between the parties that the material is furnished for the construction of a particular building, and it is so used, a lien will exist, although the exact description of the land on which the building was placed was not specifically named in the contract, nor was accurately known by the vendor.<sup>70</sup>

If a material-man has furnished to the owner materials not used upon the land, but it appears that his accounts show just what materials were furnished for the land on which he claims a lien, he may have a lien for the materials so used.<sup>71</sup>

Evidence merely that a material-man has claimed in his lien more lumber than is required for the building, according to the plans, is inadmissible, because such evidence does not go to show that the whole amount charged was not actually used in the building.<sup>72</sup>

**§ 1328. Rule of some states that material furnished must be actually used in construction of the building.**—In some states, materials furnished for a building must be actually used in its construction or alteration in order to become the foundation of a lien upon it.<sup>73</sup> It is not sufficient that they

sumed that they had been contracted for to be used in the building. *Power v. McCord*, 36 Ill. 214; *Martin v. Eversal*, 36 Ill. 222. Under the statute, the mere fact that the materials were furnished on the credit of Woods would not be an extinguishment or waiver of the plaintiff's lien." *Sodini v. Winter*, 32 Md. 130. See, also, *Stewart-Chute Lumber Co. v. Missouri Pav. Lumber Co.*, 28 Nebr. 39, 44 N. W. 47; *California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 118 Pac. 103, 113.

<sup>70</sup> *Deatherage v. Henderson*, 43

Kans. 684, 23 Pac. 1052; *Wilson v. Howell*, 48 Kans. 150, 29 Pac. 151.

<sup>71</sup> *Portoues v. Badenoch*, 132 Ill. 377, 23 N. E. 349.

<sup>72</sup> *Woolsey v. Bohn*, 41 Minn. 235, 42 N. W. 1022.

<sup>73</sup> *California: Silvester v. Coe*, *Quartz M. Co.*, 80 Cal. 510, 22 Pac. 217; *Bottomly v. Grace Church*, 2 Cal. 90; *Houghton v. Blake*, 5 Cal. 240; *Los Angeles Pressed Brick Co. v. Los Angeles Pacific Boulevard & Co.*, 7 Cal. App. 460, 94 Pac. 775. *Maine: Monroe v. Clark*, 107 Maine 134, 77 Atl. 696. *Massachusetts: Rogers v. Currier*, 13 Gray (Mass.) 129.

are furnished for a particular building if they do not in fact go into it.<sup>74</sup>

§ 1329. **Rule in other states.**—In most of the states, however, the actual use of the materials is not requisite if they were furnished for a particular building or improvement.<sup>75</sup> "To require direct and positive testimony," said Brewer, J., "that as to each specific article delivered, that it was in fact used in the building, would make the mechanics' lien law more of a burden and a trap than a blessing and help. When materials are contracted for use in a proposed building, when they are delivered in pursuance of such contract, and when the building is in fact com-

<sup>74</sup> Chapin v. Persse &c. Paper Works, 30 Conn. 461, 79 Am. Dec. 263. Indiana: Potter Mfg. Co. v. Meyer, 171 Ind. 513, 86 N. E. 837. Louisiana: Consolidated Engineering Co. v. Crowley, 105 La. 615. Missouri: Deardorff v. Everhardt, 74 Mo. 37 (Morrison v. Hancock, 40 Mo. 561, so far as it holds to the contrary, is overruled); Simmons v. Carrier, 60 Mo. 581; Fitzpatrick v. Thomas, 61 Mo. 512; Schulenberg v. Prairie Home Institute, 65 Mo. 295; Steinkamper v. McManus, 26 Mo. App. 51, per Rombauer, J.; Schulenburg v. Hawley, 6 Mo. App. 34; Fathman, &c. Planing Mill Co. v. Ritter, 33 Mo. App. 404. Minnesota: Burns v. Sewell, 48 Minn. 425, 51 N. W. 224; Hickey v. Collom, 47 Minn. 565, 50 N. W. 918. See *In re Olympic Theatre*, 2 Browne (Pa.) 275.

<sup>75</sup> Kansas: Sturges v. Breen, 27 Kans. 235; Rice v. Hodge, 26 Kans. 164, 170. Maryland: Watts v. Whittington, 48 Md. 353; Greenway v. Turner, 4 Md. 296; Maryland Brick Co. v. Spilman, 337 Md.

76, 25 Atl. 297, 17 L. R. A. 588, 35 Am. St. 431; Maryland Brick Co. v. Dunkerly, 85 Md. 199. Massachusetts: Scannell v. Hub Brewing Co., 178 Mass. 288, 59 N. E. 628. Nebraska: Stewart-Chute Lumber Co. v. Missouri Pac. Lumber Co., 28 Nebr. 39, 44 N. W. 47. New Jersey: Morris County Bank v. Rockaway Mfg. Co., 14 N. J. Eq. 189. - Pennsylvania: Wallace v. Melchior, 2 Browne (Pa.) 104; Hinchman v. Graham, 2 Serg. & R. (Pa.) 170; Harker v. Conrad, 12 Serg. & R. (Pa.) 301, 303, 14 Am. Dec. 691; Witman v. Walker, 9 Watts & S. (Pa.) 183, 186; Croskey v. Coryell, 2 Whart. (Pa.) 223; Presbyterian Church v. Allison, 10 Pa. St. 413; Odd Fellows' Hall v. Masser, 24 Pa. St. 507, 64 Am. Dec. 675; Singerly v. Doerr, 62 Pa. St. 9. Ohio: Beckel v. Petticrew, 6 Ohio St. 247. West Virginia: Tannis Bros. Co. v. Wetzel & T. R. Co., 140 Fed. 193, *affd.* 145 Fed. 458, 75 C. C. A. 266; Canton Roll & Machine Co. v. Rolling Mill Co. of America, 155 Fed. 321.

pleted, and there is no testimony tending to raise even a suspicion that the materials therefor were elsewhere obtained, or that those contracted for were not used therein, and especially when some of the materials are shown to have actually entered into its construction, it is fair to conclude and say that such materials did in fact go into the building, and that the seller has a mechanic's lien therefor.<sup>76</sup>

If the materials are not actually used in the building, they must be delivered in good faith at the building, or near to it, for use therein,<sup>77</sup> though it has been held that materials are furnished when prepared for the building, though still in the possession of the party furnishing it, he being ready and willing to put them into the building according to his contract.<sup>78</sup>

Lumber furnished for a building, with the understanding that it is to be used in the erection of the building, may be delivered at a carpenter's shop at a distance from it, and a lien will attach to the premises for the price of it, although it is never actually used in the building.<sup>79</sup> As soon as the materials are furnished they become the property of the owner and subject to the lien; and they are not liable to be taken on execution for the debts of the contractor or material-man who furnished them.<sup>80</sup>

<sup>76</sup> *Rice v. Hodge*, 26 Kans. 164; *Central Lumber Co. v. Braddock Land & C. Co.*, 84 Ark. 560, 105 S. W. 583, citing text.

<sup>77</sup> *Foster v. Dohle*, 17 Nebr. 631, 24 N. W. 208; *Marrener v. Paxton*, 17 Nebr. 634, 24 N. W. 209; *Marble v. Lumber Co.*, 19 Nebr. 732, 28 N. W. 309; *Great Western Mfg. Co. v. Hunter*, 15 Nebr. 32, 16 N. W. 759.

<sup>78</sup> *Howes v. Reliance Wire-Works Co.*, 46 Minn. 44, 48 N. W. 448.

<sup>79</sup> *White v. Miller*, 18 Pa. St. 52; *Singerly v. Doerr*, 62 Pa. St. 9; *Presbyterian Church v. Allison*, 10 Pa. St. 413; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507, 508, 64 Am. Dec. 675; *Hinchman v. Graham*, 2 Serg. & R. (Pa.) 170; *Harker v. Conrad*, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691; *Wallace v. Melchior*, 2 Browne (Pa.) 104. *Contra*, *Central Lumber Co. v. Braddock Land & C. Co.*, 84 Ark. 560, 105 S. W. 583.

<sup>80</sup> *White v. Miller*, 18 Pa. St. 52.

There can be no lien for materials furnished in excess of what can be reasonably used in the construction of the building for which they are furnished.<sup>81</sup> Of course there can be no lien for materials furnished after a building is completed.<sup>82</sup> When the contract requires an acceptance of each load of material there can be no lien for materials not accepted, nor can the delivery of such materials be used to postpone the date for filing a lien claim.<sup>83</sup>

**§ 1330. No lien for materials furnished solely on the credit of the purchaser.**—There can be no lien for materials furnished solely on the credit of the person ordering them, though they be afterwards used in the construction of the building upon which a lien is claimed.<sup>84</sup> A lien is not acquired for materials sold to a contractor, when they are supplied under an ordinary sale on credit, though the contractor may actually use them in building a house or making an improvement.<sup>85</sup> If they were furnished to a contractor for and entered into the construction of a building, the burden is upon the owner to show that they were furnished upon the credit of the contractor alone.<sup>86</sup>

But where materials were delivered upon premises already covered by buildings, under a written contract which did not mention them, nor the use to which the materials were to be applied, it was held that the contractor was the owner of the materials, and might remove them and use them wherever he might choose *Morgan v. Stevens*, 6 Abb. N. Cas. (N. Y.) 356.

<sup>81</sup> *Boyd v. Mole*, 9 Phila. (Pa.) 118.

<sup>82</sup> *In re Olympic Theatre*, 2 Browne (Pa.) 275.

<sup>83</sup> *Beidler v. Hutchinson*, 233 Ill. 192, 84 N. E. 228.

<sup>84</sup> *Davis v. Stratton*, 1 Phila.

(Pa.) 289; *Stetson & P. Mill Co. v. McDonald*, 5 Wash. 496, 32 Pac. 108; *Poole v. Union Pass. R. Co.*, 1 Monag. (Pa.) 170, 16 Atl. 736, 24 Wkly. N. Cas. 376; *Eufaula Water Co. v. Addyston Pipe & Steel Co.*, 89 Ala. 552, 8 So. 25.

<sup>85</sup> *Wagner v. Darby*, 49 Kans. 343, 30 Pac. 475, 33 Am. St. 369, per *Horton, C. J.*; *Clark v. Hall*, 10 Kans. 80; *Weaver v. Sells*, 10 Kans. 609; *Chapin v. Persse & Co. Paper Works*, 30 Conn. 461, 471, 79 Am. Dec. 263; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507, 64 Am. Dec. 675.

<sup>86</sup> *Poole v. Union Pass. R. Co.*, 1 Monag. (Pa.) 170, 16 Atl. 736;

There are decisions, however, to the effect that, upon a sale of materials for a particular building, a lien will attach for their payment if there is nothing to exclude the idea that the material-man will look to the land for payment.<sup>87</sup>

A lien for materials is so far from depending upon their use in a building that, if they are used in its construction without having been furnished for it, no lien upon it arises for such materials.<sup>88</sup>

It is a question for the jury whether materials were furnished on personal credit or on the credit of the building. Upon this question any relative evidence is admissible.<sup>89</sup>

**§ 1331. Evidence of purpose for which materials were furnished.**—The fact that the contract is in writing does not exclude parol evidence to show the purpose for which the materials included in the contract were furnished or used. Thus it may be shown that the materials were of such a character that the work upon the premises could not have been carried on without them, and thus the inference may be established that they were furnished to be used on the premises.<sup>90</sup>

On the other hand, it may be shown that materials furnished to a contractor were not suitable or adapted to the building upon which a lien for them is claimed, and therefore the inference is that the materials were not used, and were not intended to be used, in the building.<sup>91</sup>

Hommel v. Lewis, 104 Pa. St. 465; Noar v. Gill, 111 Pa. St. 488, 4 Atl. 552.

<sup>87</sup> Eufaula Water Co. v. Addyston Pipe & Steel Co., 89 Ala. 552, 8 So. 25; Shilling v. Templeton, 66 Ind. 585; Jones v. Swan, 21 Iowa 181; Smith v. Coe, 29 N. Y. 666.

<sup>88</sup> Hills v. Elliott, 16 Serg. & R. (Pa.) 56; Shriver v. Birchall, 2 Wkly. N. Cas. 172; Early v. Al-

bertson, 2 Wkly. N. Cas. 369; Barclay v. Wainwright, 86 Pa. St. 191.

<sup>89</sup> Hommel v. Lewis, 104 Pa. St. 465; Short v. Miller, 120 Pa. St. 470, 14 Atl. 374.

<sup>90</sup> Martin v. Eversal, 36 Ill. 222; Donahue v. Cromartie, 21 Cal. 80; Neilson v. Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124.

<sup>91</sup> Harlan v. Rand, 27 Pa. St. 511; Boyd v. Mole, 9 Phila. (Pa.) 118.



The fact that a person selling materials demanded and received, before the delivery of the goods, a large cash payment, is a proper fact for the jury to consider in determining whether the goods were sold on the credit of the building in which they were used, or on the personal credit of the purchaser.<sup>92</sup>

**§ 1332. Material-man not precluded from showing that materials were furnished on the credit of the building, by charging them to the buyer.**—The fact that the materials were charged to the contractor does not preclude the material-man from showing that he furnished them on the credit of a building which the person who ordered them is building as contractor.<sup>93</sup> This fact is not even slight evidence that the materials were sold on credit only. If it appears that the materials furnished for the building were delivered for the purpose of being used in its construction or repair, that they actually entered into its construction, and that the material-man subsequently within the time limited filed his claim and commenced proceedings to enforce it,

<sup>92</sup> *McCartney v. Buck*, 8 *Houst. Del.* 34, 12 *Atl.* 717, 11 *Cent.* 249.

<sup>93</sup> *Presbyterian Church v. Allison*, 10 *Pa. St.* 413; *Hommel v. Lewis*, 104 *Pa. St.* 465, 470, per *Green, J.*: "These facts are not only evidence of an intent to charge the building, but they are so conclusive upon that subject that the statute declares that, the other formal requirements being complied with, they will confer a lien against the building and the ground upon which it stands, which may be enforced against the will of the owner. The statute does not require either that the materials shall be charged against the owner, or that the claim of lien shall assert that they were fur-

nished on the credit of the building, or that affirmative proof shall be made that such was the fact. Of course if the articles were charged against the contractor alone, it is some evidence, though slight only, that they were furnished on his credit, and of this the defendant had full benefit under the charge of the court, which left the whole question to the jury. \* \* \* The fact that there were continuous dealings between the plaintiff and the contractor in the same line of goods was some evidence, which the defendant was permitted to use in support of his theory." Also *Deatherage v. Henderson*, 43 *Kans.* 684, 23 *Pac.* 1052.

the burden is upon the defendant to show that they were furnished on the credit of the contractor alone.

On the other hand, the mere circumstance that the materials were charged to the contractor does not of itself create a presumption that they were furnished on his credit only, though such circumstance would be some evidence to be considered with other evidence, if any, that the credit was given to the contractor.<sup>94</sup>

A charge of materials to the owner of a building is no evidence of a release or waiver of a lien upon the building itself. Such a charge is consistent with either a personal credit or with a claim of lien.<sup>95</sup>

The absence of any charge at all in a book of original entries, of materials furnished or delivered for use in a building, is unimportant; for any competent evidence that they were furnished for the erection of a particular building is admissible to prove the fact.<sup>96</sup>

Where materials are furnished under a contract, and part of them are procured from another, who refuses to deliver them until they are paid for by the contractor, the latter, having paid for them, can include their cost in his claim of lien.<sup>97</sup>

§ 1333. **Materials charged to building.**—The mere statement in a plaintiff's book of accounts, that materials delivered by him were delivered to be used in the construction, alteration or repair of a building, is not of itself evidence sufficient to show that they were sold on the credit of the building, and not on the credit of the purchaser.<sup>98</sup>

<sup>94</sup> Hommel v. Lewis, 104 Pa. St. 465; Noar v. Gill, 111 Pa. St. 488, 4 Atl. 552.

<sup>95</sup> Noar v. Gill, 111 Pa. St. 488, 4 Atl. 552; Wisconsin Planing Mill Co. v. Grams, 72 Wis. 275, 39 N. W. 531.

<sup>96</sup> Wolf v. Batchelder, 56 Pa. St. 87.

<sup>97</sup> Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. 272.

<sup>98</sup> McCartney v. Buck, 8 Houst. (Del.) 34, 12 Atl. 717.

Book accounts are simply evidence, when supplemented by the oath of the seller, of the sale and delivery of the goods charged and of their price.

§ 1334. **Materials sold by purchaser.**—One who furnishes materials with the understanding that they are to be used in a building has a lien as against the owner, though the latter has made a different disposition of them, and has procured other materials for the building.<sup>99</sup> Equitable considerations would arise, as between different material-men, where both had sold to the owner on the credit of the building, and the materials of one had been used and the other had not been used. Moreover, a double lien for materials would not probably be allowed as against other lienholders or incumbrancers.

If the original purchaser or contractor for materials sells them to another person instead of using them for the building for which they were intended, and the last purchaser uses them for a building upon another lot, the lien does not follow the materials to the latter structure. The purchaser

<sup>99</sup> Beckel v. Petticrew, 6 Ohio St. 247; Esslinger v. Huebner, 22 Wis. 632; Spruhen v. Stout, 52 Wis. 517, 9 N. W. 277; Weaver v. Sells, 10 Kans. 609; Daniel v. Weaver, 5 Lea (Tenn.) 392; Neilson v. Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124; Ewing v. Folsom, 67 Iowa 65, 24 N. W. 595; Oppenheimer v. Morrell, 118 Pa. St. 189, 12 Atl. 307, per Sterrett, J.; Atkins v. Little, 17 Minn. 342. In California, Code Civ. Proc. 1906, § 1196. New Mexico: Comp. Laws 1897, § 2230; and Nevada, Rev. Laws 1912, art. 2225, whenever materials have been furnished for use in the construction, alteration, or repair

of any building or other improvement, such materials shall not be subject to attachment, execution, or other legal process to enforce any debt due by the purchaser of such materials, except a debt due for the purchase-money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement. It has been held that a lien may be enforced for polishing granite columns, though the workman does not know in what building they are to be used. Emery v. Hertig, 60 Minn. 54, 61 N. W. 830.

of such material takes it free from any lien, although he buys it with knowledge that it has not been paid for.<sup>1</sup>

A material-man has a lien for material sold to a contractor on the credit of the building to be erected, though the material, while in the contractor's hands, is sold by the sheriff for the benefit of the contractor's creditors.<sup>2</sup>

**§ 1335. No lien for machinery furnished for a mill, unless done as part of its construction.**—No lien arises for machinery furnished for a mill unless this be done as a part of the construction or repair of the building, and it becomes a fixture to the realty.<sup>3</sup> The sale of the machinery to the

<sup>1</sup> Heaton v. Horr, 42 Iowa 187.

<sup>2</sup> Linden Steel Co. v. Imperial Refining Co., 146 Pa. St. 4, 23 Atl. 800.

<sup>3</sup> Beers v. Knapp, 5 Ben. (U. S.) 104, Fed. Cas. No. 1232; Graves v. Pierce, 53 Mo. 423; Hall v. St. Louis Mfg. Co., 22 Mo. App. 33; Collins v. Mott, 45 Mo. 100, 102; Allman v. Corban, 4 Baxt. (Tenn.) 74; Summerville v. Wann, 37 Pa. St. 182; R. Haas Electric & Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 N. E. 248. Rent of scrapers is neither materials furnished nor labor done. Hall v. Cowen, 51 Wash. 295, 98 Pac. 670. One may have a lien for belting furnished and affixed to the machinery. Graton & Knight Mfg. Co. v. Woodworth-Mason Co., 69 N. H. 177, 38 Atl. 790. In several states a lien is expressly given for furnishing or repairing machinery: Thus in New Jersey the statute defines "fixed machinery for manufacturing purposes" to be a building; and for machines furnished to become part of a building a lien may be claimed. Campbell v. J.

W. Taylor Mfg. Co., 64 N. J. Eq. 344, 51 Atl. 723. The machinery is not fixed if it is adjustable and changeable. Campbell v. J. W. Taylor Mfg. Co., 62 N. J. Eq. 307, 49 Atl. 1119. Alabama: See ante, § 1187. Alaska Territory: See ante, § 1187a. Arkansas: See ante, § 1189. California: See ante, § 1190. District of Columbia: See ante, § 1195. Florida: See ante, § 1196. Georgia: See ante, § 1197. Idaho: See ante, § 1198. Illinois: See ante, § 1199. Indiana: See ante, § 1200. Iowa: See ante, § 1201. Kansas: See ante, § 1202. Kentucky: See ante, § 1203. Michigan: See ante, § 1208. Minnesota: See ante, § 1209. Mississippi: See ante, § 1210. Missouri: See ante, § 1211. Montana: See ante, § 1212. Nebraska: See ante, § 1213. North Dakota: See ante, § 1219a. New Mexico: See ante, § 1217. Ohio: See ante, § 1220. Oklahoma: See ante, § 1220a. Oregon: See ante, § 1221. South Dakota: See ante, § 1224a. Tennessee: See ante, § 1225. Texas: See ante, § 1226. Washington: See ante, § 1230.

owner of the mill, and the mere placing it in the mill, do not give rise to a mechanic's lien for it.<sup>4</sup> But it is immaterial, so far as concerns the attaching of the lien, whether the building for which the machinery is supplied is in process of erection or has already been completed.<sup>5</sup> Whether machinery is a fixture, for which a lien arises upon the premises, is to be tested by the inquiry whether it is so attached to the realty as to become a fixture, and the further inquiry whether the machinery is adapted to the purposes for which the building was intended to be used or is used.<sup>6</sup>

West Virginia: See ante, § 1231. If the person contracting for machinery has no interest in the premises sufficient for a lien, the person furnishing such machinery shall have and retain a lien upon such machinery, and shall have the right to remove it from the premises. This provision does not apply to the pipes of a water company, laid through the streets of a town, and connected with the pumping works of the company. The plant of the company is an integer, and can not be separated under a vendors' lien. The entire plant is subject to the lien. *National Foundry Works v. Oconto Water Co.*, 52 Fed. 43. Lubricating oil sold to be and actually used on mill machinery is not "material." *Standard Oil Co. v. Lane*, 75 Wis. 636, 44 N. W. 644, 7 L. R. A. 191. Wyoming: See ante, § 1233.

<sup>4</sup> *Allman v. Corban*, 4 Baxt. (Tenn.) 74; *Dimmick v. Cook*, 115 Pa. St. 573, 580, 8 Atl. 627; *Harrison v. Women's Homeopathic Assn.*, 134 Pa. St. 558, 19 Atl. 804, 19 Am. St. 714.

<sup>5</sup> *White v. Chaffin*, 32 Ark. 59; *Reilly v. Hudson*, 62 Mo. 383; *Donahue v. Cromartie*, 21 Cal. 80.

<sup>6</sup> *Morgan v. Arthurs*, 3 Watts (Pa.) 140; *Pond Mach. Tool Co. v. Robinson*, 38 Minn. 272, 37 N. W. 99; *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. 744, 53 Am. Rep. 1; *Watts-Campbell Co. v. Yuengling*, 51 Hun (N. Y.) 302, 3 N. Y. S. 869, 21 N. Y. St. 186, affd. 125 N. Y. 1, 25 N. E. 1060. In a building used for making steel castings, the following articles were enumerated as fixtures: "Two engines, two pumps, the blowers, the steam boilers, the gearing, the belting, the emery wheel, the melting furnaces, the grinding mill, the twelve furnaces of four pots each, the annealing furnaces, and the smoke stacks." *Currier v. Cummings*, 40 N. J. Eq. 145, 3 Atl. 174, per Bird, V. C. A battery of boilers embedded in brick, stone, and mortar; a furnace, chimney, or stack built on a firm foundation, and extending up through the roof; engines, cranes, wire mills, furnaces, trains, and other fixtures, firmly attached to and forming a part of the realty of steel-works, and all together constituting one plant,—are all part of the building in which they are situated, and a mechanic's lien at-

§ 1336. **Machinery purchased.**—There can be no lien for machinery made away from the premises to which the purchaser intends to attach it, and which is merely furnished to the purchaser and not connected by the maker with the premises sought to be charged. Mr. Justice Campbell upon this point said:<sup>7</sup> "It is not within the terms or the design of the statute to create a lien in favor of parties who merely sell machinery which may or may not go into a building in this state according as the purchaser determines. The lien is given for something actually done to improve the premises, and not for chattels which it is supposed may be placed there by some one else. There is no more reason for giving a lien for engines and machinery sold separately as such, than for carpets or furniture or ornaments thus sold and intended to be placed in a house. If the engine is put into the building by the contractor, and becomes a fixture, he has done something towards completing the mill; but where he has merely sold it and the purchaser may do what he chooses with it, the vendor is in no sense a builder, repairer or fitterup of the building, and has done nothing whatever to the freehold."

§ 1337. **No lien for machinery furnished for the manufacture of materials.**—The statute does not give a lien for machinery furnished for the manufacture of materials used in a building or other structure. Thus, if one contracts for

taches to the premises for repairs and alterations of such fixtures. *Dickey's App.*, 115 Pa. St. 73, 7 Atl. 577. Belting furnished for a factory in the course of erection is a fixture for which a lien can be claimed. *Graton & Co. v. Woodworth-Mason Co.*, 69 N. H. 177, 38 Atl. 790. The new parts furnished to replace worn-out pieces need not be actually placed in the machine to give

rise to the lien. *Totten & Co. v. Muncie Nail Co.*, 148 Ind. 372, 47 N. E. 703.

<sup>7</sup> *Stout v. Sawyer*, 37 Mich. 313, 316. See, in connection, *Pond Mach. Tool Co. v. Robinson*, 38 Minn. 272, 37 N. W. 99. *Caulfield v. Polk*, 17 Ind. App. 429, 46 N. E. 932; *Griffin v. Ernst*, 124 App. Div. (N. Y.) 289, 108 N. Y. S. 816; *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541.

building a bridge, and machinery for crushing stone to be used for the mason work, and also appliances to carry the manufactured stone to the place where it is to be used, be supplied to him, there can be no lien for such machinery or appliances.<sup>8</sup> "When the law says, the material-man shall have a lien for all materials furnished for, or used in and about, the construction of bridges, it means such materials as ordinarily enter into, or are used in the construction of bridges, and which are fairly within the express or implied terms of the contract, between the owner and contractor. It does not mean, the machinery that may be used for the manufacture of the materials themselves. You might just as well say, that the mill by which the lumber is sawed, or the tools used by the mechanic in building a house, are materials furnished in the construction of the house, as to say that the machinery used in the manufacture of the artificial stone, is to be considered as part of the materials used in the construction of the masonry work of the defendant's bridges. The machinery thus used is the plant of the contractor, and can in no sense be said to be materials furnished or used in building the bridges."<sup>9</sup>

**§ 1338. Work in making slight changes incidental to placing machinery.**—Work done in making slight changes in a building, which is merely incidental to work in putting in a machine which is personal property, gives no foundation for a lien.<sup>10</sup> Work done and materials furnished in equipping with fixed machinery for manufacturing purposes a mill which is in itself a complete and independent structure, can

<sup>8</sup> *Basshor v. Baltimore & Ohio R. Co.*, 65 Md. 99, 3 Atl. 285. The owner of ladders left on a job can have no lien on the building for the reason that the owner of the building refused to allow him to take them away. *Gates v. O'Gara*, 145 Ala. 665, 39 So. 729.

<sup>9</sup> Per *Robinson, J.*, in *Basshor v. Baltimore & Ohio R. Co.*, 65 Md. 99, 3 Atl. 285.

<sup>10</sup> *Curnew v. Lee*, 143 Mass. 105, 8 N. E. 890. No lien for putting in temporary partitions. *Hanson v. News Pub. Co.*, 97 Maine 99.

not be regarded as furnished for the construction or repairing of the mill, and no lien attaches therefor.<sup>11</sup>

§ 1339. **Lien for repair work.**—A lien may be established for work done in repairing things so affixed to the realty as to become a part of it, as, for instance, for work upon a boiler attached to a mill.<sup>12</sup> But there can be no lien on a mill and land for altering and repairing machinery which is not permanently attached to the building so as to be a part of the realty.<sup>13</sup>

§ 1340. **Reservation of title till materials are paid for.**—A provision in a contract for furnishing machinery, that the same shall remain the property of the vendor until paid for, does not prevent such machinery from becoming fixtures when attached as such to a mill, nor does it prevent the vendor from enforcing a lien for the same.<sup>14</sup> And so, under a contract to deliver rails to a railroad company for use in the construction of its road, the contractor's statutory lien for the materials is not affected by a special agreement that the contractor shall have a lien on the rails till they are paid for, and that possession of the railroad shall be the possession of the contractor. The purpose of such a stipulation is to secure a specific lien on the materials furnished, and to require them to be used in the construction of the railroad, and that when so used they should be subject to the statutory lien.<sup>15</sup>

<sup>11</sup> *Rose v. Persse &c. Paper Works*, 29 Conn. 256.

<sup>12</sup> *Kelley v. Border City Mills*, 126 Mass. 148.

<sup>13</sup> *Baker v. Fessenden*, 71 Maine 292; *Vendome Turkish Bath Co. v. Schettler*, 2 Wash. St. 457, 27 Pac. 76.

<sup>14</sup> *Case Mfg. Co. v. Smith*, 40 Fed. 339, 15 L. R. A. 231; *Cooper*

*v. Cleghorn*, 50 Wis. 113, 6 N. W. 491; *Great Western Mfg. Co. v. Hunter*, 15 Nebr. 32, 16 N. W. 759; *Warner Elev. Mfg. Co. v. Capitol Invest. &c. Assn.*, 127 Mich. 323, 86 N. W. 828, 89 Am. St. 473.

<sup>15</sup> *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 27 L. ed. 1081, 3 Sup. Ct. 594.



§ 1341. **Whether a fixture.**—Whether an article is furnished for the construction, alteration or repair of a building, and is so attached to it as to become a part of it, is a mixed question of law and fact.<sup>16</sup> The things affixed must in the first instance be such as pertain to the realty.<sup>17</sup> Whether a thing is a fixture depends largely upon the intention with which it is affixed to the realty; whether it is attached as a permanent fixture to the realty or not.<sup>18</sup> Thus, tables used as counters in a store which are not attached to the building, and which may be used elsewhere and for other purposes, are not things for the construction of which a mechanic's lien exists.<sup>19</sup>

Gas-fixtures as distinguished from gas-fittings in a building are not attached to the freehold, and a lien does not arise for putting them up.<sup>20</sup>

A coal car is not a machine for the construction of which a mechanic's lien can be acquired. It is certainly not a fixture.<sup>21</sup>

A floating dock is not a fixture.<sup>22</sup>

A flume constructed of wood, leading from a dam to a

<sup>16</sup> *Kent v. Brown*, 59 N. H. 236; *Donahue v. Cromartie*, 21 Cal. 80.

<sup>17</sup> *McMahon v. Vickery*, 4 Mo. App. 225; *Koenig v. Mueller*, 39 Mo. 165, 168; *Collins v. Mott*, 45 Mo. 100.

<sup>18</sup> *Schaper v. Bibb*, 71 Md. 145, 17 Atl. 935.

<sup>19</sup> *Baum v. Covert*, 62 Miss. 113.

<sup>20</sup> *Jarechi v. Philharmonic Soc.*, 79 Pa. St. 403, 21 Am. Rep. 78; *Marshall v. Kaighn*, 2 Wkly. N. Cas. 426. Contra, *Baum v. Covert*, 62 Miss. 113; *Vaughen v. Halde-man*, 33 Pa. St. 522, 75 Am. Dec. 622; *McFarlane v. Foley*, 27 Ind.

App. 484, 60 N. E. 357, 87 Am. St. 264.

<sup>21</sup> *New England Car Spring Co. v. Baltimore & O. R. Co.*, 11 Md. 81, 69 Am. Dec. 181. Held otherwise under the statute of Alabama: *Civ. Code* 1907, § 4754. *Central Trust Co. v. Sheffield & B. R. Co.*, 42 Fed. 106, 9 L. R. A. 67.

<sup>22</sup> *Coddington v. Hudson County Dry Dock Co.*, 31 N. J. L. 477. In Indiana, however, a floating wharf for receiving and forwarding merchandise was considered to be within the statute giving liens on buildings. *Olmsted v. McNall*, 7 Blackf. (Ind.) 387.

water-wheel inside a mill, is a fixture, for work upon which a lien may be enforced.<sup>23</sup>

A lightning-rod attached to a house or other structure is a fixture for which a mechanic's lien may attach.<sup>24</sup>

The poles, wires, and lamps erected in the streets, for lighting purposes, by an electric-light company, are real property;<sup>25</sup> and a mechanic's lien may be enforced upon an electric-power plant, and the premises upon which the plant is situated, for poles placed in the public streets, and upon which are stretched the wires connected with the electric-light machinery.<sup>26</sup>

A pump for use in waterworks, and affixed to the same by being placed on foundations laid on the ground, and connected to pipes so as to admit the steam and water, is a fixture for which a lien is given.<sup>27</sup>

Asbestos covering placed around steam piping and intended as a permanent covering may be found to be furnished in the erection of a building and give rise to a mechanic's lien.<sup>27a</sup>

A mechanic's lien may be obtained for constructing a windmill, with a tank, pump, etc.<sup>28</sup>

**§ 1342. Fixtures unsuitable or not accepted.**—There can be no lien for articles furnished and attached to the realty

<sup>23</sup> *Edwards v. Derrickson*, 28 N. J. L. 39, *affd.* 29 N. J. L. 468, 80 Am. Dec. 220.

<sup>24</sup> *Harris v. Schultz*, 64 Iowa 539, 21 N. W. 22; *Quimby v. Sloan*, 2 E. D. Smith (N. Y.) 594. *Contra*, *Drew v. Mason*, 81 Ill. 498, 25 Am. Rep. 288.

<sup>25</sup> *Keating Implement & Machine Co. v. Marshall Electric Light & Power Co.*, 74 Tex. 605, 12 S. W. 489; *Forbes v. Willamette Falls Electric Co.*, 19 Ore. 61, 23 Pac. 670, 20 Am. St. 793.

<sup>26</sup> *Badger Lumber Co. v. Marion Water Supply Co.*, 48 Kans. 182, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. 301, *affd.* 48 Kans. 187, 30 Pac. 117, 30 Am. St. 301.

<sup>27</sup> *Goss v. Helbing*, 77 Cal. 190, 19 Pac. 277.

<sup>27a</sup> *Angier v. Bay State Dist. Co.*, 178 Mass. 163, 59 N. E. 630.

<sup>28</sup> *Phelps & Biglow Windmill Co. v. Shay*, 32 Nebr. 19, 48 N. W. 896; *Phelps & Co. Windmill Co. v. Baker*, 49 Kans. 434, 30 Pac. 472.

which prove unsuitable for the use intended, and which for that reason are removed.<sup>29</sup>

§ 1343. **Lien for furnaces, ranges and heaters.**—A lien may be established for furnaces, ranges, and fire-place heaters furnished for a house and set up in it, if they were furnished under a contract as parts of the building, and so annexed as to become parts of the realty.<sup>30</sup> If furnaces and ranges are sold as personal property to the owner of a building, and are set up in the building by him, the seller can establish no lien for them.<sup>31</sup> But it is only necessary that the furnace should be attached in such a way as to show that it was intended to be used permanently as a part of the house. Therefore a lien may be established for a portable furnace set in a pit prepared for it in the cellar of a house for the purpose of warming the house, although it is not otherwise attached to the realty, and is held in place simply by its own weight. A lien may also be established for the smoke-pipe leading from the furnace to the chimney.<sup>32</sup>

A stove with its funnel can not be considered as materials for the repair or construction of a building. They are not so

<sup>29</sup> Harlan v. Rand, 27 Pa. St. 511; Kitson v. Crump, 1 Wkly. N. Cas. 164, 9 Phila. (Pa.) 41.

<sup>30</sup> United States Nat. Bank v. Bonacum, 33 Nebr. 820, 51 N. W. 233; Schwartz v. Allen, 7 N. Y. S. 5, 24 N. Y. St. 912; Schaper v. Bibb, 71 Md. 145, 17 Atl. 935; Weber v. Weatherby, 34 Md. 656; Porch v. Agnew Co., 70 N. J. Eq. 328, 61 Atl. 721; Owen v. Johnson, 174 Pa. St. 99, 34 Atl. 549, 38 Wkly. N. Cas. 185; Erdman v. Moore, 58 N. J. L. 445, 33 Atl. 958. See Fudickar v. Monroe Athletic Club, 49 La. Ann. 1457, 22 So. 381. But a boiler and furnace is not a machine. Stebbins v. Culbreth, 86 Md. 656, 39 Atl. 321.

<sup>31</sup> Turner v. Wentworth, 119 Mass. 459; Kent v. Brown, 59 N. H. 236; Goodin v. Elleardsville Hall Assn., 5 Mo. App. 289.

<sup>32</sup> Stockwell v. Campbell, 39 Conn. 362, 12 Am. Rep. 393; Goodin v. Elleardsville Hall Assn., 5 Mo. App. 289; Michael v. Reeves, 14 Colo. App. 460, 60 Pac. 577. See, however, Baldwin v. Merrick, 1 Mo. App. 281, which relates to a new furnace sold to replace an old one. Siegmund v. Kellogg-Mackay-Cameron Co., 38 Ind. App. 95, 77 N. E. 1096; Angier v. Bay State Distilling Co., 178 Mass. 163, 59 N. E. 630.

applied as to constitute a part of the building.<sup>33</sup> A flue stop is not a lienable item.<sup>33a</sup>

In a building intended to be used as a hotel, everything of a permanent character attached to it, and reasonably necessary for the purpose of its use as a hotel, is a fixture for which a lien attaches. Thus, the heating, laundry, and cooking apparatus, including a large soup kettle, furnished as a part of the building in its original construction or subsequent repair, and necessary for its use as a hotel, is a fixture for which a mechanic's lien attaches.<sup>34</sup>

The apparatus and appliances for a brewery are fixtures for which a lien on the realty may be established.<sup>35</sup>

**§ 1344. A drain-pipe a part of a house.**—A drain-pipe extending from the cellar of a city house through the cellar wall, yard, and street into a sewer, and included in the contract for building the house, which is fitted for the use of the city water, is a part of the house, and a lien may be maintained for the laying of the drain; and it is immaterial that the fee of the street is not in the owner of the house. The

<sup>33</sup> *Lambard v. Pike*, 33 Maine 141, 144.

<sup>33a</sup> *Missoula Merc. Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594, 991.

<sup>34</sup> *Dimmick v. Cook*, 115 Pa. St. 573, 580, 8 Atl. 627. "This was a large hotel, capable of accommodating two hundred guests. For such a building permanent apparatus for heating, washing, and cooking are as essential as are engines and boilers in a mill. It is true you can eat, wash and cook without them. So you can grind flour and saw lumber by hand, but the world has outgrown such a mode of doing business and it is proper that both legislative and judicial decision should keep abreast of the times. A building with only walls and a roof is

neither a hotel nor a factory. It is a building, nothing more. When a man constructs a building for a hotel, everything of a permanent character, which will pass as a part of the freehold, and which is reasonably necessary to equip it for the purpose for which it is erected, is a part of such building and therefore comes within the Act of 1836." This decision was under the statute which gave a lien for the construction of a building, and not for the alteration or repair of it, which are included in the present statute. To similar effect see *Siegmund v. Kellogg-Mackay-Cameron Co.*, 38 Ind. App. 95, 77 N. E. 1096.

<sup>35</sup> *Scannell v. Hub Brewing Co.*, 178 Mass. 288, 59 N. E. 628.

house would be incomplete and unfinished without the drain-pipe, and this would pass by a deed of the house as a part of it.<sup>36</sup> And so where a corporation, organized to manufacture and furnish vapor for cold storage, employed a person to furnish and erect machinery on its own land, and also to furnish and lay pipes through the streets to convey the cold vapor to its customers, it was held that, as the pipes are essential to the business of the corporation, and are an integral part of its plant, the person furnishing them is entitled to a lien on its land for the value of the material and labor furnished in laying the pipes, as well as in erecting the machinery on the land itself.<sup>37</sup>

But a different view was sustained in a case in Alabama, in which it was held that there is no lien on the owner's land for work done or materials furnished for improvements on other land in which the owner has an easement only. Thus, a water company, having buildings and machinery for a pumping station on a lot of land, obtained piping to connect these works with its stand-pipe or reservoir half a mile distant. Except for the distance of twenty-five feet within such lot, the piping was laid on land in which the company had only an easement. In a suit to enforce a lien on the company's land and buildings for such piping, it was held that it could be enforced only for the piping within the lot.<sup>38</sup>

A lien may attach for the price of a cistern and pipes for furnishing a supply of water to a house,<sup>39</sup> and by a parity of reasoning, an artesian well is an appurtenance to a building for which a lien may be claimed. Appurtenance is an

<sup>36</sup> *Beatty v. Parker*, 141 Mass. 523; 6 N. E. 754. See, also, *Badger Lumber Co. v. Marion Water Supply Co.*, 48 Kans. 182, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. 301, *affd.* 48 Kans. 187, 30 Pac. 117, 30 Am. St. 306, approving and commenting upon this and other similar cases.

<sup>37</sup> *Steger v. Arctic Refrigerating*

*Co.*, 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580. See *Camden Iron Works v. Camden*, 60 N. J. Eq. 211, 47 Atl. 220; *Wells v. Christian*, 165 Ind. 662, 76 N. E. 518.

<sup>38</sup> *Eufaula Water Co. v. Addyston Pipe & Steel Co.*, 89 Ala. 552, 8 So. 25.

<sup>39</sup> *Kent v. Brown*, 59 N. H. 236.

apt term to describe detached structures, built as adjuncts to a building, to further its convenience and occupation.<sup>40</sup>

Pipes, laid in the street, which are used for the conveyance of steam are a part of a "manufactory" within the meaning of a statutory provision and laborers digging trenches for such pipes are entitled to a lien on the plant.<sup>41</sup>

But a town, city or borough can not have a lien, in the nature of a mechanic's lien, to enforce the payment of municipal charges against the owners of adjoining lots, for the construction of sewers, drains, or culverts, unless authorized by statute.<sup>42</sup>

§ 1345. **Lien for fitting mirror frames into the walls of a house.**—A lien arises for making and fitting mirror frames into the walls of a building during the process of building, if they are permanently attached to the building so as to form a part of the structure.<sup>43</sup> But mirror frames which

<sup>40</sup> *Baleh v. Chaffee*, 73 Conn. 318, 47 Atl. 327, 84 Am. St. 155; *Bates v. Harte*, 124 Ala. 427, 26 So. 898, 82 Am. St. 186.

<sup>41</sup> *Wells v. Christian*, 165 Ind. 602, 76 N. E. 518.

<sup>42</sup> *Mauch Chunk v. Shortz*, 61 Pa. St. 390; *Philadelphia v. Greble*, 38 Pa. St. 330. Where a sewer was constructed by the voluntary agreement of lot owners, the contractor was held to have a lien for the proportionate share against each lot benefited. *Williams & Co. v. Rowell*, 145 Cal. 259, 78 Pac. 725.

<sup>43</sup> *Ward v. Kilpatrick*, 85 N. Y. 413, 419, 30 Am. Rep. 674. "The mirror frames in the present case were actually annexed to the realty. They were so annexed during the process of building, and as part of that process. They

were not brought as furniture into the completed house, but themselves formed a part of such completion. Those in the hall filled up and occupied a gap left in the wainscoting. They were an essential part of the inner surface to the hall, and of a material and construction to correspond with and properly form a part of such inner surface. Those in the parlor fitted into a gap purposely left in the baseboard. Both those in the hall and those in the parlor were fastened to the walls with hooks and screws. They could be removed, but their removal would leave unfinished walls, and require work upon the house to supply and repair their absence." Per Finch, J. See also, *McNab & Co. Mfg. Co. v. Paterson Bldg. Co.*, 71 N. J. Eq. 133, 63 Atl. 709.

are not set into the walls, but are put up after the house has been built, and are capable of being easily detached without injuring the walls, are as much furniture as pictures hung in the usual way, and no lien can arise for furnishing them.<sup>44</sup>

Papering or decorating a house with paper decorations is a proper subject matter of a mechanic's lien.<sup>45</sup>

**§ 1346. Repairs in refitting a theater.** A lien arises in favor of persons who, in repairing and refitting a theater, furnish and put up stage properties, paint scenery, provide chairs which are fastened to the floor, and also balusters and railings in front of the boxes, rollers and pulleys for shifting scenery, and other things necessary to the use of the building as a theater.<sup>46</sup>

<sup>44</sup> Ward v. Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674.

<sup>45</sup> LaGrille v. Mallard, 90 Cal. 373, 27 Pac. 294.

<sup>46</sup> Halley v. Alloway, 10 Lea (Tenn.) 523, affg. Grewar v. Alloway, 3 Tenn. Ch. 584. "In regard to the balusters and railings of one of the claimants, there can be no serious contest that they constitute improvements and fixtures within the meaning of the act. I think there is little doubt that the rollers, pulleys, etc., for shifting scenery, and other stage properties, are 'fixtures or machinery' within the meaning of the act. The movable scenery and flying-stages of a theatre, necessary for the purposes of theatrical exhibitions, and which in this respect, it has been said, must be considered as a species of trade, are 'trade fixtures.' Such fixtures, like other trade fixtures, are, as between landlord and tenant, removable by the tenant, but, as between the owner and the mechan-

ic, are subject to the mechanic's lien law. The question whether a thing is a fixture or not, as between owner and mechanic, depends little upon the mode of annexation. Its fitness for the particular place where it is annexed, its being connected with the general business conducted there, and other facts going to show the intent of the owner to make one thing of the land and chattels to carry out a general purpose, would have more effect upon the question than the mode or permanence of the annexation. It has consequently been held, as between the owner and mechanic, that everything put into and forming a part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is a part of the freehold, and a fixture, as, the wheels of a mill, the stones, and even the bolting cloth, the copper kettle of a brew house, and the like. \* \* \* And it is obvious that whatever is thus liable to the me-

§ 1347. **Materials furnished for upholstering a hall.**—Materials furnished for upholstering a hall are not within the terms of a statute giving a lien for work done or materials furnished in the erection, alteration, or repair of buildings, which was declared by subsequent statute to extend to work performed or materials furnished in plumbing, gas-fitting, paper-hanging, paving, and wharf-building. "It would be apparently a usurpation of the functions of the legislature, looking toward what they felt called upon to do, to enlarge the scope of the act by expressly bringing within it such materials as plumbing, gas-fitting, paving, wharf-building, etc., to say that the things claimed here are materials also of like nature, or quality of service."<sup>47</sup>

§ 1347a. **Powder used in construction of a railroad.**—Powder used in the construction of a railroad falls within the designation of materials furnished under a lien law. The powder is not only used in the construction of the road but it is necessarily consumed and it is so intended. It is furnished to be used in the construction of the road.<sup>48</sup>

§ 1348. **Grading about a building not construction work.**—The filling in and grading the grounds about a building already erected is not work connected with the erection, alteration, or repair of a building within the meaning of a mechanic's lien law.<sup>49</sup> There is no lien, except by express

chanie's lien as a fixture must be equally treated as a fixture when furnished by the mechanic or other person under the statute." Per Cooper, Chancellor. To similar effect, see *Waycross & Co. v. Sossman*, 94 Ga. 100, 20 S. E. 252, 47 Am. St. 144.

<sup>47</sup> *McCartney v. Buck*, 8 Houst. (Del.) 34, 12 Atl. 717, 11 Cent. 249.

<sup>48</sup> *Giant Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. 470, 8 L. R. A. 700; *Schaghticoke Powder Co.*

*v. Greenwich & J. R. Co.*, 183 N. Y. 306, 76 N. E. 153, 2 L. R. A. (N. S.) 288, 111 Am. St. 751, revg. 96 App. Div. (N. Y.) 631, 89 N. Y. S. 1115.

<sup>49</sup> *Pratt v. Duncan*, 36 Minn. 545, 32 N. W. 709, 1 Am. St. 697; *Reid v. Berry*, 178 Mass. 260, 59 N. E. 760. Grading a lot and making sewer connections when shown to be necessary to the construction of a house will be held to be a part of its erection under a mechanic's lien



provision of statute, for materials and labor furnished for curbing, grading and paving the street in front of a building.<sup>50</sup> A lien will not attach for work done on a public highway, though the work be absolutely necessary to render of use the work done on the property sought to be charged which is immediately connected therewith.<sup>51</sup>

**§1349. Lien for constructing a sidewalk.**—A lien may be properly acquired for the expense of constructing a sidewalk on the street adjoining a building, inasmuch as the sidewalk is an appurtenance to the building within the meaning of the mechanic's lien act. It is immaterial that the owner's title extends only to the side and not to the centre of the street.<sup>52</sup> But a statute which gave a lien for work performed towards the erection, construction, or finishing of a building was held not to apply to the flagging of sidewalks, yards, and areas of buildings in the process of erection.<sup>53</sup> Under the statute of Iowa,<sup>54</sup> it is also held that a lien can not be enforced for labor done or materials used upon a sidewalk in front of the lot upon which the lien is claimed. The improvement is not upon the land sought to

statute. *Reid v. Berry*, 178 Mass. 260, 59 N. E. 760. See also, *Balch v. Chaffee*, 73 Conn. 318, 47 Atl. 327; *Fox v. Wunker*, 18 Ohio Cir. Ct. 610, 9 Ohio Ct. Div. 176. Surveying and staking the site for a building and preparing construction contract do not constitute labor for which a mechanic's lien may be maintained. *Buckingham v. Flummerfelt*, 15 N. Dak. 112, 106 N. W. 403. No lien against premises for constructing lawn seats. *Beck Coal & Lumber Co. v. H. A. Peterson Mfg. Co.*, 237 Ill. 250, 86 N. E. 715.

<sup>50</sup> *Smith v. Kennedy*, 89 Ill. 485; *Knaube v. Kerchner*, 39 Ind. 217. Provided for by statute in Ore-

gon. *Bellinger & Cotton's Ann. Codes & Stat.* 1902, § 5647; *Pilz v. Killingsworth*, 20 Ore. 432, 26 Pac. 305.

<sup>51</sup> *Kershaw v. Fitzpatrick*, 3 Mo. App. 575.

<sup>52</sup> *Kenney v. Apgar*, 93 N. Y. 539; *Moran v. Chase*, 52 N. Y. 346; *Webster v. Wakeling*, 2 Wkly. N. Cas. 111; *Yearsley v. Flanigen*, 22 Pa. St. 489.

<sup>53</sup> *McDermott v. Palmer*, 8 N. Y. 383, 2 E. D. Smith (N. Y.) 675, *Seld. Notes* (N. Y.) 124; *Smith v. Kennedy*, 89 Ill. 485; *Knaube v. Kerchner*, 39 Ind. 217; *Cloud v. Kendrick*, 1 Wkly. N. Cas. (Pa.) 601.

<sup>54</sup> See ante, § 1201.

be charged, but in the street, and is for the benefit of the public.<sup>55</sup> The same rule prevails in Georgia.<sup>56</sup>

**§ 1350. Fences and sodding.**—A lien arises for work done and materials furnished in building fences around the lot of land upon which a house stands.<sup>57</sup> Also for terracing and sodding a building lot.<sup>58</sup> Under statutes allowing a lien for building fences, a person furnishing materials for such purpose, in order to obtain a lien, must show not only that such material was furnished to be used for that purpose, but also that the same was in fact so used as to become a part of the realty.<sup>59</sup>

**§ 1351. Furnace stack.**—A stack erected in a building for the use of the business carried on in that building, and for running machinery in another building used for a different purpose, attached thereto and belonging to the same owner, may be regarded as a structure necessary to both buildings and as a part thereof, although each building may be used independently for a different kind of business; and a mechanic may have a lien upon both buildings for the construction of the stack.<sup>60</sup>

**§ 1352. No lien for lumber furnished and used in erecting a scaffold.**—There is no lien for lumber furnished to be used merely for the purpose of erecting scaffolding for the

<sup>55</sup> *Coenen v. Staub*, 74 Iowa 32, 36 N. W. 877, 7 Am. St. 470.

<sup>56</sup> *Seeman v. Schultze*, 100 Ga. 603, 28 S. E. 378.

<sup>57</sup> *Donaldson v. Wood*, 22 Wend. (N. Y.) 395, 400; *Gaule v. Bilyeau*, 25 Pa. St. 521; *First Nat. Bank v. Redman*, 57 Maine 405; *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325. Such a lien is given by statute in Wisconsin. See ante, § 1232. Kansas: See ante, § 1202. Illinois: *Canisius v. Mer-*

*rill*, 65 Ill. 67. In Missouri, fences and walks are considered erections and improvements for which a lien is given. *Henry v. Plitt*, 84 Mo. 237; *Fox v. Wunker*, 18 Ohio Cir. Ct. 610, 9 Ohio C. D. 176.

<sup>58</sup> *Pickett v. Gollner*, 7 N. Y. S. 196, 26 N. Y. St. 691.

<sup>59</sup> *Hill v. Bowers*, 45 Kans. 592, 26 Pac. 13.

<sup>60</sup> *Bodley v. Denmead*, 1 W. Va. 249.

laying of brick during the building of a house, though the lumber be furnished upon the credit of the building.<sup>61</sup> Such lumber is not material furnished for or about the erection or construction of the same.<sup>62</sup> It is not used, nor intended to be used, in the construction of the building, and is not within the letter or spirit of the statute. "When lumber or other material, suitable in kind and quality for a particular building, is furnished to the contractor, on its credit, the materialman is not bound to see that it is actually used in the structure. He is entitled to his lien whether the material is so used or not, because the contractor, in providing suitable materials for the building, is quasi agent of the owner; but when, as in this case, he knows the material is to be used merely for the purpose of erecting temporary scaffolding to facilitate the work of the contractor, and it is in fact so used, he has no right to a lien, notwithstanding he may have furnished it on the credit of the building. Such a claim is no more within the purview of the statute than would be one for pickhandles furnished to facilitate the work of excavating the foundation for the building."<sup>63</sup>

**§ 1353. When a lien does not arise for labor in pulling down a building.**<sup>64</sup>—A lien is given upon the ground that the work has been a benefit to the realty and has enhanced its value; and this does not result from the tearing down of a building. The lien attaches to the improvements made upon the land, and to the land upon which the improvements are

<sup>61</sup> *Oppenheimer v. Morrell*, 118 Pa. St. 189, 12 Atl. 307. The same rule is applied to scaffolding for a railway bridge in *Stimson Mill Co. v. Los Angeles Tract. Co.*, 141 Cal. 30, 74 Pac. 357.

<sup>62</sup> One furnishing coal to a contractor is not entitled to a lien. *Mossburg v. United Oil & Gas Co.*, 43 Ind. App. 465, 87 N. E. 992.

<sup>63</sup> *Oppenheimer v. Morrell*, 118

Pa. St. 189, 12 Atl. 307, per Sterrett, J. See also, *Haynes v. Holland* (Tenn.), 48 S. W. 400.

<sup>64</sup> *Holzhour v. Meer*, 59 Mo. 434. Question raised but not decided in *McCristal v. Cochran*, 147 Pa. St. 225, 23 Atl. 444; *Thompson-Starrett Co. v. Brooklyn Heights Realty Co.*, 111 App. Div. (N. Y.) 358, 98 N. Y. S. 128.

placed; but it does not attach to the land alone without the improvements. The improvements are regarded as the primary objects of the lien, and the land as secondary, when this belongs to the owner, the land being added apparently for the purpose of making the lien valuable and available. Therefore, while a lien is sometimes given upon the improvements alone, it never attaches to the land alone when no improvements are made upon it.<sup>65</sup>

**§ 1354. Lien may exist for taking down a building.**—A lien may attach for the labor of pulling down an old building in case the contract for the new building provides that the materials of the old building, so far as they may be suitable, shall be used in the construction of the new one. In such case the pulling down of the old building becomes an essential part of the erection of the new one.<sup>66</sup> But where a builder was employed to make repairs upon an old house, and, after some work had been done upon it, it was decided to pull down the old house and build a new one on the same site, it was held that there could be no lien on the new house for work done on the old one.<sup>67</sup> But window-frames and other materials furnished for the old house and not used in it, but afterwards used in the new, may be embraced in a lien on the new house.<sup>68</sup>

**§ 1355. No lien for removing a building.**—There can be no lien for labor performed in the removal of a building, under a statute which gives a lien for labor performed in the erection, alteration, or repair of a building.<sup>69</sup> The re-

<sup>65</sup> *Holzhour v. Meer*, 59 Mo. 434.

<sup>66</sup> *Whitford v. Newell*, 2 Allen (Mass.) 424. So if the pulling down is for the purpose of rebuilding. In *re Olympic Theatre*, 2 Browne (Pa.) 275; In *re Burling's Est.*, 1 Ashm. (Pa.) 377; *Driesbach v. Keller*, 2 Pa. St. 77; *Hershey v. Shenk*, 58 Pa. St. 382.

<sup>67</sup> *Nichols v. Culver*, 51 Conn. 177.

<sup>68</sup> *Nichols v. Culver*, 51 Conn. 177.

<sup>69</sup> *Trask v. Searle*, 121 Mass. 229; *Stephens v. Holmes*, 64 Ill. 336. In several states it is expressly given for labor in "removing" a building:—Indiana:

removal of a building from one place to another, whether upon the same lot of land, or from one lot to another, is not an erection, alteration, or repair of the building. "The moving a building is quite as technical and well understood a phrase as the erection of a building, or altering a building, or repairing a building; and, in the ordinary use of language, no person would understand that either the erection, alteration or repair of a building involved its removal from one place to another. If by implication the removal of a building is to be deemed an erection, alteration or repair, the pulling down a building must also be included, and the work which would create a lien would be determined by judicial and not by legislative authority."<sup>70</sup>

**§ 1356. No lien for labor in hauling lumber.**—No lien exists for labor performed in hauling lumber and sand to the premises upon which the lien is sought to be enforced, although the lumber and sand are intended to be used in the construction of a building upon the premises, and are actually used for this purpose.<sup>71</sup> The labor of the teamster is too remote to come within the terms of the statute. "It is difficult to distinguish the claim of the petitioner for a

See ante, § 1200. Nebraska: See ante, § 1213. Ohio: See ante, § 1220. Vermont: See ante, § 1228. Wisconsin: See ante, § 1232.

<sup>70</sup> Per Lord, J., in *Trask v. Searle*, 121 Mass. 229; *Eichleay v. Wilson*, 29 Pittsb. Leg. J. (N. S.) 50, 8 Pa. Super. Ct. 14. But it is held in New York that the removal of a building and placing it on other real estate at an agreed price will entitle one to a lien. *Norton & Gorman Contracting Co. v. Unique Const. Co.*, 195 N. Y. 81, 87 N. E. 777. See also, *Allen v. Elwert*, 29 Ore. 428, 44 Pac. 823, 48 Pac. 54.

<sup>71</sup> *Webster v. Real Estate Improvement Co.*, 140 Mass. 526, 6 N. E. 71; *Wilson v. Nugent*, 125 Cal. 280, 57 Pac. 1008. But see, *McClain v. Hutton*, 131 Cal. 132, 63 Pac. 182, where it is held that one hired by the owner's agent to haul brick for the erection of a building might have a lien on the building for his services. See also to same effect, *Kehoe v. Hansen*, 8 S. Dak. 198, 65 N. W. 1075, 59 Am. St. 759; *Border v. Mercer*, 163 Mass. 7, 39 N. E. 413. In New Hampshire, lumbermen have a lien on lumber cut and hauled. See ante, § 715.

lien from that of the railroad for transporting the lumber, or from that of the teamster who carted it to the railroad, or from the claim of the woodcutter who felled the trees, provided they stood in other respects towards the respondent as does this petitioner."<sup>72</sup>

A lien for labor performed or materials furnished in developing or improving a mine does not include labor done in hauling ores from a mine to a quartz mill.<sup>73</sup> But the hoisting of stone or other materials with a derrick is obviously work done in the construction of a building.<sup>74</sup>

A charge for the transportation of machinery to be repaired is properly a part of the account for repairing, and is secured by the statutory mechanic's lien.<sup>75</sup>

**§ 1357. No lien for labor in cooking for workmen.—**Services rendered in cooking for men employed in constructing a building or other improvement are not within a statute giving a lien for services rendered in the construction of it, though the cooking be done on the ground as the work goes on.<sup>76</sup> But a contractor or subcontractor who fur-

<sup>72</sup> Webster v. Real Estate Improvement Co., 140 Mass. 526, 6 N. E. 71, per Gardner, J. In Pennsylvania and California, however, it is held that work done in hauling materials to the place of building is work done for or about the erection of the building within the terms of the statute, and subjects the building to a lien. Hill v. Newman, 38 Pa. St. 151, 80 Am. Dec. 473; West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231.

<sup>73</sup> Barnard v. McKenzie, 4 Colo. 251. Contra, In re Hope Mining Co., 1 Sawy. (U. S.) 710.

<sup>74</sup> Tizzard v. Hughes, 3 Phila. (Pa.) 261.

<sup>75</sup> McKeen v. Haseltine, 46 Minn. 426, 49 N. W. 195.

<sup>76</sup> McCormick v. Los Angeles City Water Co., 40 Cal. 185. "On the same theory a blacksmith who shod the horses, or a grain dealer who furnished them forage whilst employed on the work, or a wagon-maker who repaired the carts of the contractor, would be entitled to a lien on the building. And if every one who contributed indirectly and remotely to the work is entitled to a lien, no reason is perceived why a surgeon called to set a broken limb of one of the laborers, whereby he will be enabled at an early day to resume work on the building, might

nishes labor for which he is entitled to a lien may properly include in the price of the labor the amount he has paid for the board of the men employed, if he is bound to pay the board of the men as a part of their wages.<sup>77</sup>

**§ 1358. No lien on a claim for breach of contract.**—A mechanic's lien can not attach for a claim arising from a breach of contract. Thus, where an exchange of land was made, and there was a difference in estimated values, and one party agreed to pay this difference in work and materials to be furnished for a house for the other party, while the latter undertook to satisfy a mortgage upon the property of the former, and the former supplied the work and materials as agreed, but the latter failed to satisfy the mortgage, it was held that the former could not claim a lien upon the building for which he furnished work and material, because the indebtedness of the other party was not for the work and materials, but for failure to perform the contract by satisfying the mortgage.<sup>78</sup>

**§ 1359. No lien for loan of money.**—A loan of money is not protected by a mechanic's lien, though the loan be made for the purchase of material or the payment for labor in the construction of a house, or be otherwise paid out for the use of the debtor.<sup>79</sup>

**§ 1360. Surety has no right to a lien for materials furnished.**—A surety or guarantor has no right to a mechanic's

not assert a lien; but services of this character, not performed on the building, are not within the province of the statute." Per Crockett, J.

<sup>77</sup> Lybrandt v. Eberly, 36 Pa. St. 347; Perreault v. Shaw, 69 N. H. 180, 38 Atl. 724, 76 Am. St. 160.

<sup>78</sup> Brown v. Rodocker, 65 Iowa 55, 21 N. W. 160.

<sup>79</sup> Gaylord v. Loughridge, 50 Tex. 573; Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360; Stubbs v. Clarinda, C. S. & S. W. R. Co., 65 Iowa 513, 22 N. W. 654; Lunsford v. Wren, 64 W. Va. 458, 63 S. E. 308; First Nat. Bank v. Campbell, 124 Tex. Civ. App. 160, 58 S. W. 628.

lien for materials furnished by a third person to the principal debtor, and used by him in erecting a house, though the surety or guarantor has, upon the default of the debtor, paid for such materials.<sup>80</sup>

§ 1361. **Artisans and mechanics equally entitled to liens.**—All classes of artisans and mechanics whose labor contributes to the construction of a building are equally entitled to liens. Those who adorn the walls of a house, equally with those who erect the walls, are entitled to the protection of a statute which in general terms gives a lien for all labor and materials employed in the construction of buildings or other improvements. Among those classes whose connection with a building is the least obvious, and whose right to a lien has been adjudged by the courts, may be enumerated painters,<sup>81</sup> paperhangers,<sup>82</sup> glaziers,<sup>83</sup> and plasterers.<sup>84</sup>

But a contractor is not a laborer within the meaning of the statute giving persons liens who perform work and labor, the statute being intended to protect the actual laborers and not applying to contractors or those who only superintend the labor of others.<sup>85</sup>

A laborer is not entitled to a lien for the rent of property furnished in connection with his lien.<sup>85a</sup>

<sup>80</sup> Klondike Lumber Co. v. Williams, 71 Ark. 334, 75 S. W. 854.

<sup>85a</sup> Cox v. Cagle, 112 Ga. 157, 37 S. E. 176.

<sup>80</sup> Ruggles v. Blank, 15 Bradw. (Ill.) 436.

<sup>81</sup> Martine v. Nelson, 51 Ill. 422; France v. Woolston, 4 Houst. (Del.) 557.

<sup>82</sup> Freeman v. Gilpin, 1 Phila. (Pa.) 23, 4 Clark (Pa.) 411; McCree v. Champion, 5 Phila. (Pa.) 9. But under a statute which enumerated the mechanics and artisans who

were entitled to liens, and omitted to mention paperhangers, it was held that they had no lien. Freeman v. Gilpin, 1 Phila. (Pa.) 23.

<sup>83</sup> France v. Woolston, 4 Houst. (Del.) 557. "The building would not have been habitable without the glazing, nor the wood protected from decay without the painting." Per Comegys, C. J., in McCarty v. Buck, 8 Houst. (Del.) 34, 11 Cent. 249, 12 Atl. 717.

<sup>84</sup> Parker v. Bell, 7 Gray (Mass.) 429.



Under the Massachusetts statute, however, it is held that one who supplies the labor of others for the construction of a building is entitled to a lien equally with those who perform the labor.<sup>85b</sup>

**§ 1362. Owner can have no lien on his own property.**—The landowner can not himself acquire a lien upon his own property to the prejudice of the rights of third persons.<sup>86</sup> Nor can one acting as the owner's agent or general overseer.<sup>87</sup>

**§ 1363. General manager not a laborer.**—A general manager of a corporation in all its business, at the place where it is carried on, is not a laborer entitled to the benefit of the provisions of a mechanic's lien law.<sup>88</sup> Such a manager stands very much in the position of an owner directing and managing his own business. He is the representative of the corporation, and to the laborers under him he is practically the corporation itself. Such owners do not come within the spirit of the mechanic's lien acts.

**§ 1364. Bookkeeper not a laborer.**—The services of a bookkeeper of a corporation, who also disburses its funds, are not such services as the lien laws provide for. They are neither directly nor remotely connected with the labor which is incorporated into a building or other improvement; nor are they incident to labor in mines.<sup>89</sup>

**§ 1365. No lien for superintending the construction of a building.**<sup>90</sup>—A principal contractor can have no lien for serv-

<sup>85b</sup> Wera v. Bowerman, 191 Mass. 458, 78 N. E. 102.

<sup>86</sup> Babb v. Reed, 5 Rawle (Pa.) 151, 28 Am. Dec. 650; Stevenson v. Stonehill, 5 Whart. (Pa.) 301.

<sup>87</sup> Kerby v. Daly, 45 N. Y. 84; Whitaker v. Smith, 81 N. Car. 340, 31 Am. Rep. 503.

<sup>88</sup> Smallhouse v. Kentucky &c. M. Co., 2 Mont. 443.

<sup>89</sup> Rara Avis G. & S. M. Co. v. Bouscher, 9 Colo. 385, 12 Pac. 433. And see Edgar v. Salisbury, 17 Mo. 271.

<sup>90</sup> Murphy v. Murphy, 22 Mo. App. 18; Nelson v. Withrow, 14 Mo. App. 270; Edgar v. Salisbury, 17 Mo. 271; Jones v. Shawhan, 4 Watts & S. (Pa.) 257. One who superintends the building of a

ices rendered in superintending his own workmen;<sup>91</sup> and a subcontractor has no greater right.<sup>92</sup> An architect who superintends the erection of a house has no lien for such services.<sup>93</sup>

A woodsman who superintends ordinary hands is not entitled to a lien, as he works with his head rather than with his hands.<sup>94</sup>

A consulting engineer is not within the provisions of a lien law giving a lien to a laborer or operative.<sup>95</sup> Neither is a civil engineer employed upon a railroad in the construction of the road.<sup>96</sup>

Even under a statute allowing a lien for superintendence, it has been held that going to distant places to hurry up the contractors who furnish materials, is not "superintending construction" and does not come within the scope of the statute.<sup>97</sup> But superintending the construction of a building comes within the scope of the term superintendence as used in the statute.<sup>98</sup>

**§ 1366. Superintendent of a mine who also works entitled to a lien.**—The superintendent of a mine, who in the performance of his duties does some manual labor, is a laborer entitled to the benefit of the provisions of a mechanic's lien act under a statute giving a lien to miners for labor performed.<sup>99</sup>

railroad bridge is not a laborer. *Blanchard v. Portland & R. F. R. Co.*, 87 Maine 241, 32 Atl. 890; *Cook v. Ross*, 117 N. Car. 193, 23 S. E. 252; *Williams v. Alcorn Electric Light Co.*, 98 Miss. 468, 53 So. 958.

<sup>91</sup> *Blakey v. Blakey*, 27 Mo. 39.

<sup>92</sup> *Nelson v. Withrow*, 14 Mo. App. 270.

<sup>93</sup> *Stryker v. Cassidy*, 10 Hun (N. Y.) 18, revd. 76 N. Y. 50, 52, 32 Am. Rep. 262.

<sup>94</sup> *Cole v. McNeill*, 99 Ga. 250, 25 S. E. 402.

<sup>95</sup> *Ericsson v. Brown*, 38 Barb. (N. Y.) 390.

<sup>96</sup> *Pennsylvania & Del. R. Co. v. Leuffer*, 84 Pa. St. 168, 24 Am. Rep. 189.

<sup>97</sup> *Pitschke v. Pope*, 20 Colo. App. 328, 78 Pac. 1077.

<sup>98</sup> *Fischer v. Hanna*, 8 Colo. App. 471, 47 Pac. 303.

<sup>99</sup> *Mining Co. v. Cullins*, 104 U. S. 176, 26 L. ed. 704; *Palmer v.*

The overseer of a body of miners must necessarily use some physical exertion, as well as some skill and knowledge, in the performance of his duties; and it may sometimes be necessary for him to assist with his own hands. The discharge of his duties may well be called work and labor within the terms of the statute. His services are not of a professional character, such as those of a mining engineer or of an architect; nor are they merely of a supervisory character, like those of a general superintendent of a railroad, or those of a general agent of a large mining business who is employed to disburse money and look after the general affairs of the mine. The fact that one renders services as overseer of the work does not prevent his having a lien if he also performs work as a laborer.<sup>1</sup>

But a watchman engaged to protect a mine house while the mine is not being worked is not entitled to a lien.<sup>2</sup> He must be engaged in the actual work of mining in order to acquire a lien against the mining claim.<sup>3</sup>

§ 1367. **Architect not entitled to a lien.**—An architect who simply provides the plans and specifications for a building has no lien for his labor.<sup>4</sup> An architect has no lien for

Uncas M. Co., 70 Cal. 614, 11 Pac. 666; Cullins v. Flagstaff Silver Min. Co., 2 Utah 219, affd. 104 U. S. 176, 26 L. ed. 704; Williamette Falls &c. Co. v. Remick, 1 Ore. 169; Capron v. Strout, 11 Nev. 304; Rara Avis G. & S. M. Co. v. Bouscher, 9 Colo. 385, 12 Pac. 433. And see Whitaker v. Smith, 81 N. Car. 340, 31 Am. Rep. 503. Colorado: Surveyors, civil and mining engineers, doing any work of surveying or platting of any mines, mining claims, lodes, or mineral deposits, have a like lien. Mills Ann. Stats. 1912, § 4610.

<sup>1</sup> Foerder v. Wesner, 56 Iowa 157, 9 N. W. 100.

<sup>2</sup> Williams v. Hawley, 144 Cal. 97, 77 Pac. 762.

<sup>3</sup> Reese v. Bald Mountain &c. Co., 133 Cal. 285, 65 Pac. 578.

<sup>4</sup> Price v. Kirk, 90 Pa. St. 47; Raeder v. Bensberg, 6 Mo. App. 445; Ames v. Dyer, 41 Maine 397, per Appleton, J.; Phillips v. Wright, 5 Sandf. (N. Y.) 342; Foster v. Tierney, 91 Iowa 253, 59 N. W. 56, 51 Am. St. 343. But see Parsons v. Brown, 97 Iowa 699, 66 N. W. 880; Rinaker v. Freeman, 84 Ill. App. 283, revd. Freeman v.

keeping books, auditing accounts, and making settlements with contractors; nor has he any lien for labor as a supervising architect in the improvement of the grounds and accessories about the building.<sup>5</sup> But an architect who is employed not only to make plans and specifications, but to direct and oversee the erection of a building in accordance therewith, has a lien for work done about the erection of a building, within the words of a statute giving "a lien for the payment of all debts contracted for work done or materials furnished" in the erection of a building.<sup>6</sup> This view is, however, dissented from in some states; and it is said that, while a mechanic who acts as overseer does not lose his lien for manual services done at the same time, yet an architect is not a mechanic, and that his services in drawing plans and specifications, and giving directions to the builder during the construction of a building, are not in any proper sense work or labor upon the building.<sup>7</sup> When an architect claims a lien for charges and fees, he must show that he has performed work for which the statute gives a lien, and such work is not shown by naming his calling.<sup>8</sup>

But other decisions hold that a lien for labor includes the

Rinaker, 185 Ill. 172, 56 N. E. 1055. In several states, architects are enumerated among the persons entitled to a lien: California: See ante, § 1190. Illinois: *Freeman v. Rinaker*, 185 Ill. 172, 56 N. E. 1055; revg. 84 Ill. App. 283; *Richardson v. Central Lumber Co.*, 112 Ill. App. 160. Louisiana: Rev. Civ. Code 1900, art. 3249. New Mexico: See ante, § 1217.

<sup>5</sup> *Adler v. World's Pastime Ex. Co.*, 126 Ill. 373, 18 N. E. 809. The latter service is only the work of a landscape gardener.

<sup>6</sup> *Bank of Pennsylvania v. Gries*, 35 Pa. St. 423; *Taylor v. Gilsdorff*, 74 Ill. 354; *St. Clair Coal Co. v.*

*Martz*, 75 Pa. St. 384; *Henry & Co. v. Halter*, 58 Nebr. 685, 79 N. W. 616; *Mitchell v. Packard*, 168 Mass. 467, 47 N. E. 113, 60 Am. Rep. 404; *Friedlander v. Taintor*, 14 N. Dak. 393, 104 N. W. 527, 116 Am. St. 697; *Johnson v. McClure*, 10 N. Mex. 506, 62 Pac. 983; *Rinn v. Electric Power Co. of Staten Island*, 3 App. Div. (N. Y.) 305, 38 N. Y. S. 345, 73 N. Y. St. 802; *Parsons v. Brown*, 97 Iowa 699, 66 N. W. 880.

<sup>7</sup> *Raeder v. Bensberg*, 6 Mo. App. 445; *Foushee v. Grigsby*, 12 Bush (Ky.) 75, 83; *Libbey v. Tidden*, 192 Mass. 175, 78 N. E. 313.

<sup>8</sup> *Rush v. Able*, 90 Pa. St. 153.

labor of an architect who superintends the erection of a building.<sup>9</sup> "The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls, and labor of a most important character. It is not any the less labor within the general meaning of the word, that it is done by a person who is fitted by special training and skill for its performance. The language quoted makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who supervises, directs and applies the labor of others. The plaintiff is within the language of the first section, and his right to a lien must be conceded, unless it appears from other parts of the act, that it was not the intention of the legislature to give a lien for the kind of labor performed by him. Looking at the whole act it is plain that it was not passed simply for the protection of laborers, using that word in a restricted sense as designating those who work with their hands, and are dependent upon their daily toil for their subsistence. Mechanics' lien acts were originally enacted for the special protection of this class of persons, but their scope has been greatly extended. Under the act in question a lien may be created not only in favor of workmen employed by a contractor, but in favor of the contractor also. The lumber dealer, the hardware merchant, in short any person who supplies materials for the use of the building may acquire a lien thereon for their value. The right to acquire a lien

<sup>9</sup> Hughes v. Torgerson, 96 Ala. 346, 11 So. 209, 16 L. R. A. 600, 38 Am. St. 105; Stryker v. Cassidy, 76 N. Y. 50, 52, 32 Am. Rep. 262, revg. 10 Hun (N. Y.) 18. The New York act authorizes a lien to be created in favor of "any person who shall perform any labor, or furnish any materials, in building,

altering, or repairing any house, etc., by virtue of any contract with the owner," etc. See, also, Mutual Benefit L. Ins. Co. v. Rowand, 26 N. J. Eq. 389, affd. 27 N. J. Eq. 604; Knight v. Norris, 13 Minn. 473; Mulligan v. Mulligan, 18 La. Ann. 20.

is not confined to persons who may be supposed to need the especial protection of the state.<sup>10</sup>

It has been held that a professional mining engineer and geologist is not entitled to a mechanic's lien on a mine for work done in exploring, examining and considering it.<sup>11</sup>

<sup>10</sup> *Stryker v. Cassidy*, 76 N. Y. 50, 52, 32 Am. Rep. 262, revg. 10 Hun (N. Y.) 18, per Andrews, J.      <sup>11</sup> *Lindemann v. Belden Consol. M. & M. Co.*, 16 Colo. App. 342, 65 Pac. 403.

## CHAPTER XXXIV.

### MECHANICS' LIENS: WHAT PROPERTY IS SUBJECT TO.

Sec.	Sec.
1368. Land subject to lien.	1379. Grain corporation, not a public corporation.
1369. The whole land of the owner subject to lien.	1380. House of minister plenipotentiary of foreign power.
1370. Meaning of the phrase "Lot of land."	1381. Contract to erect building to be used for unlawful purpose.
1371. Lots appurtenant to a mill.	1382. Land held under homestead exemption.
1372. Quantity of land necessary for use and occupation.	1383. No lien on house built on government land.
1373. Lien on building separate from the land.	1384. In general.
1374. Several and not a joint lien.	1385. Lien for machinery not a separate lien.
1375. Public buildings of states and municipal corporations.	1386. Machinery not affixed to real estate not subject to lien.
1376. Lien not on public buildings but on moneys.	1387. Lien on fixtures in general.
1377. Lien on fund by force of city ordinance.	1388. Trade fixtures.
1378. Property of quasi public corporations.	

§ 1368. **Land subject to lien.**—In general the lien attaches not only to the land which the building covers, but to the lot of land upon which it stands, and whatever belongs to the lot and is necessary to the enjoyment of the premises.<sup>1</sup> This is a question of fact, not of law.<sup>2</sup> The lien extends to appurtenances of the land or lot, if these are on the same

<sup>1</sup> See ante, ch. xxx, under the statutes of the several states, for provisions as to the property covered. *Cooper v. Jackson*, 107 Ga. 255, 33 S. E. 60; *Sorg v. Crandall*, 233 Ill. 79, 84 N. E. 181.

<sup>2</sup> *Edwards v. Derrickson*, 28 N. J. L. 39, affd. 29 N. J. L. 468, 80 Am. Dec. 220; *Crawfordsville v.*

*Barr*, 65 Ind. 367; *Browne v. Smith*, 2 Browne (Pa.) 229n. The land against which a lien is claimed must be connected by some evidence with the land where the improvement is located. *Eastmore v. Bunkley*, 113 Ga. 637, 39 S. E. 105.

lot;<sup>3</sup> but it does not extend beyond the ground necessary for the proper enjoyment of the building, according to the intention and design of the owner when the building was commenced, if such intention was apparent or known to the contractor.<sup>4</sup> If there are buildings already upon the lot, the lien attaches to such buildings, as they are annexed to the land and are a part of the realty. The lien attaches to the whole of the lot as it was when the contract was made or the building commenced, including the buildings upon it, and a conveyance of a portion of the lot afterwards does not affect the lien.<sup>5</sup>

A lien upon a mine for the construction of hoisting and pumping works, and laying water pipes, extends to the whole mine, and not to the several structures merely, since they form a part of the mine itself.<sup>6</sup>

A lien can not be enforced against a part of a building. Though the work be done upon a single room, the lien is upon the entire building.<sup>7</sup>

The lien covers the tract of land upon which the building is erected, and the land about it which has been occupied or conveyed as one parcel. Thus a lien upon a mill was held to cover all the land known or used as the mill property, containing in the whole more than fifty acres. There were, besides the mill, two dwelling houses on the tract, which were usually occupied by persons employed about the mill. With one house was inclosed seven or eight acres of land. The residue of the land was uninclosed, and was chiefly open, broken, back land. For thirty years the whole had been known and conveyed as one property. It was held that the

<sup>3</sup> *Tracy v. Rogers*, 69 Ill. 662; *Parmelee v. Hambleton*, 19 Ill. 615.

<sup>4</sup> *Pennoek v. Hoover*, 5 Rawle (Pa.) 291.

<sup>5</sup> *Collins v. Patch*, 156 Mass. 317, 31 N. E. 295. Lien does not cover

a separate house standing on the same undivided lot. *Ewing v. Allen*, 99 Iowa 379, 68 N. W. 702.

<sup>6</sup> *Silvester v. Coe Quartz Mine Co.*, 80 Cal. 510, 22 Pac. 217.

<sup>7</sup> *Wright v. Cowie*, 5 Wash. 341, 31 Pac. 878.



whole tract was properly included in the lot and curtilage whereon the building was erected, and was liable to the lien.<sup>8</sup>

A lien for erecting farm buildings upon a farm containing three hundred and fifty acres may be enforced against the whole farm. The question of the extent of the lien is the same in principle whether the farm be a large or a small one. "The farm is a unit; its component parts are land and buildings. In common language, we say that the buildings are on the farm; that is, that they stand on the land. It is not a strained or unnatural use of language to say that the farm is the land on which the buildings stand. Thus the whole farm may be literally within the terms of the statute."<sup>9</sup>

**§ 1369. The whole land of the owner subject to lien.—**

The land covered by a lien is generally the whole lot of land belonging to the owner on which the building is erected, unless the amount of land is restricted or defined by statute. The court will not restrict the lien to the buildings and the land covered by them; and if they limit the lien to a less quantity of land than the whole lot, they will embrace in the lien also the land about the buildings used with them, and necessary, or reasonably convenient, for their use.<sup>10</sup>

<sup>8</sup> *Edwards v. Derrickson*, 28 N. J. L. 39. Also *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325; *Sorg v. Crandall*, 233 Ill. 79, 84 N. E. 181; *LeForgee v. Colby*, 69 Ill. App. 443.

<sup>9</sup> *Lindsay v. Gunning*, 59 Conn. 296, 22 Atl. 310, 11 L. R. A. 553, per Carpenter, J., who further says: "A lien is but a statutory mortgage. A sale or foreclosure is the same as if it were a mortgage. If the parties themselves were to create the incumbrance, they

would not limit it to a barn or other building; and we can not presume that the legislature intended to subject the parties to an inconvenience that they would not have voluntarily assumed." See also, *LeForgee v. Colby*, 69 Ill. App. 443.

<sup>10</sup> *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325; *Filston Farm Co. v. Henderson*, 106 Md. 335, 67 Atl. 228; *Davidson v. Stewart*, 200 Mass. 393, 86 N. E. 779.

Under a statute which provides that the lien shall cover the lot of land on which the building is situated, the whole of the land on which a mill is located is subject to a lien for work done in repairing a boiler in the mill.<sup>11</sup>

It is not necessary for the lien claimant to show that the quantity of land on which the lien is claimed is within the statutory limit; if the defendant claims that it exceeds that limit, he must show it, and it is then for the court to carve out the portion to which the lien shall attach.<sup>12</sup>

§ 1370. **Meaning of the phrase "lot of land."**—The term "lot of land" in a city means the fractional subdivision of a block, generally limited by fixed boundaries on a recorded plan or plat. The lien claim should generally be made against that lot only upon which the building is, although the adjoining lots belong to the same owner and have no building upon them.<sup>13</sup> If the lots or tracts of land are distinct,

<sup>11</sup> *Kelley v. Border City Mills*, 126 Mass. 148.

<sup>12</sup> *Boyd v. Blake*, 42 Minn. 1, 43 N. W. 485; *North Star Iron Works v. Strong*, 33 Minn. 1, 21 N. W. 740; *Smith v. Headley*, 33 Minn. 384, 23 N. W. 550; *Filston Farm Co. v. Henderson*, 106 Md. 335, 67 Atl. 228; *Adams v. Central City Granite Brick &c. Co.*, 154 Mich. 448, 117 N. W. 932; *Darling v. Neumeister*, 99 Wis. 426, 75 N. W. 175.

<sup>13</sup> *Miller v. Hoffman*, 26 Mo. App. 199; *Van Lone v. Whittemore*, 19 Bradw. (Ill.) 447; *Woodburn v. Gifford*, 66 Ill. 285; *Gardner v. Eberhart*, 82 Ill. 316; *Evansville v. Page*, 23 Ind. 525; *Collins v. New Albany*, 59 Ind. 396; *Fitzgerald v. Thomas*, 61 Mo. 499; *Wilson v. Proctor*, 28 Minn. 13, 8 N. W. 830; *Pilz v. Killingsworth*, 20 Ore. 432, 26 Pac. 305. Where a building is constructed on two lots the right to a mechanic's lien

may be claimed on both lots. *Miller v. Schmitt*, 67 N. Y. S. 1077; *Nagle v. Garrigues*, 46 Pa. Super. Ct. 155. "By the word 'lot' the legislature evidently meant town or city lots, 25 by 100, and so on. The first act in Pennsylvania, in 1803, only included Philadelphia, and only used the word lot; the word curtilage only came in afterwards, when contemplating buildings more in the country. And by the term buildings on lots, in this said act, was only contemplated dwelling-houses. But in the country not only houses were wanted, but out-houses, barns, stables, mills, etc., and so they in time added the word curtilage to that of lot, and by which was embraced all the buildings within the curtilage." *Coddington v. Hudson County Dry Dock Co.*, 31 N. J. L. 477, 484.

the fact that they are inclosed by one fence does not make the whole appurtenant to a house built upon one of them.<sup>14</sup>

The lien is not necessarily confined to the particular lot as surveyed and laid out upon a plan or town plat. "On the contrary, where two adjacent town lots are used, without any actual division between them, as one mill lot, a part of the buildings and machinery being upon one and a part upon the other, the lien extends to both lots, though the precise spot where the work was done may be within the limits of one of them. And the case is the same whenever two or more adjacent lots are thrown into one lot, the ideal lines of division being disregarded, and used for a common purpose, whatever that purpose may be."<sup>15</sup>

Under statutes limiting the land covered by the lien to one acre in the country, such limitation does not apply to a parcel of land in a city even if it be more than an acre in extent.<sup>15a</sup>

**§ 1371. Lots appurtenant to a mill.**—Where it was sought to enforce a lien upon a flour mill and the lot on which it stood, it was held that lots of land separated from the mill lot by a street thirty feet wide were not appurtenant to it merely because a corn-crib had been built on them for

<sup>14</sup> Woodburn v. Gifford, 66 Ill. 285. But where the building erected is on two lots the lien will extend to both of them. Miller v. Schmitt, 67 N. Y. S. 1077. Where the building erected is entirely on one lot and no part of the adjoining lot which is owned by the same person is necessary to the convenient use of the house erected, the lien claimant can only assert a lien on the lot upon which the house is erected. Fulton v. Parlett, 104 Md. 62, 64 Atl. 58.

<sup>15</sup> Choteau v. Thompson, 2 Ohio St. 114, 124, per Thurman, J. Ma-

terials furnished for several buildings under one contract where located on several lots will entitle the material-man to a lien on all the lots. Badger Lumber Co. v. Holmes, 55 Nebr. 473, 76 N. W. 174. See also, Strang v. Pray, 89 Tex. 525, 35 S. W. 1054; Culmer v. Clift, 14 Utah 286, 47 Pac. 85. But see, Hays v. Goodman, 16 Montg. County. Law Repr. 43, holding that such a lien is invalid where the lots are separated by a street.

<sup>15a</sup> Christian &c. Co. v. Kling, 121 Ala. 292, 25 So. 629.

storing corn that was to be ground in the mill, or because a shed was located on them for the use of the horses and wagons of the mill,<sup>16</sup> or because steam for the building erected is furnished from other buildings situate upon the lots across the street.<sup>17</sup>

§ 1372. **Quantity of land necessary for use and occupation.**—How much land is necessary for the convenient use and occupation of a building, and subject to a lien for work or materials used in the building, is properly a question for a jury,<sup>18</sup> and oral evidence is admissible to determine it. Testimony showing that the land and building had been leased together and sold together tends to show that the land and building had been treated as a unit and used for a common purpose; and in the absence of other testimony the court may properly infer that the land so used and treated was reasonably convenient for the use and occupation of the building.<sup>19</sup> Where one claims a lien on more land for its convenient use than that occupied by the building, appropriate allegations to support the claim must be made in the complaint.<sup>20</sup>

In the absence of any statute limiting the lien to a definite quantity of land, a lien for labor done or materials furnished for one of several buildings upon a large tract of land should be confined to the particular building for which the work and materials were furnished, and the lot of land properly appurtenant thereto.<sup>21</sup>

<sup>16</sup> *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Stout v. Sower*, 22 Ill. App. 65.

<sup>17</sup> *McDonald v. Minneapolis Lumber Co.*, 28 Minn. 262, 9 N. W. 765.

<sup>18</sup> *Keppel v. Jackson*, 3 Watts & S. (Pa.) 320.

<sup>19</sup> *Gould v. Wise*, 18 Nev. 253, 3 Pac. 30; *Pairo v. Bethell*, 75 Va. 825.

<sup>20</sup> *Willamette Steam Mills Co. v. Kremer*, 94 Cal. 205, 29 Pac. 633.

<sup>21</sup> *Girard Storage Co. v. Southwark Foundry Co.*, 105 Pa. St. 248; *Woodburn v. Gifford*, 66 Ill. 285; *Windfall Natural Gas, Mining & Oil Co. v. Roe*, 42 Ind. App. 278, 85 N. E. 722, where it is held that one can not have a lien on one building for work done on another.

Where an action was brought to enforce a lien upon a building and fair grounds in a city, upon which there were many other buildings, and the area of which was one hundred and fifty acres, it was proper to direct that the lien should attach to the building and to the ground upon which the building stood, this being the grand stand, a structure easily distinguishable from all others on the tract. The land against which the lien was established in such case was that covered by the building, and no more; and the description of it as the land covered by such building was sufficiently definite; for any person familiar with the premises could go upon the land and locate the boundaries of it, even if the building were burned or torn down.<sup>22</sup>

**§ 1373. Lien on building separate from the land.**—In several states the mechanic is given a lien upon the building separate from the land in preference to all prior liens upon the land, and provision is made for enforcing the lien by a sale and removal of the building or other erection.<sup>23</sup> A statute to this effect abrogates in favor of the lien the common-law rule that things attached to the realty become a

er. In case of an extension of a building, or addition to it, it has been held that the lien extends to the whole building. *Nelson v. Campbell*, 28 Pa. St. 156.

<sup>22</sup> *Holland v. McCarty*, 24 Mo. App. 82.

<sup>23</sup> In the following states the lien may attach to the buildings, erections, or improvements in preference to any prior incumbrance upon the land: Alabama: See ante, § 1187; *Salter v. Goldberg*, 150 Ala. 511, 43 So. 571. Colorado: See ante, § 1191. Illinois: See ante, § 1189. Indiana: See ante, § 1200; Iowa: See ante, § 1201. Maine: The court shall have power to determine all ques-

tions of priority of lien or interest, if any, between parties to the proceeding. Minnesota: See ante, § 1209. Missouri: See ante, § 1211. Montana: Something susceptible of removal must be erected. *Johnson v. Puritan Min. Co.*, 19 Mont. 30, 47 Pac. 337. North Dakota: See ante, § 1219a. Oklahoma: See ante, § 1220a. Oregon: See ante, § 1221. South Dakota: See ante, § 1219a. Texas: See ante, § 1226. In New Jersey a lien will not be imposed upon a building unless in connection with some estate or interest in the land. *Leaver v. Kilmer*, 71 N. J. L. 291, 59 Atl. 643.

part of the realty, and that they can not be afterwards severed without consent of the prior mortgagees of the land. A lien is given, not on the materials as such, but on the buildings or improvements in the construction of which the materials are used. The operation of the statute, in case there is a prior mortgage of the land, is to dis sever the improvements from the realty by giving a superior lien on such improvements, and conferring on the purchaser the right to remove them.<sup>24</sup>

Unless the statute contemplates a severance of the building from the land, and a sale of it separate from the interest of the owner in the land, no lien can attach to a building erected upon the land of an owner who has never consented to or authorized the work thereon. The interest of the builder for whom the work is done in such case is only a chattel interest. He has no interest in the land which can be sold so as to make the lien effectual.<sup>25</sup>

In Michigan, where a house is built on land exempt as a homestead, the house itself separate from the land may be held subject to a lien claim.<sup>26</sup>

§ 1374. **Several and not a joint lien.**—The lien upon the land, and upon the building or other improvement, may be a several and not a joint lien. This is held to be the case under the statute of Alabama. The right to subject the improvements to sale is not lost because, by accident or negligence, the claimant has lost his lien on the land by failure to describe it properly.<sup>27</sup> Thus, where the building is de-

<sup>24</sup> *Turner v. Robbins*, 78 Ala. 592; *Bitter v. Monat Lumber & Co.*, 10 Colo. App. 307, 51 Pac. 519, *affd.* 27 Colo. 120, 59 Pac. 403. The lien takes precedence even though the mortgage is to secure a loan of money for the purpose of erecting a building. *Building & L. Assn. v. Coburn*, 150 Ind. 684, 50 N. E. 885.

<sup>25</sup> *Stevens v. Lincoln*, 114 Mass. 476; *Belding v. Cushing*, 1 Gray (Mass.) 576.

<sup>26</sup> *Holliday v. Mathewson*, 146 Mich. 336, 109 N. W. 669.

<sup>27</sup> *Bedsole v. Peters*, 79 Ala. 133; *Lane v. Jones*, 79 Ala. 156; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279. *Scruggs v. Decatur*, 155 Ala. 616, 46 So. 989.

scribed as "the recently erected two-story frame dwelling and improvements of the said owner, which are now occupied as a dwelling house by him and his family," the description is sufficient as to the dwelling house, though not as to the other improvements, or the land upon which the dwelling house and improvements are situated.<sup>28</sup>

**§ 1375. Public building of states and municipal corporations.**—On grounds of public policy the mechanics' lien laws do not, in the absence of express provisions, apply to public buildings erected by states, counties and towns for public uses.<sup>29</sup> Schoolhouses erected for the use of public schools

<sup>28</sup> *Turner v. Robbins*, 78 Ala. 592.

<sup>29</sup> Alabama: *McNeal & Co. Foundry Co. v. Bullock*, 38 Fed. 565. Arkansas: *Plummer v. School Dist. No. 1*, 90 Ark. 236, 118 S. W. 1011. California: *Bates v. Santa Barbara*, 90 Cal. 543, 27 Pac. 438; *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 464, 23 Am. St. 451; *Clark v. Beyrle*, 160 Cal. 306, 116 Pac. 739. Connecticut: *National Fire Proofing Co. v. Huntington*, 81 Conn. 632, 71 Atl. 911, 20 L. R. A. (N. S.) 261. Florida: *Special Tax School v. Smith*, 61 Fla. 782, 54 So. 376. Georgia: *Neal-Millard Co. v. Chatham Academy*, 121 Ga. 208, 48 S. E. 978, citing text; *Aetna Indemnity Co. v. Comer*, 136 Ga. 24, 70 S. E. 676. Illinois: *Board of Education v. Greenbaum*, 39 Ill. 609, 610; *Chicago v. Hasley*, 25 Ill. 595; *Bouton v. McDonough Co.*, 84 Ill. 384; *Thomas v. Illinois Industrial University*, 71 Ill. 310; *Salem v. Lane & Co.*, 90 Ill. App. 560, affd. 189 Ill. 593, 60 N. E. 37, 82 Am. St. 481. Indiana: *Parke v. O'Conner*,

86 Ind. 531, 44 Am. Rep. 338; *Pike v. Norrington*, 82 Ind. 190; *Lowe v. Howard Co.*, 94 Ind. 553; *Secrist v. Delaware*, 100 Ind. 59; *Fatout v. Board*, 102 Ind. 223, 1 N. E. 389. Townsend v. Cleveland Fire-Proofing Co., 18 Ind. App. 568, 47 N. E. 707. Iowa: *Loring v. Small*, 50 Iowa 271, 33 Am. Rep. 136; *Whiting v. Story*, 54 Iowa 81, 6 N. W. 137, 37 Am. Rep. 189; *Breneman v. Harvey*, 70 Iowa 479, 90 N. W. 846; *Lewis v. Chicksaw Co.*, 50 Iowa 234; *Green Bay Lumber Co. v. Independent School Dist.*, 125 Iowa 227, 101 N. W. 84. Kentucky: *Roe v. Scanlan*, 98 Ky. 24, 17 Ky. L. 595, 32 S. W. 216. Maine: *Goss Co. v. Greenleaf*, 98 Maine 436, 57 Atl. 581. Massachusetts: *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 380. Michigan: *Knapp v. Swaney*, 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397; *Ford v. State Board & Co.*, 166 Mich. 658, 132 N. W. 467. Minnesota: *Jordan v. Board of Education*, 39 Minn. 298, 39 N. W. 801; *Burlington Mfg. Co. v. Comrs. of Courthouse and City Hall*, 67 Minn. 327, 69 N. W.

come within this exemption.<sup>30</sup> So do waterworks owned

Mississippi: Board of Supervisors v. Gillen, 59 Miss. 198. Missouri: Dunn v. North Mo. R. Co., 24 Mo. 493; McPheeters v. Merimac Bridge Co., 28 Mo. 465; State v. Tiedermann, 3 McCrary (U. S.) 399, 10 Fed. 20. Montana: Whiteside v. School Dist., 20 Mont. 44, 49 Pac. 445. Nebraska: People v. Butler, 2 Nebr. 5; Ripley v. Gage, 3 Nebr. 397. New Jersey: Frank v. Chosen Freeholders, 39 N. J. L. 347. But in this state, where there is no contract filed and no lien can be enforced, the remedy by notice to the owner and action against him applies where the owner is a municipal corporation. New York: Brinckerhoff v. Board of Education, 2 Daly (N. Y.) 443, 37 How. Pr. (N. Y.) 499, 520; Bell v. Vanderbilt, 12 Daly (N. Y.) 467, 67 How. Pr. (N. Y.) 332; Darlington v. New York, 31 N. Y. 164, 28 How. Pr. (N. Y.) 352, 88 Am. Dec. 248; Poillon v. New York, 47 N. Y. 666; Leonard v. Brooklyn, 71 N. Y. 498, 27 Am. Rep. 80; Leonard v. Reynolds, 7 Hun (N. Y.) 73. North Carolina: Morganton Hardware Co. v. Morganton Graded School, 150 N. Car. 680, 64 S. E. 764. Oregon: Portland Lumbering Mfg. Co. v. School Dist., 13 Ore. 283, 10 Pac. 350. Pennsylvania: Patterson v. Penn. Reform School, 92 Pa. St. 229; Foster v. Fowler, 60 Pa. St. 27; Wilson v. Huntingdon, 7 Watts & S. (Pa.) 197; Guest v. Water Co., 142 Pa. St. 610, 21 Atl. 1001, 12 L. R. A. 324; Williams v. Controllers, 18 Pa. St. 275. Rhode Island: Hovey v. East Providence, 17 R. I.

80, 20 Atl. 205, 9 L. R. A. 156. Texas: Atascosa v. Angus, 83 Tex. 202, 18 S. W. 563, 29 Am. St. 637; McGregor v. Cook, 4 Will. (Tex.) Civ. Cas. Ct. App. 141, 16 S. W. 936; Herring-Hall-Marvin Co. v. Kroeger, 23 Tex. Civ. App. 672, 57 S. W. 980. Virginia: Hicks v. Roanoke Brick Co., 94 Va. 741, 27 S. E. 596. Wisconsin: Platteville v. Bell, 66 Wis. 326, 28 N. W. 404; Wilkinson v. Hoffman, 61 Wis. 637, 21 N. W. 816. But an electric light plant erected by a private person on his own land under contract to sell to a city is subject to mechanics' liens. Salem v. Lane & Co., 189 Ill. 593, 60 N. E. 37, 82 Am. St. 481. Laborers and material-men have no lien on a school building being built by a contractor. R. Connor Co. v. Aetna Indemnity Co., 136 Wis. 13, 115 N. W. 811.

<sup>30</sup> State v. Tiedermann, 3 McCrary (U. S.) 399, 10 Fed. 20; Abercrombie v. Ely, 60 Mo. 23; Hastings v. Woods, 2 Mo. App. 148; Lumbering Mfg. Co. v. School Dist., 13 Ore. 283, 10 Pac. 350; Brinckerhoff v. Board of Education, 37 How. Pr. (N. Y.) 499, 520; Williams v. Controllers, 18 Pa. St. 275; Patterson v. Penn. Reform School, 92 Pa. St. 229; Board of Education v. Neidenber, 78 Ill. 58; Thomas v. Board of Education, 71 Ill. 283; Quinn v. Allen, 85 Ill. 39; Whiteside v. School Dist., 20 Mont. 44, 49 Pac. 445; Charnock v. Colfax, 51 Iowa 70, 50 N. W. 286, 33 Am. Rep. 116; Mosher v. Independent School Dist., 44 Iowa 122; Green Bay Lumber Co. v. In-



by the municipality.<sup>31</sup> Such buildings are exempt from attachment and from sale upon execution, and for the same reason are exempt from liens which might result in an adverse sale.<sup>32</sup> The rule has also been applied to a free public library erected under public authority.<sup>32a</sup>

But as a general rule property of a corporation against which a judgment can be enforced by execution may be subjected to a mechanic's lien.<sup>33</sup> It is also a general rule that property of a corporation which may be sold under a mortgage or specific lien given by the owner may be subjected to a mechanic's lien. On the other hand, property exempt from sale under any judicial proceeding, upon grounds of public necessity, is not within the operation of the lien laws, unless the law so expressly declares.<sup>34</sup>

Sureties for building contractors can not claim a lien where the contractors themselves are debarred from doing so because the building is by implication, as a public building, exempt from liens.<sup>35</sup>

dependent School District, 125 Iowa 227, 101 N. W. 84; *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 380; *Lessard v. Revere*, 171 Mass. 294, 50 N. E. 533; *Fatout v. School Comrs.*, 102 Ind. 223, 1 N. E. 389, overruling *Shattell v. Woodward*, 17 Ind. 225; *Hovey v. East Providence*, 17 R. I. 80, 20 Atl. 205, 9 L. R. A. 156; *Jordan v. Board of Education*, 39 Minn. 298, 39 N. W. 801; *Mayrhofer v. Board of Education*, 89 Cal. 110, 26 Pac. 646; *Charnock v. Colfax*, 51 Iowa 70, 50 N. W. 286, 33 Am. Rep. 116; *Florman v. School District*, 6 Colo. App. 319, 40 Pac. 469. Otherwise in Kansas: *Wilson v. School District*, 17 Kans. 104; *School District v. Conrad*, 17 Kans. 522; *Board of Education v. Scoville*, 13 Kans. 17, 27. *Board of*

*Comrs. v. Snodgrass & c. Mfg. Co.*, 52 Kans. 253, 34 Pac. 741.

<sup>31</sup> *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W. 816.

<sup>32</sup> *Hovey v. East Providence*, 17 R. I. 80, 20 Atl. 205, 9 L. R. A. 156. In Iowa a public sewer has been held subject to a lien. *Iowa Brick Co. v. Des Moines*, 111 Iowa 272, 82 N. W. 922.

<sup>32a</sup> *Goss v. Greenleaf*, 98 Maine 436, 57 Atl. 581; *Young v. Falmouth*, 183 Mass. 80, 66 N. E. 419, 97 Am. St. 418.

<sup>33</sup> *Board of Education v. Greenbaum*, 39 Ill. 609.

<sup>34</sup> *National Foundry Works v. Oconto Water Co.*, 52 Fed. 43, per *Jenkins, J.*; *Williams v. Controllers*, 18 Pa. St. 275.

<sup>35</sup> *Knapp v. Swaney*, 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397.

It may be a question whether the exemption from lien of municipal property does not depend on the use actually made of it, and not upon the intention of the municipal corporation in erecting the building or making the improvement for which a lien is claimed.<sup>36</sup>

§ 1376. **Lien not on public buildings, but on moneys.**—Statutes have sometimes been enacted, however, which give a lien, not upon public buildings, but upon the moneys in possession of municipal corporations due or to become due, for the work done or materials furnished in the erection of such buildings.<sup>37</sup> This peculiar lien is acquired by filing a notice

<sup>36</sup> *Van Denburgh v. Greenbush*, 4 Hun (N. Y.) 795, *affd.* 66 N. Y. l. No lien allowed against an artesian well dug by a city for public purposes. *Albany v. Lynch*, 119 Ga. 491, 46 S. E. 622.

<sup>37</sup> As in New York, Laws 1878, ch. 315; *Birdseye, C. & G. Consol. Laws 1909*, p. 3158, § 5. A contract made with the trustees of public schools of a ward of the city of New York is a contract made with an incorporated city, within the meaning of this act. *Bell v. New York*, 105 N. Y. 139, 11 N. E. 495. In Iowa, every mechanic, laborer or other person who, as subcontractor, shall perform labor upon, or furnish materials for the construction of any public building, bridge or other improvement not belonging to the state, shall have a claim against the public corporation constructing such building, bridge or improvement for the value of such services and material, not in excess of the contract price to be paid for such building, bridge or improvement, nor shall such corporation be re-

quired to pay any such claim at any time before or in any manner different from that provided in the principal contract. Such claim shall be made by filing with the public officer through whom the payment is to be made an itemized sworn statement of the demand, within thirty days after the performance of the last labor or the furnishing of the last of the material, and such claims shall have priority, in the order in which they are filed. Code 1897, § 3102. If the claim be against a county, it should be filed with the auditor of the county. *Breneman v. Harvey*, 70 Iowa 479, 30 N. W. 846. In Kentucky a similar result has been obtained from a contract to retain money in the hands of the municipal corporation and pay it to subcontractors. *Roe v. Scanlan*, 98 Ky. 24, 17 Ky. L. 595, 32 S. W. 216. In New Jersey any person who furnished labor or material for a public improvement was held entitled to the lien provided by the Act of March 30, 1892. *Pierson v. Haddonfield*, 66 N. J. Eq. 180, 57

of claim with certain officers within a limited time.<sup>38</sup> It is enforced by judgment against the corporation directing payment out of the moneys due under the contract under which the lien is filed; and generally it is provided that, where there are several claims, their priority may be determined by the court. Where, under such a statute, notice of the lien is required to be filed with the head of the department or bureau having the work in charge, it is a sufficient compliance with the requirement to file the claim with the head of the board of education, or of the school trustees of a ward,<sup>39</sup> or with the clerk of the board of education, and with the city controller.<sup>40</sup>

**§ 1377. Lien on fund by force of city ordinance.**—Whether an ordinance requiring the insertion, in every contract for work done for a city, of a clause that payment of the last instalment due thereunder shall be retained until satisfactory evidence is furnished that all persons who have done work or furnished materials under such contract, and who have given ten days' written notice that a balance is due them, have been fully paid or secured, creates any lien upon the fund in the hands of the city, is a debatable question; but it is certain that no one can, by furnishing materials upon one contract, obtain a lien upon the balance due him under another contract.<sup>41</sup>

**§ 1378. Property of quasi public corporations.**—Whether the property of quasi public corporations is subject to the general lien laws is a question upon which the authorities

Atl. 471. As to nature of right see Norton v. Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506.

<sup>38</sup> A subcontractor who serves notice of his claim before a lawful and proper delivery of bonds or warrants in payment has been made by the city to the contractor, is in time. First Nat. Bank of Chicago v. Elgin, 136 Ill. App. 453.

<sup>39</sup> Bell v. Vanderbilt, 67 How. Pr. (N. Y.) 332, 12 Daly (N. Y.) 467.

<sup>40</sup> Bell v. New York, 105 N. Y. 139, 11 N. E. 495. See also, Rathbun v. State, 15 Idaho 273, 97 Pac. 335.

<sup>41</sup> Quinlan v. Russell, 94 N. Y. 350.

are not in accord. Of such corporations, railroad companies, and companies organized to supply towns and cities with water, are familiar examples. The application of the lien laws to the property of railroad companies is considered in another chapter. The application to the property of other quasi public corporations has been considered in cases in which lien claims have been made against the property of private waterworks companies. In Pennsylvania, the property of such companies is exempt from liability to such lien, in a leading case<sup>42</sup> the court declaring against the application of the lien law to the property of a water company essential to the operation of its franchise, saying that corporations "for the building of bridges, turnpike roads, railroads, canals, and the like" are agencies of the public, "directly interested in the results to be produced by such corporations in the facilities afforded to travel and the movements of trade and commerce," and that the use of the franchise "is not to be disturbed by the seizure of any part of their property essential to their active operations, by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking, to accommodate the public."

In other states, on the other hand, the public policy is declared to be that the property of such quasi public corporations shall be subject to the general lien laws.<sup>43</sup> Accord-

<sup>42</sup> *Foster v. Fowler*, 60 Pa. St. 27; *Guest v. Lower Merion Water Co.*, 142 Pa. St. 610, 21 Atl. 1001, 12 L. R. A. 324. The principle involved was distinctly approved in *Girard Point Storage Co. v. Southwark Foundry Co.*, 105 Pa. St. 248, where a mechanic's lien was sustained on the ground that the public was not directly interested in the business of the defendant corporation. The rule is the same in Alabama. *McNeal*

*Pipe & Co. v. Bullock*, 38 Fed. 565. The Supreme Court of this state refrains from expressing an opinion on this question in the case of *Eufaula Water Co. v. Addyston Pipe & Steel Co.*, 89 Ala. 552, 8 So. 25. Kentucky: *Graham v. Mt. Sterling Coal Road Co.*, 14 Bush (Ky.) 425, 29 Am. Rep. 412.

<sup>43</sup> Wisconsin: *National Foundry Works v. Oconto Water Co.*, 52 Fed. 43; *Hill v. La Crosse & M. R. Co.*, 11 Wis. 214; *Purtell v.*

ingly it is held that the entire franchise and plant of a water company, including piping laid in the streets of a city and the interest of the company in the premises, are subject to the lien of a material-man who furnished the piping.<sup>44</sup>

Chicago Bolt Co., 74 Wis. 132, 42 N. W. 265. See, however, *Wilkinson v. Hoffman*, 61 Wis. 637, 21 N. W. 816. See, also, *Harrison & Co. v. Water Works Co.*, 25 Fed. 170, a case arising in Iowa, where the question was raised but not decided. *Kansas: Badger Lumber Co. v. Marion Water Supply & Co.*, 48 Kans. 187, 30 Pac. 117, 30 Am. St. 306. *North Carolina: McNeal Pipe Co. v. Howland*, 111 N. Car. 615, 16 S. E. 857, 20 L. R. A. 743.

<sup>44</sup> *National Foundry Works v. Oconto Water Co.*, 52 Fed. 43. Judge Jenkins, delivering the judgment, said: "By severance of franchise and plant, the latter would become of little worth, and the paramount public welfare forbids their separation, in the interest of both creditor and debtor, in the interest of the public, and as a matter of common equity, plant and franchise should be decreed to be sold as an entirety. I think it within the inherent powers of a court of equity to so decree; not that the lien embraces the franchise, but because plant and franchise have, by act of the defendant, been rendered inseparable. The plant has been applied to a public use. The public welfare requires that use to be uninterrupted. A court of equity may therefore well require that the right to the use shall follow the tangible property devoted to that use, and dependent upon it.

It may well be required that, upon subjection of the plant to sale in satisfaction of the lien granted by the law, the franchise to maintain and operate it for the public use shall be sold with it, as an essential incident to it; treating plant and franchise as an entirety. Otherwise, a judicial sale would work destruction to both plant and franchise. The course suggested is conformable to equity. It conserves the public welfare. It preserves this property to public use, giving to the purchaser the estate as the defendant has it. It renders to the complainant a right given it by the law. It operates not unjustly upon the defendant, since thereby its property, subjected by the law to sale, is preserved from sacrifice necessarily resulting from separation of franchise and plant. It is demanded by the exigency of the occasion that equity should supplement and effectuate the law. Indeed, if, as a matter of strict legal right, the franchise to operate does not inhere in the tangible property necessary to its use, as an essential incident to it, I think that in a court of equity the defendant may well be deemed, by his act of devoting this plant to public use under its franchise, thereby rendering it inseparable therefrom, to have assented that upon its sale, volutary or involuntary, the franchise to operate should pass with it."

A church is not exempt from a mechanic's lien;<sup>45</sup> but the lien can not be made to include an adjoining burial ground belonging to the church.<sup>46</sup>

The depot of a railroad company is subject to a mechanic's lien;<sup>47</sup> and so is a stable occupied by a street passenger railroad company.<sup>48</sup>

The property of a college or university is not exempt from mechanics' liens, though it be prohibited from creating any incumbrance upon its property by mortgage or otherwise.<sup>49</sup>

**§ 1379. Grain corporation not a public corporation.—**A corporation organized for the storage of grain is not a public corporation entitled to exemption from mechanics' liens. In the property of such a corporation the public have no other or further interest than it has in the storehouses of private individuals. It may receive the grain of one person and refuse that of another. It may at any time suspend operation and shut out the public altogether. The public is only incidentally benefited or interested in such a corporation. The property and buildings of such a corporation are not exempt from the ordinary forms of lien and execution because its trade or business in some degree promotes the common welfare.<sup>50</sup>

**§ 1380. House of minister plenipotentiary of foreign power.—**The house of a minister plenipotentiary of a foreign power used for his residence is exempt from execution and sale, and consequently exempt from the operation of

<sup>45</sup> *Presbyterian Church v. Allison*, 10 Pa. St. 413, 20 L. R. A. 743. *Contra*, *Eureka Stone Co. v. First Christian Church of Ft. Smith*, 86 Ark. 212, 110 S. W. 1042.

<sup>46</sup> *Beam v. First M. E. Church*, 3 Clark (Pa.) 343.

<sup>47</sup> *Evans v. Railroad Co.*, 11 Pitts. L. J. 4.

<sup>48</sup> *Mellvain v. Hestonville & M. R. Co.*, 5 Phila. (Pa.) 13.

<sup>49</sup> *University of Lewisburg v. Reber*, 43 Pa. St. 305.

<sup>50</sup> *Girard Point Storage Co. v. Southwark Foundry*, 105 Pa. St. 248, 15 Wkly. N. Cas. 25.

mechanics' lien laws. But he is not exempt from the application of the lien law as to any house or building which is not used as a mansion for purposes connected with his representative character; and when exemption is claimed, it must appear by proof that he is entitled to a suspension of the rule that the *lex rei sitae* controls.<sup>51</sup>

**§ 1381. Contract to erect building to be used for unlawful purpose.**—A contract for the erection of a building to be used for an illegal purpose, the contractor knowing such purpose and intending to aid in carrying it out, can not be the foundation of a lien.<sup>52</sup>

**§ 1382. Land held under homestead exemption.**—Land held under a homestead exemption is generally subject to a mechanic's lien.<sup>53</sup> The statutes of a few states provide that homestead estates shall not be exempt from sale for the satisfaction of debts contracted for improvements made

<sup>51</sup> *Byre v. Herran*, 1 Daly (N. Y.) 344, 346.

<sup>52</sup> *Dorsey v. Langworthy*, 39 Greene (Iowa) 341; *Spurgeon v. McElwain*, 6 Ohio 442, 444, 27 Am. Dec. 266; *Bishop v. Honey*, 34 Tex. 245.

<sup>53</sup> *Hurd v. Hixon*, 27 Kans. 722; *Thompson v. Wickersham*, 9 Baxt. (Tenn.) 216; *Miller v. Brown*, 11 Lea (Tenn.) 155; *Steenbergen v. Gowdy*, 93 Ky. 146, 14 Ky. L. 88, 19 S. W. 186; *Roberts v. Riggs*, 84 Ky. 251, 8 Ky. L. 247, 1 S. W. 431; *Tyler v. Jewett*, 82 Ala. 93, 2 So. 905; *Murray v. Rapley*, 30 Ark. 568; *Robinson v. Wilson*, 15 Kans. 595, 22 Am. Rep. 272; *Phelps & Bigelow Windmill Co. v. Shay*, 32 Nebr. 19, 48 N. W. 896; *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837. Homestead not subject to lien in South Da-

kota. *Morgan v. Benthein*, 10 S. Dak. 650, 75 N. W. 204, 66 Am. St. 733; *Lamb Lumber Co. v. Roberts*, 23 S. Dak. 191, 121 N. W. 93. Not subject to lien in Texas in absence of contract. *Haldeman v. McDonald*, (Tex.) 58 S. W. 1040; *Republic Guaranty & Surety Co. v. Cameron*, (Tex. Civ. App.), 143 S. W. 317. In Michigan a homestead is subject to a mechanic's lien if the improvements are made under a contract signed by the husband and wife. *Holliday v. Mathewson*, 146 Mich. 336, 109 N. W. 669. The lien may be secured by contract in Utah. *Volker-Scowcroft Lumber Co. v. Vance*, 32 Utah 74, 88 Pac. 896. In Louisiana the lien only extends to the building and lot not to exceed one acre. *People's Ind. Rice Mill Co. v. Benoit*, 117 La. 999, 42 So. 480.

thereon.<sup>54</sup> Such statutes are not unconstitutional as impair-

<sup>54</sup>As in Alabama: Civ. Code 1907, § 4162. Arkansas: Dig. of Stats. 1904, § 3898. California: Civ. Code 1906, § 1241. Georgia: Code 1911, § 3377. Hawaii: The certificate of occupation, or lease, or interest, of an occupier or lessee of a homestead shall not be assignable, nor shall such certificate, or lease or interest nor the buildings, improvements or crops at any time placed or growing upon such premises be subject to attachment, levy or sale upon execution, or any process in bankruptcy. Rev. Laws 1905, § 296. Idaho: Rev. Code 1908, § 3177. Illinois: Rev. Stats. 1913, p. 1244, § 3. Iowa: Code 1897, § 2975. Kansas: Gen. Stats. 1909, § 3646. Kentucky: The homestead exemption shall not apply to sales under execution, attachment or judgment, if the debt or liability existed prior to the purchase of the land, or of the erection of the improvements thereon. Stats. 1909, § 1702. In Kentucky the lien of a mechanic is subordinate to the right of homestead, when the lien is for an additional improvement; but not if the improvement created the homestead, as where the lot was vacant when the mechanic entered upon it to make the improvement. *Roberts v. Riggs*, 84 Ky. 251, 8 Ky. L. 247, 1 S. W. 431. Maine: Rev. Stats. 1903, ch. 83, § 68. Michigan: In Michigan, in case the lands upon which such improvements are made are held and occupied as a homestead, the lien shall not attach to such lands and improvements if the im-

provements be made in pursuance of a contract in writing, signed by both the husband and wife. *Howell's Stats.* 1912, § 13767. For a case under a former statute, see *Mills v. Hobbs*, 76 Mich. 122, 42 N. W. 1084. Minnesota: In Minnesota, before any express statute was enacted, the courts held that no mechanic's lien could be acquired against a homestead estate. *Cogel v. Mickow*, 11 Minn. 475. In 1869 the Homestead Act was amended so that "such exemption shall not extend to any contract for a lien, or upon which a lien would arise under the laws of this state, for work done or material furnished in the erection or repair of a dwelling-house, or other building, on said land." But the court has construed this to mean that unless there is an express contract for a lien, the homestead estate is still secure from a mechanic's lien. *Coleman v. Ballandi*, 22 Minn. 144; *Keller v. Struck*, 31 Minn. 446, 18 N. W. 280. The act now reads: Such homestead exemption shall not extend to any mortgage lawfully obtained thereon, to any valid lien for taxes or assessments, or to any charge arising under the laws relating to laborers' or materialmen's liens. But if the owner be married, no mortgage of the homestead, except for purchase money unpaid thereon, nor any sale or other alienation thereof, shall be valid without the signatures of both husband and wife. Gen. Stats. 1913, § 6961. One ground of the unconstitution-



ality of the mechanic's lien law of 1887, ch. 170, was that it made homesteads subject to such liens. *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513, 1 L. R. A. 177, 12 Am. St. 663. Mississippi: Code 1906, § 2156. Montana: Code (Civ.) 1895, § 1674. Nebraska: Ann. Stats. 1911, § 6277. Nevada: Rev. Laws 1912, §§ 288, 2143. New Hampshire: Pub. Stats. & Sess. Laws 1901, ch. 138, § 3. North Carolina: Revisal 1905, § 685. North Dakota: Rev. Codes 1905, § 5051. Ohio: Gen. Code 1910, § 8314. South Carolina: Code 1912, § 3718. Tennessee: Ann. Code 1896, § 3799. Texas: When material is furnished, labor performed, erections or repairs made upon a homestead, if the owner thereof is a married man, then to fix and secure the lien upon the same, it shall be necessary for the person or persons who furnished the material or performed the labor, before such material is furnished or labor is performed, to make and enter into a contract in writing, setting forth the terms thereof, which shall be signed by the owner and his wife, and privily acknowledged by her, as is required in making sale of homestead. And such contract shall be recorded in the office of the county clerk in the county where such homestead is situated in a well-bound book to be kept for that purpose; provided, when such contract has been made and entered into by the husband and wife and the contractor or builder, and the same has been recorded, as heretofore provided, then the same shall inure to the benefit of any and all persons who shall furnish material

or labor thereon for such contractor or builder. Rev. Civ. Stats. 1911, § 5631. Statute construed in *Cameron v. Marshall*, 65 Tex. 7; *Huff v. Clark*, 59 Tex. 347; *Fullenwider v. Longmoor*, 73 Tex. 480, 11 S. W. 500. The record must be made within the time prescribed by other sections of the act for recording the contract or account. *Cameron v. Marshall*, 65 Tex. 7. The wife's consent must precede the purchase of the material. *Lyon v. Ozee*, 66 Tex. 95, 17 S. W. 405. A promissory note given for such material after it is furnished is insufficient. *Taylor v. Huck*, 65 Tex. 238. If, at the time a verbal contract was made for work on a house, the land had not been dedicated and occupied as a homestead, the contract is not affected by any subsequent act of the owner whereby the property is impressed with the character of a homestead. *Swope v. Stantzenberger*, 59 Tex. 387; *Potshuiskey v. Kremplan*, 26 Tex. 307; *Pope v. Graham*, 44 Tex. 196. Aside from this statute, the husband alone could contract for material and labor to improve the homestead, and could subject it to a lien. *Miner v. Moore*, 53 Tex. 224; *Pope v. Graham*, 44 Tex. 196. See also, *Halderman v. McDonald*, (Tex.) 58 S. W. 1040. Utah: The homestead is subject to execution in satisfaction of judgments obtained on debts secured by mechanics' or laborers' liens for work or labor done or material furnished exclusively for the improvement of the same. Comp. Laws 1907, § 1156. It has been held that the above section is in conflict with the constitution,

ing the obligation of a contract, for they merely change the remedy.<sup>55</sup>

A mechanic's lien does not prevail against the right of dower. A sale under decree or judgment to satisfy the lien is subject to the dower right.<sup>56</sup>

**§ 1383. No lien on house built on government land.**—No lien can attach to a house built upon government land occupied by the debtor under the United States Homestead Act, while he has no right to a patent of the same.<sup>57</sup> The house, if built upon permanent foundations attached to the soil, becomes a part of the real estate. The statute of the United States relating to homestead settlements provides that the land shall not in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.<sup>58</sup>

**§ 1384. In general.**—Ordinarily no lien attaches to a building except as it attaches to the land on which the building is located. The building is subject to the lien only as an

which requires the legislature to provide for the selection and exemption of a homestead. The constitution exempts a homestead from execution sale without exception. *Volker-Scowcroft Lumber Co. v. Vance*, 32 Utah 74, 88 Pac. 896. Vermont: Pub. Stats. 1906, § 2649. Virginia: In Virginia the householder may, without the consent of his wife, mortgage or encumber his real estate for the purchase money thereof, or for the erection or repair of buildings thereon. Code 1904, § 3634. Washington: Remington and Ballinger's Ann. Codes & Stats. 1910, § 533. West Virginia: Code 1906, § 1330. Wisconsin: Stat. 1898,

§ 2983. Wyoming: Comp. Stats. 1910, § 3811.

<sup>55</sup> *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860.

<sup>56</sup> *Gove v. Cather*, 23 Ill. 634, 76 Am. Dec. 711; *Shaeffer v. Weed*, 3 Gil. (Ill.) 511.

<sup>57</sup> *Kansas Lumber Co. v. Jones*, 32 Kans. 195, 4 Pac. 74; *Paige v. Peters*, 70 Wis. 178, 35 N. W. 328, 5 Am. St. 156. One holding a lease on school lands is held to be the owner under the provisions of the mechanic's lien law of Oklahoma. Code Civ. Proc. § 619; Comp. Laws 1909, § 6151; *Jarrell v. Block*, 19 Okla. 467, 92 Pac. 167.

<sup>58</sup> U. S. Comp. Stat. 1901, § 2296.

incident of the freehold.<sup>59</sup> In like manner there is no lien upon materials or machinery furnished for any building or improvement, except as these are attached to the building and become a part of the realty.<sup>60</sup>

A lien attaches to fixtures to the realty. In determining what are fixtures to which a mechanic's lien will attach, the rules applicable between an heir and an executor should be applied.<sup>61</sup> Those things only should be considered fixtures for this purpose which are so attached as to become a part of the realty; or are so attached to some structure as to become a part of it, this structure itself being a part of the realty.<sup>62</sup>

Where machinery is fitted and adjusted to a building so as to become a part of the realty, and to be subject to the owner's mortgage of the realty, it is subject to the operation of a mechanic's lien upon the realty. Machinery placed in a building erected for a brewery under a contract with the owner and necessary for its operation, becomes part of the freehold, and falls within the provisions of the law giv-

<sup>59</sup> *Ranson v. Sheehan*, 78 Mo. 668; *Coe v. N. J. Midland R. Co.*, 31 N. J. Eq. 105; *Wagar v. Briscoe*, 38 Mich. 587; *Inverarity v. Stowell*, 10 Ore. 261.

<sup>60</sup> *Richardson v. Koch*, 81 Mo. 264; *Ranson v. Sheehan*, 78 Mo. 668; *Collins v. Mott*, 45 Mo. 100; *Graves v. Pierce*, 53 Mo. 423; *Heidegger v. Atlantic Milling Co.*, 16 Mo. App. 327; *Baylies v. Sinex*, 21 Ind. 45; *American Radiator Co. v. Pendleton*, 62 Wash. 56, 112 Pac. 1117.

<sup>61</sup> See ante, §§ 1335-1351.

<sup>62</sup> *Goodin v. Elleardsville Hall Assn.*, 5 Mo. App. 289; *O'Brien v. Hanson*, 9 Mo. App. 545; *Richardson v. Koch*, 81 Mo. App. 264; *Heidegger v. Atlantic Milling Co.*, 16 Mo. App. 327 (bolting-cloth);

*Wademan v. Thorp*, 5 Watts. (Pa.) 115 (burr millstones); *Gray v. Holdship*, 17 S. & R. (Pa.) 413, 17 Am. Dec. 680; *Hart v. Globe Iron Works*, 37 Ohio St. 75. A portable stove constructed for the purpose of heating laundry irons is no more a part of the building than an ordinary parlor or kitchen stove, and is not the subject of a lien. *Harrison v. Women's Homeopathic Asso.*, 134 Pa. St. 558, 19 Atl. 804, 19 Am. St. 714. Electric wires forming the connection between dwellings and stores and the electric plant are fixtures under the provisions of a mechanic's lien law. *Hughes v. Lambertville Electric Light, Heat & Power Co.*, 53 N. J. Eq. 435, 32 Atl. 69.

ing a lien for erecting, altering or repairing a building, though portions of such machinery are removable.<sup>63</sup>

**§ 1385. Lien for machinery not a separate lien.**—The lien attaches to the entire structure as well as to the land upon which it is situated. A lien for machinery attached to a building, or furnished to be attached, is not a separate lien upon that particular machinery, but a lien upon the whole building and premises, and upon all other fixtures thereon.<sup>64</sup> It does not attach to machinery placed by a mechanic in a building, but to the building, and indirectly only to the machinery when this becomes a part of the building.<sup>65</sup> Though a statute provides that the mechanic "shall have for his work or labor done, or materials, fixtures, engine, boiler, or machinery furnished, a lien upon such building, erection, or improvement, and upon the land," yet there is no lien upon an engine, boiler or machinery not permanently connected with the building or land; there is no lien upon them unless they are so connected with the building or realty as to become a part of it, for some permanent object, so as to go and pass with the realty as a fundamental part thereof.<sup>66</sup> A carding machine is not a fixture in a mill to which a mechanic's lien will attach. Such a machine is not permanently affixed to the realty.<sup>67</sup>

<sup>63</sup> *Watts-Campbell & Co. v. Yuengling*, 125 N. Y. 1, 25 N. E. 1060, affg. 51 Hun (N. Y.) 302, 3 N. Y. S. 869, 21 N. Y. St. 186. Machinery used in fitting up a factory and attached to the real estate so that it would pass by a conveyance of the real estate is subject to a lien as real estate. *Griffin v. Ernst*, 124 App. Div. (N. Y. 289, 108 N. Y. S. 816. See also, *Kountz Bros. Co. v. Consolidated Ice Co.*, 28 Pa. Super. Ct. 266.

<sup>64</sup> *Equitable L. Ins. Co. v. Slye*,

45 Iowa 615. But under the statutes of Oregon which give a lien on any building, machinery or structure on which work is performed it is held that the lien exists on machinery even though it is not attached to the real estate. *McFeron v. Doyne*, 59 Ore. 366, 116 Pac. 1063.

<sup>65</sup> *Hall v. St. Louis Mfg. Co.*, 22 Mo. App. 33.

<sup>66</sup> *Richardson v. Koch*, 81 Mo. 264.

<sup>67</sup> *Graves v. Pierce*, 53 Mo. 423.

§ 1386. **Machinery not affixed to real estate not subject to lien.**—Machinery which is not affixed to the realty so as to become a part of it is not subject to a lien. It must become a part of the realty as much as the building itself in which the machinery is placed. Therefore a carding machine fixed in a building is not subject to the lien. It is not such machinery as is used in the erection or improvement of a building. It becomes no part of the building, but is a fixture which may be removed.<sup>68</sup> And so a portable engine and boiler and machinery used in a mill for crushing and separating metallic ores, being machinery which may be removed from the building, and still leave this a complete structure, are not subject to a mechanic's lien.<sup>69</sup>

The purpose of statutes which give a lien upon machinery is to afford mechanics a lien on property of which they could not have such possession as would give them a lien by the common law; hence, where machinery is of such a character that a common law lien may be had upon it, it should not also be liable to the statutory lien.<sup>70</sup>

§ 1387. **Lien on fixtures in general.**—Thus a bathtub and pipes, running through the house and connecting with it, are subject to a lien which attaches to the house.<sup>71</sup> A cooking-range and fire-plate heaters, with their necessary attachments, put as permanent fixtures into a dwelling house, are subject to lien.<sup>72</sup> So is a furnace put into a house for heating it.<sup>73</sup>

<sup>68</sup> *Graves v. Pierce*, 53 Mo. 423.

<sup>69</sup> *Richardson v. Koch*, 81 Mo. 264.

<sup>70</sup> *Griggs v. Stone*, 51 N. J. L. 549, 18 Atl. 1094, 7 L. R. A. 48.

<sup>71</sup> *Cohen v. Kyler*, 27 Mo. 122; *Goodin v. Elleardsville Hall Assn.*, 5 Mo. App. 289.

<sup>72</sup> *Schaper v. Bibb*, 71 Md. 145, 17 Atl. 935. "As a general rule, it may be a stated that whether a

thing which may be a fixture becomes a part of the building by annexing it, depends upon the intention with which it is done. The character of the physical attachment, whether slight or otherwise, and the use, are mainly important in determining the question of in-

<sup>73</sup> *Weber v. Weatherby*, 34 Md. 656.

A copper kettle or boiler in a brew-house is part of the freehold, and subject to a mechanic's lien.<sup>74</sup>

But it does not attach to tools, implements, moulds and the like used in a manufactory.<sup>75</sup>

Tables not attached to a building, though used as counters, are not covered by a mechanic's lien.<sup>76</sup>

The movable scenery of a theater is not subject to the lien.<sup>77</sup>

Swings and seats are not fixtures to the realty, and no lien can attach to them.<sup>78</sup>

**§ 1388. Trade fixtures.**—An engine-house, partly of stone and partly of wood, with stone foundation for a steam engine, erected by a tenant for years, for the use of a coal mine, he having the privilege of removing it, with all the fixtures, is not the proper subject of a mechanic's lien. The building and machinery are personal property.<sup>79</sup> Any doubt there might be, from the nature of the property and the manner it is attached to the realty, is removed by the agreement that it may be removed and taken away by the lessee. The contract of the parties affixes to it the character of personality.

A lien may be acquired on an oil well for labor performed and fuel furnished in drilling such well.<sup>80</sup>

tention of the party making the attachment." Per Alvey, C. J. See also, *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594, 991; *Michael v. Reeves*, 14 Colo. App. 460, 60 Pac. 577; *Rowen v. Alladio*, 51 Ore. 121, 93 Pac. 929.

<sup>74</sup> *Gray v. Holdship*, 17 Serg. & R. (Pa.) 413, 17 Am. Dec. 680.

<sup>75</sup> *Hacussler v. Mo. Glass Co.*, 52 Mo. 452.

<sup>76</sup> *Baum v. Covert*, 62 Miss. 113.

<sup>77</sup> *In re Olympic Theatre*, 2 Browne (Pa.) 275.

<sup>78</sup> *Lothian v. Wood*, 55 Cal. 159.

<sup>79</sup> *White's Appeal*, 10 Pa. St. 252.

<sup>80</sup> *Haskell v. Gallagher*, 20 Ind. App. 224, 50 N. E. 485, 67 Am. St. 250.

## CHAPTER XXXV.

### MECHANICS' LIENS: THE CLAIM, CERTIFICATE, OR NOTICE.

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§ 1389. How lien is procured.—A lien can be secured only by compliance with the statute in filing a notice, claim or statement of lien in the manner and within the time pre-



scribed.<sup>1</sup> No other notice or claim of lien, though brought to the knowledge of the owner, or of a purchaser from him, has any effect.<sup>2</sup> The filing of the account or claim of lien is a prerequisite to the enforcement of the lien. It does not bring the lien into existence, for the lien exists inchoately from the time of the making of the contract, or from the time the building was commenced, or the work upon it was commenced, whichever the particular statute prescribes as the beginning of the lien.<sup>3</sup> The lien exists by virtue of statutory provisions, and the requirements prescribed for securing the benefits of this remedy must be observed.<sup>4</sup>

Claims for liens which are in their nature separate, can not be joined in a mechanic's lien notice, and different parties holding claims unconnected with each other acquire no rights by joining in a notice of lien.<sup>5</sup>

### § 1390. Particulars required to be stated in the notice.—

All the particulars required to be stated in the notice creating the lien are material. They are provided for in order that a proper record or index or docket may be made of

<sup>1</sup> Some statutes require not only that a proper claim be filed, but that this claim be properly indexed or recorded. Thus, in Pennsylvania, if the claim, though filed, is not indexed or properly indexed, it does not become a lien as against subsequent incumbrancers. *Cessna's Appeal*, 7 *Sad. (Pa.)* 183, 19 *Wkly. N. Cas.* 530, 10 *Atl.* 1. The docket is the only thing that affects incumbrancers and purchasers. *Armstrong v. Hallowell*, 35 *Pa. St.* 485. Each step provided by statute to secure a lien must be taken to charge the land with a lien. *Wees v. Elbon*, 61 *W. Va.* 380, 56 *S. E.* 611; *Kinsey v. Spurlin* (*Tex. Civ. App.*), 102 *S. W.* 122; *Wolf v. Keely*, 23 *Pa. Co. Ct.*

408; *United States Blowpipe Co. v. Spencer*, 61 *W. Va.* 191, 56 *S. E.* 345.

<sup>2</sup> *Shackleford v. Beck*, 80 *Va.* 573. The notice must be served personally and it is not personally served when sent through the mail. *Peck v. Hinds*, 68 *Ill. App.* 319; *Sykes Steel Roofing Co. v. Bernstein*, 156 *Ill. App.* 500.

<sup>3</sup> *Douglass v. St. Louis Zinc Co.*, 56 *Mo.* 388; *Burrough v. White*, 18 *Mo. App.* 229.

<sup>4</sup> *Reindollar v. Flickinger*, 59 *Md.* 459, per *Yellott, J.*; *Cannon v. Williams*, 14 *Colo.* 21, 23 *Pac.* 456; *Drexel v. Richards*, 48 *Nebr.* 322, 67 *N. W.* 169.

<sup>5</sup> *Lowden v. Sorg*, 129 *Ill. App.* 261.

the claim, and thereby notice of the claim given to the owner, and protection afforded to purchasers and mortgagees. The omission of any of the particulars required by statute to be stated is fatal to the lien.<sup>6</sup> The facts required in the notice must be averred in the complaint, in order to show a cause of action; and if the notice is defective by reason of the omission of the name of the owner, or of anything which the statute requires, the defect can not be amended or corrected in the complaint.<sup>7</sup>

§ 1391. **Form of notice or claim not material.**—The form of the notice or claim is immaterial, provided it complies substantially with all the requirements of the statute.<sup>8</sup> Everything required by the statute should be stated with reasonable clearness and certainty of language. The statement should be compared carefully with the statute, for a compliance with the statute in this stage of the proceedings is of more importance than a strict observance of the rules of pleading and practice in the suit to enforce the lien; for, while the pleadings may be amended, omissions or errors in the statement of claim are generally fatal to the lien.

The statement should properly be signed by the claimant; but if the statute does not require that it be signed, and the claimant signs an affidavit immediately following the state-

<sup>6</sup> Conklin v. Wood, 3 E. D. Smith (N. Y.) 662; Beals v. Congregation, 1 E. D. Smith (N. Y.) 654; Malter v. Falcon Min. Co., 18 Nev. 209, 2 Pac. 50; Keller v. Houlihan, 32 Minn. 486, 21 N. W. 729; Reindollar v. Flickinger, 59 Md. 469; Cannon v. Williams, 14 Colo. 21, 23 Pac. 456; Robertson v. Moore, 10 Idaho 115, 77 Pac. 218. Statement held sufficient in Neuman v. Grant, 36 Mont. 77, 92 Pac. 43.

<sup>7</sup> Hicks v. Murray, 43 Cal. 515;

Hoffman v. Walton, 36 Mo. 613; Conklin v. Wood, 3 E. D. Smith (N. Y.) 662; Bertheolet v. Parker, 43 Wis. 551; Malter v. Falcon M. Co., 18 Nev. 209, 2 Pac. 50.

<sup>8</sup> Beals v. Congregation, 1 E. D. Smith (N. Y.) 654; Clark v. Huey, 12 Ind. App. 224, 40 N. E. 152. Where the statement refers to a repealed statute as a basis for the lien, such reference will be regarded as surplusage and does not defeat the lien. Barndt v. Parks, 103 Minn. 360, 115 N. W. 197.

ment, the failure to sign the statement is unimportant.<sup>9</sup> But if neither the statement nor the affidavit is signed by the claimant, or by any one in his behalf, it is insufficient to establish a lien.<sup>10</sup> Some statutes expressly require a subscribing of it. Such a requirement is not met by a statement with the name of the claimant at the top of his bill, though this be made with his own hand.<sup>11</sup>

### § 1392. Statement must show *prima facie* right to lien.—

The statement should show a *prima facie* right of lien. It therefore must connect the claimant with the owner of the lot or building against which it is sought to enforce the lien, either by showing that the claimant contracted with the owner or his agent, or that he furnished materials or labor to one who was erecting a building or other improvement within the statute, under such a contract or with the owner's consent.<sup>12</sup>

The statement must show that the claimant has performed his contract, but this may be alleged in general terms. Thus,

<sup>9</sup> Deatherage v. Woods, 37 Kans. 59, 14 Pac. 474; White v. Dumpke, 45 Wis. 454.

<sup>10</sup> Hentig v. Sperry, 38 Kans. 459, 17 Pac. 42.

<sup>11</sup> Stratton v. Schoenbar (Maine), 10 Atl. 446. A notice of claim of lien signed in the name of the claimant by a certain attorney is a sufficient signing. Siegmund v. Kellogg & Co., 38 Ind. App. 95, 77 N. E. 1096.

<sup>12</sup> Clark v. Schatz, 24 Minn. 300; O'Neil v. St. Olaf's School, 26 Minn. 329, 4 N. W. 47; Rugg v. Hoover, 28 Minn. 404, 10 N. W. 473; Keller v. Houlihan, 32 Minn. 486, 21 N. W. 729; Merriman v. Bartlett, 34 Minn. 524, 26 N. W. 728; McGlaufflin v. Beeden, 41 Minn. 408, 43 N. W. 86; Hill v. Gill, 40 Minn. 441, 42 N. W. 294;

Johnston v. Harrington, 5 Wash. 73, 31 Pac. 316; Gordon v. Deal, 23 Ore. 153, 31 Pac. 287. Failure to state in express terms that the materials are furnished by the claimant is not fatal. Sickman v. Wollett, 31 Colo. 58, 71 Pac. 1107. Where the notice states the name of the owner and states that the work was done at the request of the superintendent of a mining company operating the mine, it substantially states that the claimant was employed by such person. It need not state the relation between the owner and employer. Castagnetto v. Coppertown Min. & Co., 146 Cal. 329, 80 Pac. 74. A slight misstatement of the name of a contracting firm does not defeat the lien. Cady Lumber Co.

if the improvement for which a lien is claimed be a well, which by the contract was to furnish enough water for the owner's stock and farm use, it is sufficient to allege that the well was completed according to the contract.<sup>13</sup>

If the lien is claimed directly under an original contract, the claimant must be the contractor, or he must show that he has the rights of the contractor by virtue of an assignment, or some form of subrogation to the rights of such contractor. The mere fact that the claimant is a guarantor of the original contractor is insufficient to authorize him to perfect a lien.<sup>14</sup>

If the claim is made by the contractor, the contract, if in writing, should be set out fully; but if the claim is by a subcontractor, or any one claiming under him, only the fact of the original contract or consent need be stated; but the claimant's own contract, if in writing, should be set out at length. The contract or consent of the owner need not be stated with the precision necessary in pleadings; but facts must be stated sufficiently to connect the owner with the claim for a lien.<sup>15</sup>

The claim must set forth the nature of the work or materials, with such a specification of the building as will exclude work done or materials supplied for anything else. A claim for work and labor done to a house described, in the construction of the same and its "appurtenances," is not sufficiently certain.<sup>16</sup> Such a claim, however, would be good if the things appurtenant to the house had been described, and these were to be used upon the same lot together, and formed part of an entire contract. Thus, a claim of lien

v. Conkling, 70 Nebr. 807, 98 N. W. 42.

<sup>13</sup> Bangs v. Berg, 82 Iowa 350, 48 N. W. 90.

<sup>14</sup> Dye v. Forbes, 34 Minn. 13, 24 N. W. 309.

<sup>15</sup> Keller v. Houlihan, 32 Minn.

486, 21 N. W. 729; McGlaulin v. Beeden, 41 Minn. 408, 43 N. W. 86; Pool v. Wedemeyer, 56 Tex. 287; Harris v. Harris, 9 Colo. App. 211, 41 Pac. 841, quoting text.

<sup>16</sup> Barclay's App., 13 Pa. St. 495.

against a mansion-house, barn and wagon-house, on a farm to which they were all appurtenant, and were all intended to be occupied and used together, may under the circumstances be made without an apportionment of the claim among the several buildings.<sup>17</sup> But one furnishing material for the erection of a house, and a stable appurtenant thereto, is not entitled to a lien for the materials furnished for the latter, where it is not mentioned in the body of his claim of lien, nor in the bill of particulars attached thereto, except in the caption.<sup>18</sup>

The statement must accurately set forth the relations of the parties. Thus if the claim is filed by a subcontractor it is error to claim a personal judgment against the owner and allege that the contractor bought the materials as his agent.<sup>19</sup>

**§ 1393. Partnership claim of lien.**—Where work or labor is furnished by a partnership, the account or claim should be made in the partnership name. If some of the partners have retired, or transferred their interest in the firm, after the lien debt was contracted, the statement of lien should be made in the original firm name.<sup>20</sup> But if a partnership be dissolved during the performance of a contract for the furnishing of materials or the performance of work, and a new firm, or some member of the old partnership, continues the performance of the contract, with the express or implied acquiescence of the owner, a new contract or account arises with the new firm or the continuing member. The

<sup>17</sup> *Lauman's App.*, 8 Pa. St. 473.

<sup>18</sup> *Bevan v. Thackara*, 143 Pa. St. 182, 22 Atl. 873, 24 Am. St. 529.

<sup>19</sup> *Western Sash &c. Co. v. Heiman*, 71 Kans. 43, 80 Pac. 16.

<sup>20</sup> *German Bank v. Schloth*, 59 Iowa 316, 13 N. W. 314. See *Smith v. Johnson*, 2 MacAr. (D. C.) 481.

In some states it seems that the continuing partner who completes the contract may file the claim in his own name. *Ogden v. Alexander*, 63 Hun (N. Y.) 56, 17 N. Y. St. 641, 46 N. Y. St. 829, *affd.* 140 N. Y. 356, 35 N. E. 638; *Wetmore v. Marsh*, 81 Iowa 677, 47 N. W. 1021.

continuity of the contract or running account is broken, and the lien claims are separate, and must be filed separately.<sup>21</sup>

A lien is not invalidated by an error in the firm name of the claimants as stated in the certificate, when the names of the individual partners are correctly given, and the certificate is signed by the true name of the firm.<sup>22</sup> But if the statement is in the partnership name, the mention of the individual names of the partners is not essential to its validity.<sup>23</sup> On the other hand, the claim can be made in the name of the individual partners and need not be made in the firm name.<sup>24</sup>

**§ 1393a. Claim filed by assignee.**—When claims are filed by an assignee, he should set forth all the particulars of each claim, such as the name of the claimant, in each case, the person doing the work, description of the property, total amount of the indebtedness, credit thereon, if any, and the balance due such claimant. Accordingly a statement made by one to whom a hundred or more claims had been assigned, showing merely the total, and not the amount on each claim, is insufficient. Each assignor is a claimant, and each must comply with the law; and the defendant has a legal right to contest each separate and individual claim in the hands of the assignee, though an aggregated judgment may be entered as the result of the findings of the individual claims. Each of the claims must be regarded and tried as a separate suit. The owner should be informed by the complaint of the claim of each assignor, and of the balance due, so as to enable him to answer and contest each individually.<sup>25</sup>

<sup>21</sup> *Henry v. Mahone*, 23 Mo. App. 83.

<sup>22</sup> *Shattuck v. Beardsley*, 46 Conn. 386.

<sup>23</sup> *Chicago Lumber Co. v. Osborn*, 40 Kans. 168, 19 Pac. 656.

<sup>24</sup> *Waters v. Goldberg*, 124 App. Div. (N. Y.) 511, 108 N. Y. S. 992.

<sup>25</sup> *Hanna v. Colo. Sav. Bank*, 3 Colo. App. 28, 31 Pac. 1020; *Keystone Mining Co. v. Gallagher*, 5 Colo. 23; *Power v. McCord*, 36 Ill. 214.

In Kentucky it seems that the person performing the labor must file the lien statement, and a statement filed by an assignee of the claim is insufficient to give effect to the lien.<sup>26</sup>

§ 1394. **Only one lien under one contract.**—Neither a contractor nor a subcontractor can file successive liens from time to time, as the work progresses, for labor or materials performed and furnished under an entire contract. He can acquire but one lien under an entire contract, and for this purpose must file his lien, after the completion of the work, within the time limited by statute.<sup>27</sup> The fact that the payments are to be made in instalments as the work goes on does not make the contract or the lien severable, and enable the contractor to file successive liens as the payments fall due.<sup>28</sup>

If two or more buildings on the same lot, or on contiguous lots, be erected under one contract, it is unnecessary to file more than one lien for materials or labor furnished for such buildings.<sup>29</sup>

A claim of lien filed by a material-man against a railway company for materials furnished a contractor and his assignee, who assumed all liabilities, although it omits to show the proportion of materials furnished to each, is sufficient under a statute requiring that the claim shall state the name of the person to whom the materials were furnished.<sup>30</sup>

Where the material-man furnishes materials to several independent contractors, it is not necessary for him to segregate the amounts in the claim.

<sup>26</sup> Frailey v. Winchester & B. R. Co., 96 Ky. 570, 16 Ky. L. 645, 29 S. W. 446.

<sup>27</sup> Cox v. Western Pacific R. Co., 44 Cal. 18, 47 Cal. 87; Barnard v. Hassan, 60 Ore. 62, 118 Pac. 201.

<sup>28</sup> Cox v. Western Pacific R. Co., 44 Cal. 18, 47 Cal. 87.

<sup>29</sup> Schroeder v. Mueller, 33 Mo.

App. 28; Heier v. Meisch, 33 Mo. App. 35.

<sup>30</sup> Harmon v. San Francisco & S. R. Co., 86 Cal. 617, 23 Pac. 1024, 25 Pac. 124, distinguishing Gordon Hardware Co. v. San Francisco & S. R. Co., 86 Cal. 620, 22 Pac. 407, 25 Pac. 125.

§ 1395. **Subcontractor may make single claim for all material furnished.**—A subcontractor may make a single claim or statement of lien for all material furnished to a contractor for a building, although the contractor may have erected the building under different contracts with the owner. A subcontractor can not be required to take notice where, in the construction of a building, one contract between the owner and the contractor ends and another begins. All that is required is, that the subcontractor should show a contract or consent on the part of the owner, and a proper statement of all materials he has furnished.<sup>31</sup>

§ 1396. **Claim for materials to show that they were used or furnished for use in the building.**—In making a claim for materials furnished for a building, the statement should show either that the materials were used,<sup>32</sup> or were furnished to be used,<sup>33</sup> in the construction or repair of such building.<sup>34</sup>

It should state the name of the contractor, subcontractor or other person to whom the materials were furnished;<sup>35</sup> and if furnished to more than one person, it should designate the materials furnished to each. A description of the materials furnished as "nails, spikes, iron, steel, picks, shovels, and other like material," is too indefinite and uncertain to sustain a lien.<sup>36</sup>

Where the notice of lien fails to state the nature and amount of materials furnished and to be furnished, it is insufficient.<sup>37</sup>

<sup>31</sup> *Jones & M. Lumber Co. v. Murphy*, 64 Iowa 165, 19 N. W. 898.

<sup>32</sup> See ante, § 1328.

<sup>33</sup> See ante, § 1329.

<sup>34</sup> *Ewing v. Folsom*, 67 Iowa 65, 24 N. W. 595.

<sup>35</sup> Naming the individual member of a contracting firm is held sufficient where the owner is not misled. *First Presbyterian Church*

*v. Santy*, 52 Kan. 462, 34 Pac. 974.

<sup>36</sup> *Gordon Hardware Co. v. San Francisco & S. R. Co.*, 86 Cal. 620, 22 Pac. 407.

<sup>37</sup> *McKinney v. White*, 162 N. Y. 601, 57 N. E. 1116, affg. 15 App. Div. (N. Y.) 423, 44 N. Y. S. 561; *Toop v. Smith*, 181 N. Y. 283, affg. 87 App. Div. (N. Y.) 241, 84 N. Y. S. 326, affd. 181 N. Y. 283, 73 N. E. 1113.



§ 1397. Name of the owner or reputed owner to be stated.—The name of the owner or reputed owner, when required to be given, should be stated as an independent matter in a direct and positive manner.<sup>38</sup> A statement of the owner's name made incidentally, and as part of the description of the property, is insufficient.<sup>39</sup> The requirement is one of substance, and can not be dispensed with.<sup>40</sup> The statement of the owner's name is a material matter when required by statute, not less so than the statement of amount of the demand, and is equally indispensable.<sup>41</sup> If the claimant knows the name of the owner, he should state it. He is only relieved from giving the name in case it is unknown to him. If, knowing the name, he omits to state it, his claim or notice of lien is ineffectual.<sup>42</sup> If a claimant of a lien, knowing the name of the owner of the estate, misstates it in his certificate or claim of lien filed, he can not maintain a lien.<sup>43</sup>

But the notice is sufficient if the owner's name is stated,

<sup>38</sup> *Reindollar v. Flickinger*, 59 Md. 469; *Gordon v. Deal*, 23 Ore. 153, 31 Pac. 287; *White v. Mullins*, 3 Idaho 434, 31 Pac. 801; *Malter v. Falcon Min. Co.*, 18 Nev. 209, 2 Pac. 50; *Sprague Inv. Co. v. Mouat Lumber &c. Co.*, 14 Colo. App. 107, 60 Pac. 179.

<sup>39</sup> *Rugg v. Hoover*, 28 Minn. 404, 407, 10 N. W. 473; *Malter v. Falcon Min. Co.*, 18 Nev. 209, 2 Pac. 50; *Beals v. Congregation*, 1 E. D. Smith (N. Y.) 654, 657; *Mayes v. Ruffners*, 8 W. Va. 384, 386. See, however, *Hays v. Mercier*, 22 Nebr. 656, 35 N. W. 894; *Provost v. Shirk*, 223 Ill. 468, 79 N. E. 178.

<sup>40</sup> *Gordon v. Deal*, 23 Ore. 153, 31 Pac. 287; *Blattner v. Wadleigh*, 48 Kans. 290, 29 Pac. 165; *Kezar-tee v. Marks*, 15 Ore. 529, 16 Pac.

407; *Newman v. Brown*, 27 Kans. 117.

<sup>41</sup> *Phelps v. Maxwell's Creek G. M. Co.*, 49 Cal. 336; *Conter v. Farrington*, 46 Minn. 336, 48 N. W. 1134; *Reindollar v. Flickinger*, 59 Md. 469; *Gordon v. Deal*, 23 Ore. 153, 31 Pac. 287; *Missoula Mercantile Co. v. O'Donnell*, 29 Mont. 65, 60 Pac. 991; *Sprague Inv. Co. v. Mouat Lumber &c. Co.*, 14 Colo. App. 107, 60 Pac. 179; *Bryan v. Abbott*, 131 Cal. 222, 63 Pac. 363.

<sup>42</sup> *Kelly v. Laws*, 109 Mass. 395; 396.

<sup>43</sup> *Kelly v. Laws*, 109 Mass. 395; *Amidon v. Benjamin*, 128 Mass. 534; *Mayes v. Ruffners*, 8 W. Va. 384. *Contra*, *Mivelaz v. Johnson*, 124 Ky. 251, 98 S. W. 1020.

his interest described, and it is quite apparent that the claim was designed to reach his interest.<sup>44</sup>

A claim of lien which describes the property as belonging to the husband will not support a suit to enforce the lien against the wife.<sup>45</sup> If the property upon which the lien is claimed is community property, the claim must state the names of both the husband and wife.<sup>46</sup>

The statutes do not require the notice of lien to state, in so many words, that a lien is claimed against the interest of any particular person or owner, but are satisfied when the names of the persons against whose interest the lien is claimed are given with a statement of the facts subjecting their interests to the lien.<sup>47</sup>

#### § 1398. Name of owner when lien attached must be stated.

—It is the name of the person who was the owner when the lien attached that is required to be given; that is, the owner at the time the contract was made, the building commenced, or the labor commenced to be performed, or the materials to be furnished, from whichever event the lien dates its origin. A statement of the name of the owner at the date of the claim or certificate of lien is not a compliance with the statutes, and is insufficient.<sup>48</sup> On the other hand, it is held in some states that the notice should state the name of the owner at the time the lien is filed and not the name of the owner at the time the claimant was employed.<sup>49</sup> Giving the names of both present and past owners without stat-

<sup>44</sup> *Kealey v. Murray*, 61 Hun (N. Y.) 619, 15 N. Y. S. 403.

<sup>45</sup> *Basshor v. Kilbourn*, 3 McAr. (D. C.) 273.

<sup>46</sup> *Sagmeister v. Foss*, 4 Wash. 320, 30 Pac. 80, 744; *Littell & Co. v. Manufacturing Co. v. Miller*, 3 Wash. 480, 28 Pac. 1035.

<sup>47</sup> *Ross v. Simon*, 16 Daly (N. Y.) 159, 9 N. Y. S. 536, 32 N. Y. St. 74.

<sup>48</sup> *Morrison v. Philippi*, 35 Minn. 192, 28 N. W. 239.

<sup>49</sup> *Waters v. Johnson*, 134 Mich. 436, 96 N. W. 504; *Sprague Inv. Co. v. Mouat Lumber & Co.*, 14 Colo. App. 107, 60 Pac. 179; *Collins v. Snoke*, 9 Wash. 566, 38 Pac. 161; *Corbett v. Chambers*, 109 Cal. 178, 41 Pac. 873.

ting when the title passed from one to the other has been held sufficient.<sup>50</sup>

The owner is not necessarily the owner of the fee. The owner whose name is required is the owner whose interest is subject to the lien. His interest may be merely a leasehold interest; or even the interest of one who has contracted for the purchase of land, and has entered into possession and made improvements.<sup>51</sup>

**§ 1399. Where property has been conveyed it is necessary that notice name owner at time of filing statement.—** If a conveyance of the property has been executed and recorded pending the performance of the contract under which a lien is claimed, the statement of the claim must state the name of the owner of the premises at the time of the filing of such statement. The record gives the claimant notice of the ownership. A person having only a bond for a deed borrowed a sum of money from his daughter upon the promise that he would give her a deed, when he got one from the owner, to secure the loan. He proceeded to build a house, and afterwards obtained the title from the owner, and executed and recorded a deed in absolute terms to his daughter without her knowledge. There was no evidence that she ever had possession of the deed or of the land, or knew of the form or contents of the deed. The facts, however, warranted the finding that the daughter assented to and accepted the deed. The claimant had knowledge of the deed when he filed his statement, in which he gave the name of the father as the owner. Though the daughter was summoned in to answer the petition, it was held that it could not be maintained, because of the defective certificate or statement of the lien.<sup>52</sup>

<sup>50</sup> *Ah Louis v. Harwood*, 140 Cal. 500, 74 Pac. 41.

<sup>51</sup> *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325; *West Coast Lum-*

*ber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231.

<sup>52</sup> *Amidon v. Benjamin*, 128 Mass. 534.

§ 1400. Rule under statute requiring name of owner to be stated if known.—But under a statute which merely requires that the owner's name shall be stated, if known, and which does not require any entry of the owner's name in the lien docket or index, the omission of the name of the owner does not impair the validity of the lien; and consequently an error or mistake in the name of the owner given in the notice may be corrected by proper averments in the complaint.<sup>53</sup> If the owner's name is not known, the claim need aver nothing on that subject.<sup>54</sup> The lien law is a remedial statute, furnishing a summary remedy for the recovery of a certain class of claims; and while it is to be strictly construed, so far as to require a substantial compliance with every material provision by which the property of a third person may be incumbered and a cloud put upon the title by the mere act of the claimant, it is not to be so strictly interpreted as to deprive creditors of the benefit intended to be conferred.<sup>55</sup>

No objection can be taken to a notice or certificate which gives the initials only of the owner's Christian name, although the person claiming the lien knew the full name.<sup>56</sup> Where the certificate originally stated the Christian name of the owner to be John, when his name was in fact James, and before the certificate was recorded the last three letters of the name were erased, but the recorder recorded the name as John, it was held that the mistake of the recording officer did not prevent the enforcement of the lien.<sup>57</sup>

<sup>53</sup> *Leigene v. Schwarzler*, 67 How. Pr. (N. Y.) 130, 10 Daly (N. Y.) 547; *Hubbell v. Schreyer*, 56 N. Y. 604, 15 Abb. Pr. (N. S.) (N. Y.) 300, 304.

<sup>54</sup> *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231.

<sup>55</sup> *Hubbell v. Schreyer*, 56 N. Y. 604, 15 Abb. Pr. (N. S.) (N. Y.)

300; *Leigene v. Schwarzler*, 67 How. Pr. (N. Y.) 130, 10 Daly (N. Y.) 547.

<sup>56</sup> *Getchell v. Moran*, 124 Mass. 404; *Patrick v. Smith*, 120 Mass. 510.

<sup>57</sup> *Getchell v. Moran*, 124 Mass. 404.

§ 1401. Sufficiency of statement as to ownership.—A provision that the claim of lien shall state the name of the owner or reputed owner is complied with by a statement that the person against whom a lien is claimed is the owner and reputed owner,<sup>58</sup> or the owner or reputed owner.<sup>59</sup> But if the owner's name be unknown, the proper course is to say so, and, if there be a reputed owner, to state his name.<sup>60</sup>

A statement in the alternative is sufficient under such a statute.<sup>61</sup>

Where the notice must contain the name of the owner or reputed owner, it is sufficient that the notice is served on the person described as the reputed owner.<sup>62</sup>

The party claiming a lien is relieved from giving the true name of the owner only when this is not known to him.<sup>63</sup> In such case the omission of the name or a mistake in it is not fatal to the lien.<sup>64</sup>

It is important that the owner's name should be given in the certificate, if it can be done, because otherwise purchasers and mortgagees relying upon the record title are liable to be misled. But the statute contemplates that there may be cases where the name of the owner need not be given in the certificate. If the name of the owner be not known to the petitioner, the certificate is good though it does not name the owner, or states that "to the best knowl-

<sup>58</sup> *Arata v. Tellurium Gold & Silver Mining Co.*, 65 Cal. 340, 4 Pac. 195.

<sup>59</sup> *Minor v. Marshall*, 6 N. Mex. 194, 27 Pac. 481.

<sup>60</sup> *Malter v. Falcon M. Co.*, 18 Nev. 209, 2 Pac. 50; *Harmon v. Ashmead*, 68 Cal. 321, 9 Pac. 183; *Hooper v. Flood*, 54 Cal. 218, 222; *McElwee v. Sandford*, 53 How. Pr. (N. Y.) 89, 90.

<sup>61</sup> *Abelman v. Myer*, 122 App.

Div. (N. Y.) 470, 106 N. Y. S. 978.

<sup>62</sup> *Shryock v. Hensel*, 95 Md. 614, 53 Atl. 412.

<sup>63</sup> *Kelly v. Laws*, 109 Mass. 395, 396.

<sup>64</sup> *Cleverly v. Moseley*, 148 Mass. 280, 19 N. E. 394; *McPhee v. Litchfield*, 145 Mass. 565, 14 N. E. 923, 1 Am. St. 482; *Instalment Building Co. v. Wentworth*, 1 Wash. St. 467, 469, 25 Pac. 298.

edge and belief" of the petitioner a person named is the owner, when in fact he was not the owner.<sup>65</sup>

If the claim is filed against the owner of a leasehold interest by name, and states that the owner of the fee is unknown, the claim is not bad because it does not specifically state that the name of the reputed owner of the fee is not known.<sup>66</sup>

Under a requirement that the notice shall set forth "the name of the owner or reputed owner, at the time of making said statement, of the property charged with the lien, according to the best information then had," a statement that the claimant is informed that a certain person is the owner, without adding "according to the best information then had," is sufficient, especially if it appears as a fact that the person thus named as the supposed owner appears to have been really the owner.<sup>67</sup> But under such a statutory provision, it is not allowable to name the lessee in a notice and then proceed against the lessor when originally there was not intention to charge the interest of the lessor with a lien.<sup>68</sup>

**§ 1402. Owner of building.**—While the name of the owner of the land must be stated if the claimant seeks to affect the land with his lien, under the laws of several of the states a lien may be enforced upon the building alone; and therefore, when a claimant seeks to do this, he must state the name of the owner of the building, if the owner of the land and of the building be different persons.<sup>69</sup>

**§ 1403. Statement of name not necessary in the absence of a statute requiring it.**—If the statute does not require the name of the owner to be stated, the statement need not

<sup>65</sup> *McPhee v. Litchfield*, 145 Mass. 565, 14 N. E. 923, 1 Am. St. 482, per Morton, C. J.

<sup>66</sup> *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231.

<sup>67</sup> *Hurlbert v. New Ulm Basket-Works*, 47 Minn. 81, 49 N. W. 521.

<sup>68</sup> *DeKlyn v. Gould*, 165 N. Y. 282, 59 N. E. 95, 80 Am. St. 719, affg. 34 App. Div. (N. Y.) 436, 54 N. Y. S. 345.

<sup>69</sup> *Kezartee v. Marks*, 15 Ore. 529, 16 Pac. 407; *Allen v. Rowe*, 19 Ore. 188, 23 Pac. 901.

give the name.<sup>70</sup> In such case, if the owner has died before the filing of the statement, the account may be made out against his estate, without mentioning the names of the heirs.<sup>71</sup>

Thus the Illinois statute only requires that the claim shall state the name of the person against whom the lien is filed and a description of the property charged with the lien.<sup>72</sup>

**§ 1404. Account or claim to be specific.**—The account or claim of lien should be certain and specific as to the amount, character, and value of the work and materials furnished, and the dates when the same were furnished, so as to advise the owner, other lien creditors, and all persons interested, of the particulars of the demand sought to be enforced, and enable them, if they desire to do so, to contest the same.<sup>73</sup> The Supreme Court of Pennsylvania on this point say:<sup>74</sup> "As the law calls for nothing unreasonable at the hand of him who would fasten an incumbrance upon the property of his neighbour, no just ground of complaint is afforded, by insisting upon a rigid adherence to its provisions. The information it exacts is, or ought to be, entirely within the power of the creditor to give, and an omis-

<sup>70</sup> Welch v. McGrath, 59 Iowa 519.

<sup>71</sup> Welch v. McGrath, 59 Iowa 519.

<sup>72</sup> Sorg v. Crandall, 233 Ill. 79, 84 N. E. 181.

<sup>73</sup> Noll v. Swineford, 6 Pa. St. 187; Lauman's App., 8 Pa. St. 473, 476; Carson v. White, 6 Gill (Md.) 17, 27; Ferguson v. Ashbell, 53 Tex. 245; Schneider v. Kolt-hoff, 59 Ind. 568; Wade v. Reitz, 18 Ind. 307. A claim for materials "furnished and to be furnished" held insufficient. Finn v. Smith, 186 N. Y. 465, affg. 107 App. Div.

(N. Y.) 630. See also to same effect Ball v. Doherty, 128 N. Y. S. 1014. A statement for work done and materials furnished under a contract that is completed for a stated price is itemized sufficiently when it names the contract price and is sufficiently definite. Home Lumber & Supply Co. v. McCurley, 84 Kans. 751, 115 Pac. 590. For a statement insufficient because too indefinite, see Feeney v. Rothbaum, 155 Mo. App. 331, 137 S. W. 82.

<sup>74</sup> Noll v. Swineford, 6 Pa. St. 187, 191.

sion to put it on the record is, therefore, without excuse.<sup>75</sup>

\* \* \* Indeed the great object of the statute in pointing out the characteristics of the statement to be filed, would, in the end, be utterly defeated, were we to indulge the laxity of practice which ignorance and carelessness conspire to introduce and perpetuate."

A substantial compliance with the statute is required, but only a substantial compliance. Trivial errors or omissions will not invalidate the account or statement.<sup>76</sup> A mistake in stating the date of the completion of the work, under a statute which does not require such a statement, will not affect the lien where the complaint in an action to enforce such a lien alleges that the notice was in fact filed within the proper time after the completion of the work.<sup>77</sup> The omission of the words "after allowing all just credits" does not render a statement bad if it contains a just statement of the demand.<sup>78</sup> It is not necessary to set out in the lien statement the details of the contract under which the work is done. The law is satisfied with a general statement.<sup>79</sup>

§ 1405. **Terms, conditions, and time given.**—Under a statute which requires that the claim filed shall state the

<sup>75</sup> *Rehrer v. Zeigler*, 3 Watts & S. (Pa.) 258; *Thomas v. James*, 7 Watts & S. (Pa.) 381; *Witman v. Walker*, 9 Watts & S. (Pa.) 183, 186.

<sup>76</sup> *Simmons v. Carrier*, 60 Mo. 581; *Hilliker v. Francisco*, 65 Mo. 598; *Mississippi Planing Mill v. Presbyterian Church*, 54 Mo. 520; *Greenwood v. Harris*, 8 Mo. App. 603; *Leisse v. Schwartz*, 6 Mo. App. 413; *Hayden v. Wulffing*, 19 Mo. App. 353; *Cole v. Barron*, 8 Mo. App. 509; *Schulenburg v. Werner*, 6 Mo. App. 292; *Henry v. Plitt*, 84 Mo. 237; *Buckley v. Taylor*, 51 Ark. 302, 11 S. W. 281;

*Smith v. Sherman Min. Co.*, 12 Mont. 524, 31 Pac. 72. A claim correctly stating the whole amount due, is not invalid because it states this whole to be due under the contract whereas a small part is due under an implied contract. *Continental B. & L. Assn. v. Hutton*, 144 Cal. 609, 78 Pac. 21.

<sup>77</sup> *Slight v. Patton*, 96 Cal. 384, 31 Pac. 248.

<sup>78</sup> *Alabama &c. Lumber Co. v. Tisdale*, 139 Ala. 250, 36 So. 618.

<sup>79</sup> *Branham v. Nye*, 9 Colo. App. 19, 47 Pac. 402.



terms and conditions of the contract, and the "time given," no objection can be taken to a claim, which states the terms and conditions of the contract, because it does not also state the time given, if it does not appear that there was any express agreement as to time.<sup>80</sup> But a statement is defective which states that the material and labor for which the lien is claimed were furnished under a subcontract, but omits to set out the terms of the original contract.<sup>81</sup>

A lien notice should be sufficiently definite to fairly apprise the owner of what he is charged with, what kind of material, and what the same was furnished for,<sup>82</sup> and whether furnished upon a contract price, or upon a basis of a quantum meruit.<sup>83</sup> It should show that each item is one for which the statute grants a lien and that in point of time a lien may be claimed thereon.<sup>84</sup>

But under the Indiana statute, the notice is sufficient when it states the amount due, to whom, from whom, and for what, and describes the premises.<sup>85</sup>

**§ 1406. Statement of credits in a notice.**—Under statutes which require that the lien filed shall state the amount of the

<sup>80</sup> Hills v. Ohlig, 63 Cal. 104; Doane v. Clinton, 2 Utah 417; Albrecht v. C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157.

<sup>81</sup> Gates v. Brown, 1 Wash. St. 470, 25 Pac. 914. "The lien notice in this case is clearly defective, as it does not purport to contain a statement of the terms and conditions of the contract, while it does state that the work was performed and material furnished under a sub-contract." Per Scott, J. California Powder Works v. Blue Tent Gold Mines (Cal.), 22 Pac. 391; May &c. Brick Co. v. General Engineering Co., 180 Ill. 535, 54 N. E. 638.

<sup>82</sup> Tacoma Lumber Co. v. Kennedy, 4 Wash. 305, 30 Pac. 79; Warren v. Quade, 3 Wash. 750, 29 Pac. 827.

<sup>83</sup> Tacoma Foundry &c. Co. v. Wolff, 4 Wash. 818, 31 Pac. 1053; Reed v. Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; Cohn v. Wright, 89 Cal. 86, 26 Pac. 643.

<sup>84</sup> Crandall v. Lyon, 188 Ill. 86, 58 N. E. 972, revg. 90 Ill. App. 265.

<sup>85</sup> Coburn v. Stephens, 137 Ind. 683, 36 N. E. 132, 45 Am. St. 218; Jeffersonville Water-Supply Co. v. Ritter, 146 Ind. 521, 45 N. E. 697.

claim with all just credits, the amount of the claim for labor and materials must be truly stated, and also all the payments received.<sup>86</sup> But under statutes which only require the amount claimed as a lien to be stated, or the entire amount after deducting all just credits, it is sufficient to state the balance claimed to be due.<sup>87</sup> A liberal construction is usually given to the requirements of statutes in regard to stating the amount of the lien claim; and, even under a requirement that the amount shall be stated with all just credits, it has been held that a statement of the balance due, when this is stated to be the amount due after deducting all just credits, is sufficient.<sup>88</sup> And where the requirement is that the amount shall be stated after deducting all just credits, it is sufficient to state the balance due, without stating that the amount is due over and above all just credits and offsets.<sup>89</sup>

Under a contract with the owner to erect a building or several buildings, or to do certain work or furnish certain materials, for a specified sum, the contract being entire, the statement of claim may be in one item. No detailed state-

<sup>86</sup> *Nichols v. Culver*, 51 Conn. 177; *Heston v. Martin*, 11 Cal. 41; *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507; *Selden v. Meeks*, 17 Cal. 128; *Cannon v. Williams*, 14 Colo. 21, 23 Pac. 456; *In re Emslie*, 102 Fed. 291, 42 C. C. A. 350. The statement of claim is not sufficient where the sum named as due is sixty per cent. in excess of the sum due. *Griff v. Clark*, 155 Mich. 611, 119 N. W. 1076. Where claim is excessive but made in good faith the lien will still be valid. *Fairbairn v. Moody*, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469.

<sup>87</sup> *Knight v. Norris*, 13 Minn.

473; *Laswell v. Presbyterian Church*, 46 Mo. 279; *Thomas v. Huesman*, 10 Ohio St. 152, 157; *Borden v. Mercer*, 163 Mass. 7, 39 N. E. 413; *Red River Lumber Co. v. Friel*, 7 N. Dak. 46, 73 N. W. 203; *Wertz v. Lamb*, 43 Mont. 477, 117 Pac. 89.

<sup>88</sup> *Merchant v. Humeston*, 2 Wash. 433, 7 Pac. 903; *Maynard v. Ivey*, 21 Nev. 241, 29 Pac. 1090; *Cooper Mfg. Co. v. Delahunt*, 36 Ore. 402, 51 Pac. 649, 60 Pac. 1.

<sup>89</sup> *Kezartee v. Marks*, 15 Ore. 529, 16 Pac. 407; *Whittier v. Blakely*, 13 Ore. 546, 11 Pac. 305; *Ainslie v. Kohn*, 16 Ore. 363, 19 Pac. 97.

ment of labor and materials is necessary or proper.<sup>90</sup> And so, if the value or amount of the work or materials can only be ascertained by measurement, it is enough to state the measurement, with the dates of commenceing and finishing the work.<sup>91</sup>

The statement should be as definite as the circumstances of the case will allow.<sup>92</sup> It is not necessary to give an itemized statement where the contract or claim can be fairly understood without it. It is the better and safer practice so to do, however, especially where the lien is claimed by any one other than the original contractor. If all the items relate to one transaction, respecting which the contract was made, they may be included in one statement; and although intermediate balances have been struck by the parties, they may be included in one statement.<sup>93</sup>

**§ 1407. Dates of items in a claim to be stated.**—The dates of the items of the claim should be so stated as to enable parties interested to discover during what period the labor was done and the materials furnished.<sup>94</sup> The rule requires certainty to a common intent, not precision, in the statement.<sup>95</sup> A statement of account for materials furnished is generally sufficient as to date if it gives the dates between which the articles were delivered, without giving the specific dates at which each part of the whole was de-

<sup>90</sup> Doolittle v. Plenz, 16 Nebr. 153, 20 N. W. 116; Manly v. Downing, 15 Nebr. 637, 19 N. W. 601.

<sup>91</sup> Davis v. Hines, 6 Ohio St. 473; Thomas v. Huesman, 10 Ohio St. 152; Sharon Town Co. v. Morris, 39 Kans. 377, 18 Pac. 230.

<sup>92</sup> Mix v. Ely, 2 G. Greene (Iowa) 513.

<sup>93</sup> Lamb v. Hannemann, 40 Iowa 41.

<sup>94</sup> Rush v. Able, 90 Pa. St. 153;

Bayer v. Reeside, 14 Pa. St. 167; McClintock v. Rush, 63 Pa. St. 203; Johnson v. Gold, 32 Minn. 535, 21 N. W. 719. A substantial mistake in the date is fatal to the lien. The May &c. Brick Co. v. General Engineering Co., 180 Ill. 535, 54 N. E. 638, affg. 76 Ill. App. 380.

<sup>95</sup> Bangs v. Berg, 82 Iowa 350, 48 N. W. 90; Eggirt v. Snoko, 122 Iowa 582, 98 N. W. 372.

livered,<sup>96</sup> or if it appears that the work was done or material furnished within the statutory time.<sup>97</sup> The mere omission of the year in the date of the account is not a fatal error.<sup>98</sup>

Where a statute requires a statement of the date when the materials were furnished or the work done, an error in stating the date accidentally made, or made without fraudulent intent, may be cured by proof of the correct date, if it appears that this was within the time allowed for filing the lien.<sup>99</sup> A claim of lien which states that sixty days had not elapsed since the work was performed and the materials furnished, and is dated at the end before the signature, is a sufficient statement of the date from which the lien was claimed to have commenced.<sup>1</sup>

**§ 1408. Statement not to be in excess of amount due.—**The requirement of a just and true account is not complied with by filing one for an amount greatly in excess of the amount due.<sup>2</sup> If a claimant places upon record a statement which he knows is not correct, the authorities are very uniform that the lien is lost.<sup>3</sup> Thus, if one places on record a

<sup>96</sup> *Stuart v. Broome*, 59 Tex. 466; *Manly v. Downing*, 15 Nebr. 637, 19 N. W. 601.

<sup>97</sup> *Hayden v. Wulfin*, 19 Mo. App. 353.

<sup>98</sup> *Cole v. Barron*, 8 Mo. App. 509.

<sup>99</sup> *Treusch v. Shryock*, 55 Md. 330.

<sup>1</sup> *Ryan v. Klock*, 36 Hun (N. Y.) 104.

<sup>2</sup> *Hoffman v. Walton*, 36 Mo. 613; *Kling v. Railway Construction Co.*, 7 Mo. App. 410, 412, per *Bakewell, J.*: "It is surely no hardship to require of those to whom this extraordinary remedy is given that they should file, as

the law requires, an account substantially correct and sufficiently definite of the claims for which they are entitled to a lien. It would be oppressive to the owners of real estate to hold that a lien may be filed for any amount, and shall be good for such items as may be established. The claim must stand or fall substantially as made. *Griff v. Clark*, 155 Mich. 611, 119 N. W. 1076.

<sup>3</sup> *Lynch v. Cronan*, 6 Gray (Mass.) 531; *Foster v. Schneider*, 50 Hun (N. Y.) 151, 2 N. Y. S. 875, 19 N. Y. St. 449; *Whitenack v. Noe*, 11 N. J. Eq. 321; *Reeve v. Elmendorf*, 38 N. J. L. 125; *Hoffman*

claim for over nine hundred dollars when the true amount was only about seven hundred and fifty dollars, knowing that the deductions should be made, and that the amounts thereof appeared in the contract, he will be held to have lost his lien, on the ground that he knowingly and wilfully claimed more than his due, his only excuse being that his attorney, who had the contract, was away, though it appeared that no effort was made to get it from the attorney's office, or to get the duplicate thereof which the owner of the property had.<sup>4</sup> Yet, under such a statute, the lien is not lost because the claimant, through inadvertence or mistake, has included some items for which he is not entitled to a lien; especially if no one has been injured by the error, and the erroneous items can be separated easily from the rest.<sup>5</sup> It is not necessary, under such requirement, that these words shall appear in the lien account or affidavit.<sup>6</sup>

**§ 1409. Account to show the amount of the lien.**—The account itself must show the amount of the lien charge, under a provision for filing a just and true account, without the aid of extrinsic evidence to separate the charges for which there is a lien from those for which there is no lien. When the account is in a single item, and it appears from the contract that this is for different services, for a part of which no lien can attach, the account is not a sufficient basis

v. Walton, 36 Mo. 613; Stubbs v. Clarinda, C. & C. R. Co., 65 Iowa 513, 22 N. W. 654; J. E. Grelich Co. v. Taylor, 143 Mich. 704, 107 N. W. 712; Gibbs v. Hanchette, 90 Mich. 657, 51 N. W. 691; Christian v. Allee, 104 Ill. App. 177, citing text.

<sup>4</sup> Gibbs v. Hanchette, 90 Mich. 657, 51 N. W. 691.

<sup>5</sup> Allen v. Frumet M. & S. Co., 73 Mo. 688; Johnson v. Barnes & Co. Building Co., 23 Mo. App. 546; Greenwood v. Harris, 8 Mo. App.

603; Black v. Appolonio, 1 Mont. 342; Mason v. Germaine, 1 Mont. 263; Harrington v. Dollman, 64 Ind. 255; Kiel v. Carll, 51 Conn. 440; Odd Fellows' Hall v. Masser, 24 Pa. St. 507, 64 Am. Dec. 675; Gaskell v. Beard, 50 Hun (N. Y.) 101, 11 N. Y. S. 399, 33 N. Y. St. 852.

<sup>6</sup> Schroeder v. Mueller, 33 Mo. App. 28; Bassett v. Brewer, 74 Tex. 554, 12 S. W. 229.

for a lien.<sup>7</sup> If, however, the account be made up of several items, for some of which there might be a lien, and for others of which there could be no lien, the claimant might enforce the lien for the former items after rejecting the other items.<sup>8</sup>

An account by a subcontractor which refers for its items to the contract between him and the contractor is insufficient, unless the contract is made part of the account.<sup>9</sup> It is not the contract but the account which shows the lien claim.<sup>10</sup>

**§ 1410. Sufficiency of statement of amount of balance due.**—Where partial payments have been made, it is only necessary to state the amount of the balance due, unless the statutes expressly or impliedly require a specification of the value of the labor and materials, and of the amount of any payments made.<sup>11</sup> The certificate should show on what account the claim is made, so that it will appear that the claim is one for which there may be a lien. But if the amount claimed is stated to be for labor and materials, it does not matter that the whole amount of the debt for labor and materials had been a larger amount, and that this had been reduced to the amount for which a lien is claimed by partial payments.

If the owner directs no special application of partial payments made by him, and the contractor does not make a special application of them at the time, he can not afterwards make a special application of them to serve his inter-

<sup>7</sup> *Edgar v. Salisbury*, 17 Mo. 271.

<sup>8</sup> *Edgar v. Salisbury*, 17 Mo. 271, per *Gamble, J.*

<sup>9</sup> *Nelson v. Withrow*, 14 Mo. App. 270.

<sup>10</sup> *Lewis v. Cutter*, 6 Mo. App. 54.

<sup>11</sup> *Nichols v. Culver*, 51 Conn. 177; *Thomas v. Huesman*, 10 Ohio

St. 152, 157; *Laswell v. Presbyterian Church*, 46 Mo. 279; *Knight v. Norris*, 13 Minn. 473; *Heston v. Martin*, 11 Cal. 41; *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507; *Selden v. Meeks*, 17 Cal. 128; *Ernaek v. Campbell*, 14 App. D. C. 186; *Wertz v. Lamb*, 43 Mont. 477, 117 Pac. 89.

ests as these are subsequently developed.<sup>12</sup> The law will generally apply such payments to the oldest items of the account. But if materials are furnished for several houses at the same time, and afterwards a lien is claimed upon one of them, general payments made upon account, and not specifically applied by either debtor or creditor, should be applied pro rata upon the accounts for the several houses, and the omission to give such credit in the account of the lien filed is a failure to give a just and true account, and vitiates the lien.<sup>13</sup>

Where it appears that part of plaintiff's account consists of advances made by him to pay freights chargeable to the defendant, it is equitable to apply cash payments which had been made on the general account to the nonlienable items thereof.<sup>14</sup>

§ 1411. Claim bad when contract only partly completed and amount due not shown disclosed.—A claim which shows that the contract is only partly performed, and does not show the amount due, is bad. A statement claiming a lien for the entire amount agreed upon to be paid for the performance of a contract in erecting a building, which shows that the contract has not been completed by reason of proceedings in insolvency against the owner, and which does not show the proportion or amount due for the labor actually performed and materials actually used, is insufficient to support a lien.<sup>15</sup>

Under the statute of New York, which requires the notices filed with the clerk to contain a statement whether all the work for which the claim is made has been actually performed or furnished, and, if not, how much of it, a notice which fails to state how much of the work under the con-

<sup>12</sup> Lane v. Jones, 79 Ala. 156;  
Jefferson v. Church of St. Mat-  
thew, 41 Minn. 392, 43 N. W. 74.

<sup>14</sup> North v. La Flesh, 73 Wis.  
520, 41 N. W. 633.

<sup>13</sup> Lane v. Jones, 79 Ala. 156.

<sup>15</sup> Lewin v. Whittenton Mills, 13  
Gray (Mass.) 100.

tract remains to be performed, but states that it all has been performed, when in fact it has been only partly performed, does not entitle the claimant to a lien.<sup>16</sup>

A notice of a lien for partially completed work, which states an entire completion of it, is void.<sup>17</sup> But where subcontractors for the plastering of a building, who had completed their work except the pointing up, to be done after the other mechanics had left the building, filed a notice of lien therefor, stating that all their work had been done, and thereafter the principal contractors abandoned the work, leaving it unfinished, it was held that, as the subcontractors had substantially performed their contract, and were not in default as to the unimportant part unfinished, their notice of lien was sufficient.<sup>18</sup> A notice of lien which sets out several contracts, and alleges completion of all, will not be vitiated as to the completed contracts by the fact that one of the contracts set out remains incomplete.<sup>19</sup>

§ 1412. **Including nonlienable items.**—A lien is not defeated by a statement of the lien which includes, as a part of the claim for labor and materials furnished for building a house, items of charge for labor and materials used in building a fence and other structures which were included in the same contract, if the mechanic honestly supposed that he had a lien for all he claimed;<sup>20</sup> especially if the statute de-

<sup>16</sup> *Foster v. Schneider*, 50 Hun (N. Y.) 151, 2 N. Y. S. 875, 19 N. Y. St. 449.

<sup>17</sup> *Close v. Clark*, 16 Daly (N. Y.) 91, 9 N. Y. St. 671; *Foster v. Schneider*, 50 Hun (N. Y.) 151, 2 N. Y. S. 875, 19 N. Y. St. 449.

<sup>18</sup> *Mull v. Jones*, 18 N. Y. S. 359, 45 N. Y. St. 643.

<sup>19</sup> *Brandt v. Verdon*, 18 N. Y. S. 119, 49 N. Y. St. 885, *affd.* 137 N. Y. 616, 33 N. E. 745.

<sup>20</sup> *Hubbard v. Brown*, 8 Allen (Mass.) 590; *Harmon v. San Fran-*

*cisco & S. R. Co.*, 86 Cal. 617, 25 Pac. 124, *revd.* 23 Pac. 1024; *Malone v. Big Flat Min. Co.*, 76 Cal. 578, 18 Pac. 772; *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633; *Perkins v. Wilson*, 1 Marv. (Del.) 196, 1 Harl. (Del.) 143; 40 Atl. 950; *Carthage Superior Limestone Co. v. Central Methodist Church*, 156 Mo. App. 671, 137 S. W. 1028; *Home Lumber & Supply Co. v. McCurley*, 84 Kans. 751, 115 Pac. 590.



clares that no inaccuracy in the statement shall invalidate the proceedings, unless it shall appear that the person filing the certificate has wilfully and knowingly claimed more than is his due,<sup>21</sup> or provided the value of the items for which there is a lien is easily ascertainable from the account itself,<sup>22</sup> and no restatement thereof is necessary for that purpose.<sup>23</sup> Under a statute which strictly requires "a just and true account of the demand justly due, after all just credits are given," such a statement as the above would doubtless defeat the lien.

But there can be no lien under an entire contract which includes labor for which there may be a lien, as well as labor for which there is no lien. If a sum named is to be paid for the entire amount of labor described, there can be no lien for the labor for which a lien is given, for the contract can not be enforced for that part of the labor, as the contract is entire and can not be apportioned.<sup>24</sup>

If the items for which a lien is given, as well as those for which there is no lien, be furnished for an entire price, so that it is practically impossible to determine what part of

<sup>21</sup> As under the present statute in Massachusetts. Rev. Laws 1902, ch. 197, § 7. *Lynch v. Cronan*, 6 Gray (Mass.) 531.

<sup>22</sup> *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633; *Dennis v. Smith*, 38 Minn. 494, 38 N. W. 695; *Gordon Hardware Co. v. San Francisco & S. R. Co.*, 86 Cal. 620, 22 Pac. 401, 25 Pac. 125; *Malone v. Big Flat Min. Co.*, 76 Cal. 578, 18 Pac. 772; *Day v. Chapman*, 88 Ill. App. 358; *McNab & Harlan Mfg. Co. v. Paterson Bldg. Co.*, 71 N. J. Eq. 133, 63 Atl. 709; *Kittrell v. Hopkins*, 114 Mo. App. 431, 90 S. W. 109.

<sup>23</sup> *McMaster v. Merrick*, 41 Mich. 505, 2 N. W. 895; *Dennis v.*

*Smith*, 38 Minn. 494, 38 N. W. 695; *Maynard v. Ivey*, 21 Nev. 241, 29 Pac. 1090; *Allen v. Fruit Min. Smelting Co.*, 73 Mo. 688, 692; *Johnson, Barnes & Co. Bldg. Co.*, 23 Mo. App. 546, 548; *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157; *Gaskell v. Beard*, 58 Hun (N. Y.) 101, 11 N. Y. S. 399.

<sup>24</sup> *Adler v. World's Pastime Exposition Co.*, 126 Ill. 373, 18 N. E. 809; *Crosby v. Loop*, 14 Ill. 330; *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541; *Peatman v. Centerville Light & Power Co.*, 105 Iowa 1, 74 N. W. 689, 67 Am. St. 276.

the contract price is applicable to the lienable items and what to the nonlienable, there can be no lien for the whole account, and none for any part.<sup>25</sup>

§ 1413. **Overstatement of amount due not necessarily fatal.**—An innocent overstatement of the amount of the claim will not invalidate the certificate under a statute which requires a statement of the amount justly due, as nearly as the same can be ascertained. A misstatement of the amount does not invalidate the lien, at least between the parties, unless the misstatement was intentional.<sup>26</sup> But the claimant should be held to the strictest exercise of good faith; and if it appears that he has included in his statement items of account for which he is not entitled to a lien, for the purpose of securing a lien for such items, his entire claim for

<sup>25</sup> *Morrison v. Minot*, 5 Allen (Mass.) 403; *Dennis v. Smith*, 38 Minn. 494, 38 N. W. 695; *Kearney v. Wurdeman*, 33 Mo. App. 447; *Gauss v. Hussmann*, 22 Mo. App. 115, 118. In *Schulenburg & Co. Lumber Co. v. Strimple*, 33 Mo. App. 154, 160, *Rombauer, P. J.*, delivering the opinion, said: "This claim is based upon a misconception of the law. It is the inseparable blending of items, for which the law gives no lien because they are not lienable in their nature, with lienable items which defeats the entire lien claim and not the blending of lienable items, some of which remain unproved or unproved to their full extent. That distinction is clearly drawn in *Johnson v. The Building Company*, [*Barnes & Co.*] 23 Mo. App. 546, 549, 550, and reiterated in *Pullis v. Hoffman*, 28 Mo. App. 666, 671."

<sup>26</sup> *Nichols v. Culver*, 51 Conn.

177; *Kiel v. Carll*, 51 Conn. 440; *Marston v. Kenyon*, 44 Conn. 349; *Bank of Charleston v. Curtiss*, 18 Conn. 342, 349, 46 Am. Dec. 325; *Hopkins v. Forrester*, 39 Conn. 351; *Thomas v. Huesman*, 10 Ohio St. 152; *Barber v. Reynolds*, 44 Cal. 519; *Harmon v. San Francisco & S. R. Co.*, 86 Cal. 617, 25 Pac. 124, revg. 23 Pac. 1024; *Morgan v. Taylor*, 5 N. Y. S. 920, 15 Daly (N. Y.) 304, 24 N. Y. St. 60, affd. 128 N. Y. 622, 28 N. E. 253; *Ringle v. Wallis Iron Works*, 149 N. Y. 439, 44 N. E. 175, modifying 76 Hun (N. Y.) 449, 28 N. Y. S. 107, 59 N. Y. St. 177; *Nolan v. Lovelock*, 1 Mont. 224; *Mason v. Germaine*, 1 Mont. 263; *Black v. Appolonio*, 1 Mont. 342; *Harrington v. Dollman*, 64 Ind. 255; *McMonagle v. Wilson*, 103 Mich. 264, 61 N. W. 495; *Hurlburt v. Just*, 126 Mich. 337, 85 N. W. 872, even where disparity is great. *Green Bay Lumber Co. v. Thomas*,

a lien should be rejected.<sup>27</sup> The lien is not invalidated, at least between the parties, by a claim of a larger sum than is actually due, if the misstatement was unintentional.<sup>28</sup> An honest mistake, either of law or of fact, by reason of which the amount due is overstated, in the absence of fraud or of an intention to deceive, and where no one has in fact been deceived or misled to his injury, will not vitiate the lien.<sup>29</sup> The amount of the claim may properly be made large enough to cover everything which the lienor may be entitled to, for the reason that there can be no recovery beyond the amount claimed in the lien filed.<sup>30</sup>

106 Iowa 420, 76 N. W. 749; *Palmer v. McGinness*, 127 Iowa 118, 102 N. W. 802; *Green Bay Lumber Co. v. Miller*, 98 Iowa 468; *Trueblood v. Shellhouse*, 19 Ind. App. 91, 48 N. E. 47; *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157; *Alabama & c. Lumber Co. v. Tisdale*, 139 Ala. 250, 36 So. 618; *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422, affg. 61 Ill. App. 310; *Kendall v. Fader*, 99 Ill. App. 104, affd. 199 Ill. 294, 65 N. E. 318; *Culmer v. Caine*, 22 Utah 216, 61 Pac. 1008; *Hall v. Thomas*, 111 N. Y. S. 979.

<sup>27</sup> *Stubbs v. Clarinda. C. S. & S. W. R. Co.*, 65 Iowa 513, 22 N. W. 654. In this case items for money expended were included in the account in such a way as to make it appear that they were for services rendered; and the plaintiff was denied a lien even for the services which he had rendered. *Aeschlimann v. Presbyterian Hospital*, 165 N. Y. 296, 59 N. E. 148, 80 Am. St. 723, affg. 29 App. Div. (N. Y.) 630, 53 N. Y. S. 998.

<sup>28</sup> *Nichols v. Culver*, 51 Conn. 177; *Smith v. Norris*, 120 Mass. 58, 63; *Morgan v. Taylor*, 5 N. Y. S. 920, 15 Daly (N. Y.) 304, 24 N. Y. St. 60, affd. 128 N. Y. 622, 28 N. E. 253.

<sup>29</sup> *Kiel v. Carll*, 51 Conn. 440; *Marston v. Kenyon*, 44 Conn. 349; *Hopkins v. Forrester*, 39 Conn. 351; *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325; *McAllister v. Des Rochers*, 132 Mich. 381, 93 N. W. 887; *Vickery v. Richardson*, 189 Mass. 53, 75 N. E. 136. Even though the overstatement contains a non-lienable item. *Culver v. Schroth*, 153 Ill. 437, 39 N. E. 115, affg. 54 Ill. App. 643.

<sup>30</sup> *Lutz v. Ely*, 3 Abb. Prac. (N. Y.) 475, 3 E. D. Smith (N. Y.) 621; *Morgan v. Taylor*, 15 Daly (N. Y.) 304, 5 N. Y. S. 920, 24 N. Y. St. 60, affd. 128 N. Y. 622, 28 N. E. 253. But see *Walls v. Ducharme*, 162 Mass. 432, 38 N. E. 1114, holding claims were made in bad faith.

§ 1414. **Intentional omission of credits.**—The intentional omission of credits for the purpose of increasing the amount of a lien is a violation of the requirement to file “a just and true account,” and vitiates the statement.<sup>31</sup> The omission of credits may not be intentional, and it does not necessarily lead to the conclusion that the claimant intended to claim more than was justly due to him; but the jury is authorized to consider this fact as bearing upon the question.<sup>32</sup>

§ 1415. **Statute may protect one against an overstatement of account due.**—A statutory provision that no inaccuracy in the statement shall invalidate the proceedings, unless it shall appear that the person filing the statement has wilfully and knowingly claimed more than is his due, protects an overstatement of the amount due, if this be not made wilfully and knowingly.<sup>33</sup> The lien is not defeated by an overstatement of the amount for which a lien is claimed, if the whole amount is really due to the claimant, and he honestly supposes that he has a lien therefor. It is not defeated by a mistake as to the proper way of appropriating partial payments, if the claimant does not wilfully and knowingly claim more than is due.<sup>34</sup> It is no objection that a claimant has placed too great a value upon his labor, it not appearing that he wilfully and knowingly claimed more than was due.<sup>35</sup> The fact that some materials furnished for a building are wasted, and do not go into its con-

<sup>31</sup> Lane v. Jones, 79 Ala. 156; Hoffman v. Walton, 36 Mo. 613; McWilliams v. Allan, 45 Mo. 573; State v. Shelton, 238 Mo. 281, 142 S. W. 417.

<sup>32</sup> Corbett v. Greenlaw, 117 Mass. 167.

<sup>33</sup> Underwood v. Walcott, 3 Allen (Mass.) 464; Smith v. Norris, 120 Mass. 58; Whitney v. Joslin,

108 Mass. 103; Stockton Lumber Co. v. Schuler, 155 Cal. 411, 101 Pac. 307; Treloar v. Hamilton, 225 Ill. 102, 80 N. E. 75; Strandell v. Moran, 49 Wash. 533, 95 Pac. 1106.

<sup>34</sup> Sexton v. Weaver, 141 Mass. 273, 6 N. E. 367.

<sup>35</sup> Smith v. Norris, 120 Mass. 58.

struction, does not invalidate the claim though included in it.<sup>36</sup>

§ 1416. **Statement of aggregate price of work and materials.**—A statute which allows the filing of a statement of the aggregate price of the work and materials,<sup>37</sup> where there is a contract for a stipulated sum, or where the value or amount of the work or materials can only be ascertained by measurement when done, applies only to one who contracts with the owner, notwithstanding its general terms.<sup>38</sup> A subcontractor is bound to set forth the particulars of his claim. The subcontractor is entitled to no more than the fair market value of the work done and materials furnished on the credit of the building; and hence the owner should be informed by the claim filed as to the particulars of the claim, that he may make the necessary inquiries to satisfy himself of its justice as a lien on his property. The agreement between the contractor and subcontractor is not the measure of the owner's responsibility; his building is bound for no more than the value of the work done and materials furnished by the subcontractor.<sup>39</sup>

But where the contract is made with the owner through an agent, it is not necessary upon filing a **mechanic's lien** to specify the particulars of the work done or materials furnished, as in the case of a contract entered into with a subcontractor.<sup>40</sup>

<sup>36</sup> *Schroeder v. Mueller*, 33 Mo. App. 28.

<sup>37</sup> *Felgenhauer v. Haas*, 123 App. Div. (N. Y.) 75, 108 N. Y. S. 476.

<sup>38</sup> *Gray v. Dick*, 97 Pa. St. 142; *Lee v. Burke*, 66 Pa. St. 336; *Russell v. Bell*, 44 Pa. St. 47; *Young v. Lyman*, 9 Pa. St. 449. See, also, *Rude v. Mitchell*, 97 Mo. 365, 11 S. W. 225, and notes in 24 Am. Law Rev., p. 857. In Maine the statute

makes no distinction between a contractor and a subcontractor as regards the statement of the claim. *Wescott v. Bunker*, 83 Maine 499, 22 Atl. 388.

<sup>39</sup> *Gray v. Dick*, 97 Pa. St. 142, per *Trunkey, J.*; *Lee v. Burke*, 66 Pa. St. 336; *Brown v. Myers*, 145 Pa. St. 17, 23 Atl. 254.

<sup>40</sup> *Harnish v. Herr*, 98 Pa. St. 6.

**§ 1417. Statutes requiring the filing of true account.**—Statutes which require the filing of a true account of the work done or materials furnished necessarily imply an itemized or detailed statement of the transactions which are the foundation of the lien.<sup>41</sup> The particulars of the lien serve for the protection not only of the owner, but for the protection of the contractor, and of purchasers and others who may become interested in the property subject to the lien.<sup>42</sup> The chief purpose, however, which the account serves, is to give the owner notice of the amount and character of the claim, so that he may protect himself in his future dealings with the contractor. To serve this purpose the claim should show what it is for, whether work or materials; and a notice which does not show this is defective.<sup>43</sup> Stating a balance due is not sufficient.<sup>44</sup>

**§ 1418. Bill of particulars when required by statute not complied with by filing for balance due.**—Under statutes which require a bill of particulars or account, a statement of the balance due is insufficient.<sup>45</sup> But if the entire work be done under a contract for a definite price, it is sufficient to

<sup>41</sup> *Shackleford v. Beck*, 80 Va. 573; *Carson v. White*, 6 Gill (Md.) 17; *Greene v. Ely*, 2 Greene (Iowa) 508; *Rude v. Mitchell*, 97 Mo. 365, 11 S. W. 225; *School District v. Howell*, 44 Kans. 285, 24 Pac. 365; *Grace v. Oakland Bldg. Assn.*, 166 Ill. 637, 46 N. E. 1102, revg. 63 Ill. App. 339.

<sup>42</sup> *Valentine v. Ranson*, 57 Iowa 179, 10 N. W. 338; *Noll v. Swineford*, 6 Pa. St. 187; *Shackleford v. Beck*, 80 Va. 573; *Carson v. White*, 6 Gill (Md.) 17.

<sup>43</sup> *German Lutheran Church v. Heise*, 44 Md. 453, 454; *Thomas v. Barber*, 10 Md. 380; *Heinrich v. Carondelet Gymnastic Soc.*, 8 Mo. App. 588; *Foster v. Wulfig*, 20

Mo. App. 85; *Codling v. Nast*, 8 Mo. App. 573. For a statement held to be sufficient see *Mills v. Olsen*, 43 Mont. 129, 115 Pac. 33.

<sup>44</sup> *Cannon v. Williams*, 14 Colo. 21, 23 Pac. 456; *Hanna v. Colo. Sav. Bank*, 3 Colo. App. 28, 31 Pac. 1020. Statement of balance due is sufficient under *Carrols Ky. Stat.* 1909, § 2468; *Dobson v. Thurman*, 30 Ky. L. 1331, 101 S. W. 310.

<sup>45</sup> *Rude v. Mitchell*, 97 Mo. 365, 11 S. W. 225; *Graves v. Pierce*, 53 Mo. 423; *Coe v. Ritter*, 86 Mo. 277, 287; *McWilliams v. Allen*, 45 Mo. 573; *Burrough v. White*, 18 Mo. App. 229; *Martin v. Burns*, 54 Kans. 641.

state this without any attempt to give the various items for the work done and material furnished.<sup>46</sup> If the items of building material are particularly and accurately described, except that the price of each item is not given, but the whole amount of the price agreed upon is given at the foot of the account, the statement is sufficient.<sup>47</sup> In like manner, under a statute which requires a statement of the terms, time given, and conditions of the contract, if there are no special terms, time or conditions, of course none need be stated.<sup>48</sup>

**§ 1419. Account containing a lumping charge.**—An account containing a lumping charge, in which is mingled an item for which no lien is given, will not support a lien; and the defect can not be cured by oral evidence from which the jury may separate items for which a lien is given from those for which a lien is not given.<sup>49</sup> Thus, if the account filed is a single item, being the contract price for the carpenter's work upon a house, and the contract shows that this price was not for work alone, but was also for superintending the work, it is held that the defect in the account could not be cured by an apportionment of the amount which was

<sup>46</sup> *Pool v. Wedemeyer*, 56 Tex. 287; *Doolittle v. Plenz*, 16 Nebr. 153, 20 N. W. 116; *Manly v. Downing*, 15 Nebr. 637, 19 N. W. 601; *Davis v. Hines*, 6 Ohio St. 473; *Thomas v. Huesman*, 10 Ohio St. 152; *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422, affg. 61 Ill. App. 310; *Moore v. Parish*, 163 Ill. 93, 45 N. E. 573, revg. 58 Ill. App. 617, citing text; *Bowman Lumber Co. v. Newton*, 72 Iowa 90; *Wescott v. Bunker*, 83 Maine 499, 22 Atl. 388; *Hilliker v. Francisco*, 65 Mo. 598. Where the contract has been abandoned, the account must be

itemized. *Nixon v. Cydon Lodge*, 56 Kans. 298, 43 Pac. 236.

<sup>47</sup> *Bardwell v. Anderson*, 13 Mont. 87, 32 Pac. 285; *Queal v. Stradley*, 117 Iowa 748, 90 N. W. 588; *Grace v. Nesbitt*, 109 Mo. 9, 18 S. W. 1118. Contra, *Ehlin v. Murphy*, 170 Ill. 399, 48 N. E. 956, affg. 69 Ill. App. 555.

<sup>48</sup> *Lonkey v. Wells*, 16 Nev. 271.

<sup>49</sup> *Edgar v. Salisbury*, 17 Mo. 271; *Kershaw v. Fitzpatrick*, 30 Mo. App. 575; *Nelson v. Withrow*, 14 Mo. App. 270. But see *Scheibner v. Cohnen*, 108 Mich. 165, 65 N. W. 760. Contra, where, however, the claims were not lumped.

fairly due for work from the amount which was due for superintending the work.<sup>50</sup> The amount of the lien claim must appear clearly and definitely from the account filed.

**§ 1420. Rule under some statutes.**—Under some statutes it is sufficient to state the amount of the lien claim without giving the items that make up such amount.<sup>51</sup> This is especially the case where all the items for labor and materials are furnished under an entire contract for a specified sum; and accordingly it need not appear what part of the amount due is for labor, as distinguished from the amount due for materials.<sup>52</sup> The true amount, and not the items that make it up, is the material thing to be shown, and the items are not so important for the purpose of the certificate, as they are in making or creating proof of the account.<sup>53</sup>

**§ 1421. In general.**—It is only necessary that the statement or notice of lien should so describe the property that it can be reasonably recognized. In other words, a description is sufficient if it contains enough to enable a person who is familiar with the locality to identify the land intended to be described with reasonable certainty.<sup>54</sup> There

<sup>50</sup> *Nelson v. Withrow*, 14 Mo. App. 270.

<sup>51</sup> *Ricker v. Joy*, 72 Maine 106; *Wescott v. Bunker*, 83 Maine 499, 22 Atl. 388; *Lonkey v. Wells*, 16 Nev. 271; *Brennan v. Swasey*, 16 Cal. 140, 142, 76 Am. Dec. 507; *Selden v. Meeks*, 17 Cal. 128, 131; *Garrison v. Hawkins Lumber Co.*, 111 Ala. 308, 20 So. 427.

<sup>52</sup> *Wescott v. Bunker*, 83 Maine 499, 22 Atl. 388. See ante, § 1418.

<sup>53</sup> *Sexton v. Weaver*, 141 Mass. 273, 6 N. E. 367, per W. Allen, J.; *Whittier v. Blakely*, 13 Ore. 546, 11 Pac. 305.

<sup>54</sup> See post, § 1600. California: *Tibbetts v. Moore*, 23 Cal. 208, 209;

*Hotaling v. Cronise*, 2 Cal. 60; *Tredinnick v. Red Cloud Consolidated M. Co.*, 72 Cal. 78, 13 Pac. 152; *Willamette Steam Mills Co. v. Kremer*, 94 Cal. 205, 29 Pac. 633; *D. I. Nofziger Lumber Co. v. Waters*, 10 Cal. App. 89, 101 Pac. 38; *Patten & Danies Lumber Co. v. Gibson*, 9 Cal. App. 23, 98 Pac. 37. Colorado: *Martin v. Simmons*, 11 Colo. 411, 18 Pac. 535. Connecticut: *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325; *Cronan v. Corbett*, 78 Conn. 475, 62 Atl. 662. Delaware: *France v. Woolston*, 4 Houst. (Del.) 557. Florida: *Emerson v. Gainey*, 26 Fla. 133, 7 So. 526. Illinois:



is generally great reluctance to declaring a claim invalid merely by reason of a loose description; and the jury is generally allowed to determine whether the land is in fact

- Quackenbush v. Carson, 21 Ill. 99; Blanchard v. Fried, 162 Ill. 462, revg. 85 Ill. App. 622. Indiana: White v. Stanton, 111 Ind. 540, 13 N. E. 48; Crawfordsville v. Boots, 76 Ind. 32; Caldwell v. Asbury, 29 Ind. 451; Newcomer v. Hutchings, 96 Ind. 119; McNamee v. Rauch, 128 Ind. 59, 27 N. W. 423; Quack v. Schmid, 131 Ind. 185, 30 N. E. 514; Stephens v. Duffy, 41 Ind. App. 385, 83 N. E. 268; Windfall Natural Gas Mining & Oil Co. v. Roe, 41 Ind. App. 687, 84 N. E. 996. Kansas: Eaton v. Hixon, 35 Kans. 663, 12 Pac. 22. Kentucky: Mivelaz v. Johnson, 124 Ky. 251, 98 S. W. 1020, where description began ten feet too far south and included sixteen feet of the land. Massachusetts: Patrick v. Smith, 120 Mass. 510; Bristow v. Evans, 124 Mass. 548; Parker v. Bell, 7 Gray (Mass.) 429; Cleverly v. Moseley, 148 Mass. 280, 19 N. E. 394; Pollock v. Morrison, 177 Mass. 412, 59 N. E. 80. See Pollock v. Morrison, 176 Mass. 83, 57 N. E. 326. Minnesota: North Star Iron Works Co. v. Strong, 33 Minn. 1, 21 N. W. 740; Nystrom v. London &c. Mortg. Co., 47 Minn. 31, 49 N. W. 394; Northwestern Cement Co. v. Norwegian Seminary, 43 Minn. 449, 45 N. W. 868; McCarty v. Van Etten, 4 Minn. 461; Russell v. Hayden, 40 Minn. 88, 41 N. W. 456; Tulloch v. Rogers, 52 Minn. 114, 53 N. W. 1063; Doyle v. Wagner, 100 Minn. 380, 111 N. W. 275; American Bridge Co. v. Houstain, 113 Minn. 16, 128 N. W. 1014. Missouri: Holland v. McCarty, 24 Mo. App. 82; De Witt v. Smith, 63 Mo. 263; Wright v. Beardsley, 69 Mo. 548; Bradish v. James, 83 Mo. 313; Mechanics' P. M. Co. v. Nast, 7 Mo. App. 147; Hooven, Owens & Reutschler Co. v. Featherstone, 99 Fed. 180. Montana: Vantilburgh v. Black, 2 Mont. 371. Nebraska: White Lake Lumber Co. v. Russell, 22 Nebr. 126, 34 N. W. 104, 3 Am. St. 262. New York: Tinker v. Geraghty, 1 E. D. Smith (N. Y.) 687; Hurley v. Tucker, 128 App. Div. (N. Y.) 580, 142 N. Y. S. 980, affd. 198 N. Y. 534, 92 N. E. 1087; Hall v. Thomas, 111 N. Y. S. 979. Oregon: Kezartee v. Marks, 15 Ore. 529, 16 Pac. 407. Pennsylvania: Knabb's App., 10 Pa. St. 186, 51 Am. Dec. 472; Ewing v. Barras, 4 Watts & S. (Pa.) 467; McClintock v. Rush, 63 Pa. St. 203; Kennedy v. House, 41 Pa. St. 39, 80 Am. Dec. 594. See Linden Steel Co. v. Imperial Refining Co., 146 Pa. St. 4, 23 Atl. 800; Short v. Ames, 121 Pa. St. 530, 15 Atl. 607. South Dakota: Cole v. Custer County Agric. &c. Assn., 3 S. Dak. 272, 52 N. W. 1086. Washington: Kellogg v. Little &c. Mfg. Co., 1 Wash. St. 407, 25 Pac. 461. West Virginia: A contractor is required to file a true account in his notice of lien and describe the property

described.<sup>55</sup> Only such descriptions as are calculated to mislead subsequent purchasers and creditors,<sup>56</sup> or fail to locate the premises, invalidate the claim.<sup>57</sup> A description in a claim can not be supplied by parol evidence, but an ambiguity may be explained and the premises identified by such evidence.<sup>58</sup> A description which is correct for a lot numbered fourteen on a certain survey is not sufficient to create a lien on lot thirteen on the same survey. Such a description is not helped by a statutory provision that any error or mistake in the description shall not affect the validity of the lien, provided the property may be identified by the description. Nor is such description aided by a reference to the lot as the lot on which there are "certain frame buildings and outhouses," as such description might apply to any lot on which such buildings stood, even though it appears that there were no buildings on lot fourteen, while there were such on lot thirteen.<sup>59</sup>

The land may be described by the buildings or structures covering the land, if it is sought to subject only the land so covered to the lien, and the buildings are such in character, or are so described, as to be readily identified.<sup>60</sup> A mine

definitely so it can be identified. *O'Neal v. Taylor*, 59 W. Va. 370, 53 S. E. 471. Wisconsin: *Brown v. La Crosse City Gaslight Co.*, 16 Wis. 555.

<sup>55</sup> *Cleverly v. Moseley*, 148 Mass. 280, 19 N. E. 394; *Kezartee v. Marks*, 15 Ore. 529, 16 Pac. 407.

<sup>56</sup> *Ewing v. Barras*, 4 Watts & S. (Pa.) 467; *National Lumber Co. v. Bowman*, 77 Iowa 706, 42 N. W. 557; *Drexel v. Richards*, 50 Nebr. 509, 70 N. W. 23, 48 Nebr. 732, 67 N. W. 742.

<sup>57</sup> *McCarty v. Van Etten*, 4 Minn. 461; *Mt. Tacoma Mfg. Co. v. Cultum*, 5 Wash. 294, 32 Pac. 95; *Warren v. Quade*, 3 Wash. 750,

29 Pac. 827; *Young v. Howell*, 5 Wash. 239, 31 Pac. 629.

<sup>58</sup> *Munger v. Green*, 20 Ind. 38; *McNamee v. Rauch*, 128 Ind. 59, 27 N. E. 423.

<sup>59</sup> *Goodrich Lumber Co. v. Davie*, 13 Mont. 76, 32 Pac. 282. See *Western Cornice & C. Co. v. Leavenworth*, 52 Nebr. 418, 72 N. W. 592.

<sup>60</sup> *Brown v. Wright*, 25 Mo. App. 54; *Holland v. McCarty*, 24 Mo. App. 82; *Tibbetts v. Moore*, 23 Cal. 208; *Kennedy v. House*, 41 Pa. St. 39; *Harker v. Conrad*, 12 Serg. & R. (Pa.) 301; *Scholes v. Hughes*, 77 Tex. 482, 14 S. W. 148, describing a "brick city hall" in a town

which is well known may be described by name, the county, township, and mining district being also mentioned.<sup>61</sup> A quartz mill may be described by the name by which it is known in a town and county named.<sup>62</sup>

**§ 1422. Insufficient description of property in a notice.—**

A notice of a lien which does not specify the lot or building on which the lien is claimed, except by the name of the street, or the name of the county in which it is situated, is insufficient.<sup>63</sup> A statement that the property upon which the lien is claimed is a line of street railway owned by a certain corporation in a city named, it appearing that the corporation had several lines of railway, to either of which such designation would be equally applicable, is insufficient.<sup>64</sup> The same certainty of description is requisite as in case of a levy under an execution, so that the court may be informed what land to order to be sold, and the purchaser may be able to locate it. Certainty of description is also requisite to enable incumbrancers and creditors to determine from the record what property is covered by the lien.<sup>65</sup> Under a statute which allows a lien upon the improvement, and upon the land upon which it is situated to the extent of one acre, the particular acre must be described with reasonable and convenient certainty.<sup>66</sup> A statement of lien which describes the structure, and states that it is situated upon a certain eighty-acre tract of land, and claims a lien

named; *Strawn v. Cogswell*, 28 Ill. 457, describing "a mill belonging to" a person named; *Brown v. The La Crosse City Gaslight & Coke Co.*, 16 Wis. 555, describing the works of the defendant company.

<sup>61</sup> *Tredinnick v. Red Cloud Consolidated M. Co.*, 72 Cal. 78, 13 Pac. 152.

<sup>62</sup> *Tibbetts v. Moore*, 23 Cal. 208, 212.

<sup>63</sup> *Basshor v. Kilbourn*, 3 McAr. (D. C.) 273.

<sup>64</sup> *Fleming v. St. Paul City R. Co.*, 47 Minn. 124, 49 N. W. 661.

<sup>65</sup> *Montgomery Iron Works v. Dorman*, 78 Ala. 218; *Lemly v. La Grange Iron & Steel Co.*, 65 Mo. 545.

<sup>66</sup> *Montgomery Iron Works v. Dorman*, 78 Ala. 218; *Williams v. Porter*, 51 Mo. 441; *Penrose v. Calkins*, 77 Cal. 396, 19 Pac. 641.

upon "one acre of land," without further description or location of such acre, is insufficient.<sup>67</sup>

A notice of a lien that describes the building as one of seven distinct buildings situate on two certain lots, and sets forth that the demand is for one-seventh of the aggregate of labor done and material furnished in the erection of the seven buildings, is void for uncertainty.<sup>68</sup> A claim filed for the construction "of several buildings and a certain oil refinery," without a further description of the buildings, and with an erroneous description of the locality where they are situated, is radically defective.<sup>69</sup>

### § 1423. Notice not invalid for describing too much land.

—A lien is not invalid because the certificate claims too much land, where it appears that the claimant did not intend to claim more land than he was entitled to, and, on discovering the error, filed an informal release of the land not covered by nor appurtenant to the building, and the owner has not been injured, nor have the rights of others been affected.<sup>70</sup> But on the other hand the lien can not extend beyond the land described in the lien claim filed.<sup>71</sup>

<sup>67</sup> *Bedsole v. Peters*, 79 Ala. 133; *Turner v. Robbins*, 78 Ala. 592.

<sup>68</sup> *Merchant v. Humeston*, 2 Wash. T. 433, 7 Pac. 903. Where several houses are built on one lot it is not necessary to describe the land belonging to each house in the certificate, unless such description can be found in a deed of the premises. *Sprague Inv. Co. v. Mouat Lumber & Co.*, 14 Colo. App. 107, 60 Pac. 179.

<sup>69</sup> *Short v. Ames*, 121 Pa. St. 530, 15 Atl. 607.

<sup>70</sup> *Shattuck v. Beardsley*, 46 Conn. 386; *Derrickson v. Edwards*, 29 N. J. L. 468, 80 Am. Dec. 220; *Whitenack v. Noe*, 11 N. J. Eq.

321; *White Lake Lumber Co. v. Russell*, 22 Nebr. 126, 34 N. W. 104; *Holland v. McCarty*, 24 Mo. App. 82; *Oster v. Rabeneau*, 46 Mo. 595, 596; *Bradish v. James*, 83 Mo. 313, 317; *De Witt v. Smith*, 63 Mo. 263; *Bissell v. Lewis*, 56 Iowa 231, 9 N. W. 177; *North Star Iron Works Co. v. Strong*, 33 Minn. 1, 21 N. W. 740; *Lane v. Jones*, 79 Ala. 156; *White v. Stanton*, 111 Ind. 540, 13 N. E. 48; *Crawfordsville v. Johnson*, 51 Ind. 397;

<sup>71</sup> *McDonald v. Lindall*, 3 Rawle (Pa.) 492; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744.

§ 1424. **Imperfect but sufficient descriptions.**—A notice describing the land as “lots one, four, five, and ten in a certain block \* \* \* containing eighty acres, more or less, as well as the dwelling-house erected thereon,” is sufficient to put all parties interested upon inquiry as to the particular lot upon which the house is situate; though the fair inference is, that the four lots comprised as an entirety a lot of eighty acres, on some part of which the house was erected.<sup>72</sup>

Where lots were described as being in a certain square, the number of which was erroneously stated, and reference was made to the book and page of a registry, where the square intended was described, and where the description contained in the notice was applicable alone to the last-mentioned square, and where no one had been misled by the notice, the lien was upheld on the ground that the property was sufficiently identified.<sup>73</sup>

A notice which names the section, township, and range in which the land lies, though it fails to mention the county, is defective and incomplete, but not wholly uncertain; and the defect may be supplied by averments in the action to foreclose the lien that the land was situate in a certain county, that all the parties resided in that county, and that the notice was duly recorded in that county.<sup>74</sup>

Irwin v. Crawfordsville, 72 Ind. 111; Scott v. Goldinhorst, 123 Ind. 268, 24 N. E. 333; Heyde v. Sult, 22 Ind. App. 83, 52 N. E. 456; Western Iron Works v. Montana Pulp & Co., 30 Mont. 550, 77 Pac. 413.

<sup>72</sup> White v. Stanton, 111 Ind. 540, 13 N. E. 48. A description of adjoining half lots is sufficient although the descriptive words east and west are applied to the wrong lot number. Evans v. Sanford, 65

Minn. 271, 68 N. W. 21. See also, Union Lumber Co. v. Simon, 150 Cal. 751, 89 Pac. 1077.

<sup>73</sup> McLean v. Young, 2 MacAr. (D. C.) 184. See Hammond & Co. v. Hartzell, 125 Mich. 177, 84 N. W. 52; Mivelaz v. Johnson, 30 Ky. L. 389, 98 S. W. 1020; Broxton Artificial Stone Works v. Jowers, 4 Ga. App. 91, 60 S. E. 1012.

<sup>74</sup> White v. Stanton, 111 Ind. 540, 13 N. E. 48.

A description of land by metes and bounds which excludes the parcel in which the lien is claimed is insufficient though followed by a reference to a deed describing the entire tract.<sup>75</sup>

Where the land against which a lien is claimed is imperfectly described, but the building is accurately described, the lien has been held good against the building alone.<sup>76</sup>

A description of the property as "thirty lengths of cribbing at Mills Station" is too indefinite to sustain a lien, for any thirty lengths of cribbing at that station would answer the description.<sup>77</sup>

§ 1425. **Description of limited area of land.**—Where it is required that land against which a lien is claimed shall be described, and that the land subject to a lien shall be limited to a certain number of acres, a description of the entire tract of land sufficient to identify it is generally all that is required in the statement of the claim. The court may determine the shape and location of the limited area.<sup>78</sup> Thus a description of a tract of land as situated on a certain creek, and as being the same land conveyed to the employer by a deed, the book and page of the record of which is given, is sufficient; and the location of the particular portion of the land upon which the house was built, and upon which a lien is claimed, is sufficiently described as "the north or upper part of the tract." The court may order an official survey of this portion in order to fix the lines of this lot, as a basis for the foreclosure of the lien by sale.<sup>79</sup>

<sup>75</sup> *Muto v. Smith*, 175 Mass. 175, 55 N. E. 1041.

<sup>76</sup> *Hannah &c. Mercantile Co. v. Mosser*, 105 Mich. 18, 62 N. W. 1120.

<sup>77</sup> *Roose v. Billingsly & N. C. Co.*, 74 Iowa 51, 36 N. W. 885.

<sup>78</sup> *North Star Iron Works Co. v. Strong*, 33 Minn. 1, 21 N. W.

740; *Tibbetts v. Moore*, 23 Cal. 208; *Edwards v. Derrickson*, 28 N. J. L. 39, *affd.* 29 N. J. L. 486, 80 Am. Dec. 220; *McCoy v. Quick*, 30 Wis. 521; *Hill v. La Crosse & M. R. Co.*, 11 Wis. 214.

<sup>79</sup> *Swope v. Stantzenberger*, 59 Tex. 387.

Under a statute which gives a lien to the extent of one acre, and requires in the statement of claim a true description of the property, or so near as to identify the same, a description of fifteen acres of ground by the exterior boundaries is insufficient.<sup>80</sup> This affords no identification of the one acre to which the lien is limited.

**§ 1426. Failure of description not cured by survey after suit filed.**—A failure to describe the acre or other quantity of land to which the lien is limited can not be cured by a survey after suit is brought, and setting out in the petition the exact boundaries of the land upon which the lien is claimed,—at least not as against a third person purchasing the premises.<sup>81</sup> But in a case where a lien was claimed upon a single town lot, which embraced a fraction over an acre, it was held that the excessive description of the fractional part ought not, as between the lienor and the owner of the lot for whom the work was done, to vitiate the lien where the true limit of the lot to be affected might be so easily ascertained by a commissioner or other agent of the court.<sup>82</sup>

**§ 1427. Limitation from completion of building.**—The completion of a house dates from the completion of any final or additional work done at the request of the owner, though it was substantially completed at an earlier date. Thus, where a contractor substantially completed a house upon the 6th of August, and the owner went into possession during that month, but some time in September the contractor furnished and hung the blinds, and on the 22d day of November, at the request of the owner, the contractor furnished materials and did final work to the value of fourteen dollars, and this work was necessary to the comfortable

<sup>80</sup> *Ranson v. Sheehan*, 78 Mo.

668; *Wright v. Beardsley*, 69 Mo.

548; *Williams v. Porter*, 51 Mo.

441.

<sup>81</sup> *Ranson v. Sheehan*, 78 Mo.

668.

<sup>82</sup> *Oster v. Rabeneau*, 46 Mo. 595.

use of the house in winter, no rights of third parties having intervened, it was held that the final work was to be regarded as sufficient to preserve the lien.<sup>83</sup>

A statement filed after the expiration of the time limited is ineffectual to create a lien.<sup>84</sup>

The parties to a building contract may, however, agree that the building shall be considered as completed, though there is some final work to be done upon it before it is actually completed, and in that case the limitation will run from the time of the acceptance of the building under such agreement, and not from the time of its actual completion.<sup>85</sup>

The obtaining by a contractor of the architect's certificate that the work is satisfactory, in accordance with a condition of the contract is not essential to his right to enforce a mechanic's lien, where his failure to obtain such certificate is due to collusion between the architect and the owner.<sup>86</sup>

**§ 1428. Same limitation affecting subcontractors.**—A subcontractor who furnishes labor or materials to a contractor, who has a contract for the erection and completion of a building, should not file his lien and commence suit to enforce it within the time limited from and after the time when he ceased to furnish labor or materials under his subcontract, but within the time limited from and after the completion of the building.<sup>87</sup> As between the owner of the property and the contractor and subcontractor, the con-

<sup>83</sup> *Nichols v. Culver*, 51 Conn. 177.

<sup>84</sup> *Hug v. Hintrager*, 80 Iowa 359, 45 N. W. 1035. Even as to a purchaser with notice. *Von Tobel v. Ostrander*, 158 Ill. 499, 42 N. E. 152, affg. 56 Ill. App. 381.

<sup>85</sup> *Franklin St. Church Trustees v. Davis*, 85 Va. 193, 7 S. E. 245.

<sup>86</sup> *McDonald v. Patterson*, 186 Ill. 381, affg. 84 Ill. App. 326.

<sup>87</sup> *Clough v. McDonald*, 18 Kans. 114; *Delahay v. Goldie*, 17 Kans. 263, 265; *Cunningham v. Barr*, 45 Kans. 158, 25 Pac. 583. Where no distinct contract is made for a portion of the building, a statement filed before the completion of the building is premature and ineffectual. *Chicago Lumber Co. v. Tomlinson*, 54 Kans. 770, 39 Pac. 694.



tractor and the subcontractor should be considered as substantially one and the same person with reference to the completion of the building, and therefore the building should be considered as completed only when the contractor has completed his part. No privity of contract exists between the owner of the building and the subcontractor, but the rights of the latter are based solely upon his contract with the contractor. The contractor, and not the owner of the building, is the subcontractor's debtor, and the subcontractor has no right to claim that the building has been completed until the contractor, under whom he claims, has such right. The sum agreed to be paid by the owner to the contractor for constructing a building is a fund which may be held, so far as it will go, for the payment of all the claims of all the various subcontractors for work and materials furnished to the contractor; and it is a matter of convenience, policy, and justice that all persons entitled to payment or contribution out of this fund should be able to reach it, and get their proportionate shares of it at the same time, or within the same period of time.<sup>88</sup>

**§ 1429. Transfer of title during progress of building.**—Upon a transfer of title during the progress of a building, the building can not be considered completed at the date of such transfer as regards contractors and workmen who continue the work under the purchaser, and complete the building as originally planned.<sup>89</sup> The completion of a build-

<sup>88</sup> Davis v. Bullard, 32 Kans. 234, 4 Pac. 75, per Valentine, J.

<sup>89</sup> Perry v. Conroy, 22 Kans. 716; Gordon v. Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273; Edwards v. Derickson, 28 N. J. L. 39, affd. 29 N. J. L. 468, 80 Am. Dec. 220; Hern v. Hopkins, 13 Serg. & R. (Pa.) 269; Pennock v. Hoover, 5 Rawle (Pa.) 291. Where, during the

progress of work for a railroad company, it sells to another company, which assumes to pay its grantor's debts, it is not necessary for the contractors to file their lien within the time limited after the sale, in order to preserve their lien against the latter company, since the contract will support a lien against the former com-

ing is something apparent to the sight. Any one having a claim can without trouble watch for the actual completion of the building, and file his lien so as to preserve it. But of a change of title a claimant might have no knowledge unless he watched the public records; and if such change of title were the completion of the building, as regards the contractors and workmen engaged upon it, their only safety at any time would lie in filing their liens directly upon the furnishing of any material, or the doing of any work. Such was not the intention of the laws.

**§ 1430. Filing statement prematurely.**—A statement of lien filed prematurely, equally with a statement filed too late, creates no lien. Thus, under statutes which provide for the filing of a statement for claim of lien within a certain time after the completion of the building, a statement filed before the completion of the building is premature.<sup>90</sup> A lien for the construction of a dwelling-house filed before the doors of a house are hung, the plumbing finished, the closets and bath-room completed, ventilators placed, and mouldings put in, is premature, and can not be enforced. Such omissions are not within a provision that "trivial imperfections," shall not be deemed a lack of completion so as to prevent the

pany, and all who take the property with notice of the obligation. *Williams v. Chicago & C. R. Co.*, 112 Mo. 463, 20 S. W. 631, 34 Am. St. 403.

<sup>90</sup> *Seaton v. Chamberlain*, 32 Kans. 239, 4 Pac. 89; *Davis v. Bul-  
lard*, 32 Kans. 234, 4 Pac. 75; *Craw-  
ford v. Blackman*, 30 Kans. 527, 1  
Pac. 136; *Catlin v. Douglass*, 33  
Fed. 569; *Roylance v. San Luis  
Hotel Co.*, 74 Cal. 273, 15 Pac. 777,  
20 Pac. 573; *Schwartz v. Knight*,  
74 Cal. 432, 16 Pac. 235; *Clark v.  
Anderson*, 88 Minn. 200, 92 N. W.

964; *General Fire & C. Co. v. Chap-  
lin*, 183 Mass. 375, 67 N. E. 321;  
*The Tabor-Pierce Lumber Co. v.  
The International Trust Co.*, 19  
Colo. App. 108, 75 Pac. 150. But  
see, *Waterbury Lumber & C. Co. v.  
Coogan*, 73 Conn. 519, 48 Atl. 204.  
In Virginia it has been held that  
a subcontractor who prematurely  
files a mechanic's lien on the work  
in hand is liable in an action on  
the case for libel for the injury  
occasioned thereby to the contrac-  
tor. *Moore v. Rolin*, 87 Va. 107,  
15 S. E. 520, 16 L. R. A. 625.

filing of the lien. Such things are necessary to be done to effect a "completion" of the building.<sup>91</sup>

But if a statement be filed prematurely, and a judgment is rendered in a suit to enforce the lien founded on such a statement, such judgment is no bar to another action brought subsequently and within the proper time, and upon a proper statement, against the same parties to enforce the same lien.<sup>92</sup>

**§ 1431. Filing lien within a limited time after last work done.**—Under statutes which provide for the filing of a lien within a limited time after the last work was performed or the last material supplied, or within a limited time after the indebtedness has accrued, it becomes material to determine whether all the work was done or all the materials were supplied under one contract or order, or under separate contracts or orders. This is often a question of much nicety and difficulty. If there was a single continuing contract, such as a contract to furnish all the lumber for building a house, then the statement of lien must be filed within the limited time from the delivery of the last item of lumber. But if there was no general understanding or agreement affecting all the lumber to be furnished, but it was furnished under separate orders from time to time as it was needed, and the purchaser was under no obligation to purchase of that particular seller, then the statement should be filed within the time limited after the delivery of each order.<sup>93</sup> If, for instance, the original contractor has died after work under it was begun, the contract is thereby ended, and a subcontractor has no lien under that contract for further

<sup>91</sup> Schallert-Ganahl Lumber Co. v. Sheldon, 97 Cal. xviii, 32 Pac. 235.

<sup>92</sup> Seaton v. Hixon, 35 Kans. 663, 12 Pac. 22.

<sup>93</sup> Cutcliff v. McAnally, 88 Ala. 507, 7 So. 331; Lane v. Jones, 79

Ala. 156; Livermore v. Wright, 33 Mo. 31; Allen v. Frumet Mining Co., 73 Mo. 688; Page v. Bettes, 17 Mo. App. 366; Brown & Haywood Co. v. Trone, 98 Wis. 1, 73 N. W. 561.

work done or materials furnished. Therefore, in order to obtain a lien for anything done under that contract, he must file his claim or account within the time limited after the date of the last item furnished under that contract.<sup>94</sup>

A lien claim which includes work done and material furnished under two or more separate contracts should state the dates for each, and a mere statement that the work has been finished and materials furnished within less than six months before filing the claim is not sufficient.<sup>95</sup>

Although it may not appear how much of the last item in a lien account entered into the construction of the building, yet if it appears that some part of it did so enter into the construction, within the statutory period before the filing of the lien, the lien will not be held invalid on account of the date of filing.<sup>96</sup>

An agreement extending the time for final payment in case of delay in the building is as much a part of the contract as the date set for payment and the time does not begin to run against the lien claim until final payment is due.<sup>97</sup>

**§ 1432. Notice where there are distinct contracts.**—Where there are distinct contracts for different parts of a building, as for instance one contract to do all the stone work and to furnish all the materials for the same, and another contract for the brick work, and another for the wood work, each contract must stand upon its own merits, and liens under the different contracts must be filed within the time limited from the time of the completion of the work under each contract.<sup>98</sup> A subcontractor who has furnished

<sup>94</sup> Gauss v. Hussmann, 22 Mo. App. 115.

<sup>95</sup> Clark v. Boarman, 89 Md. 428, 43 Atl. 926.

<sup>96</sup> Schulenberg v. Strimple, 33 Mo. App. 154.

<sup>97</sup> Bloomington Hotel Co. v.

Garthwait, 227 Ill. 613, 81 N. E. 714.

<sup>98</sup> Cutcliff v. McAnnally, 88 Ala. 507, 7 So. 331; Kearney v. Wurdeman, 33 Mo. App. 447; Livermore v. Wright, 33 Mo. 31; Page v. Bettes, 17 Mo. App. 366; Peck v.

materials to one who has contracted merely to do the stone work of a building may regard the building as completed when he and the contractor to whom he has furnished materials have completed the contract for the stone work, and may file his lien and prosecute his action to enforce the lien within the time limited from the completion of that contract.<sup>99</sup>

**§ 1433. Notice for wages under a monthly or yearly contract.**—Where labor is performed under a contract for wages by the month or year, and the laborer continues in the service much beyond the term of a month or year, under a statute which provides for filing an account within a specified time after the labor has been performed, he is not required to file an account within such time after the expiration of each term of a month or year, but may file it within the proper time after the whole period of service.<sup>1</sup> Where the laborer quits work for more than sixty days and then goes back and works for six hours on the same job, he can not tack the two claims and file a lien for the whole.<sup>2</sup>

**§ 1434. Where materials are furnished for several houses under one contract.**—Where materials are furnished for several houses under one entire contract, and some of

Bridwell, 10 Mo. App. 524; Henry v. Hinds, 18 Mo. App. 497. Two separate contracts can not be tacked together for the purpose of extending the lien. Valley Lumber &c. Co. v. Driessel, 13 Idaho 662, 93 Pac. 765; Badger Lumber Co. v. Stipp, 157 Mo. 366, 57 S. W. 1059; Hooven, Owens & Reuschler Co. v. Featherstone, 99 Fed. 180; Henry & Coatsworth Co. v. Halter, 58 Nebr. 685, 79 N. W. 616; Todd v. Gernert, 223 Pa. 103, 72 Atl. 249;

Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho 662, 93 Pac. 765; Fitzpatrick v. Ernst, 102 Minn. 195, 113 N. W. 4.

<sup>99</sup> Crawford v. Blackman, 30 Kans. 527, 1 Pac. 136; Malone v. Zielian, 1 Man. (Del.) 285, 2 Hard. (Del.) 35, 40 Atl. 944.

<sup>1</sup> Alvord v. Hendrie, 2 Mont. 115; Ah Louis v. Harwood, 140 Cal. 500, 74 Pac. 41.

<sup>2</sup> Hansen v. Kinney, 46 Nebr. 207, 64 N. W. 710; Buchanan v. Selden, 43 Nebr. 559, 61 N. W. 732.

the material is furnished and used in one of the houses within the time limited for filing a lien, the lien remains against all of them, although the claimant may be obliged to apportion his demand among them, and is restricted in his recovery against the several houses to the amount claimed against each respectively.<sup>3</sup>

But where brick for a block of houses was furnished without a special contract, but as ordered during the progress of the work, and three of the houses were finished and sold by the owner, these houses could not be subjected to a lien for brick furnished afterwards to be used upon the other houses in the block.<sup>4</sup>

Where a contract was made with a bricklayer to do all the brick and stone work about the erection of a building, including the laying of the pavement, the contract being entire, it was held that a mechanic's lien could be filed within the time limited from the completion of the work, including the pavement; but it was also held that, though the contract for constructing the building and laying the pavement be entire, if the building was finished, and the contract treated by the parties as complete, and a considerable time was allowed to elapse before the pavement was laid, and other rights intervened, the claim filed after the expiration of the time limited from the date of the last work upon the building was too late.<sup>5</sup>

Where a building contract is entire, it is sufficient to file a lien within the time limited after the entire contract is executed and all the work done.<sup>6</sup>

**§ 1435. Materials furnished on running account.**—The more difficult questions arise where work is done or ma-

<sup>3</sup> *Okisko County v. Matthews*, 3 Md. 168; *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614, 43 N. E. 876; *Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575; *Maryland Brick Co. v. Dunkerly*, 85 Md. 199,

36 Atl. 761; *Schmidt v. Anderson*, 253 Ill. 29, 97 N. E. 291.

<sup>4</sup> *Ortwine v. Caskey*, 43 Md. 134.

<sup>5</sup> *Yearsley v. Flanigen*, 22 Pa. St. 489.

<sup>6</sup> *Derrickson v. Edwards*, 29 N.

terials are furnished without any specific agreement, but as the same are required, and are connected only as they form parts of a connected whole in the building or improvement for which they are furnished. If a material-man begins to furnish materials for the erection or repair of a building without any specific agreement as to the amount to be furnished, or the time within which they are to be furnished, but there is a reasonable expectation that further material will be required of him, and he is afterwards called upon from time to time to furnish the same, he is generally entitled to a lien as under an entire contract.<sup>7</sup> In determining a particular case, the character of the account, the time within which the work was done or the materials furnished, and the purpose in doing the work or furnishing the materials, afford a proper ground for the presumption either that there was or was not an understanding from the com-

J. L. 468, 80 Am. Dec. 220; *Wilson v. Forder*, 30 Pa. St. 129; *Yearsley v. Flanigen*, 22 Pa. St. 489; *Fourth Baptist Church v. Trout*, 28 Pa. St. 153; *Bolton's App.* 3 Grant (Pa.) 204; *Geiss v. Rapp*, 14 Leg. Int. 116; *Hill's Est.*, 2 Clark (Pa.) 96; *Silvester v. Coe Quartz M. Co.*, 80 Cal. 510, 22 Pac. 217; *Kizer Lumber Co. v. Mosely*, 56 Ark. 544, 20 S. W. 409. In this case *Battle, J.*, said: "If the materials were furnished at short intervals, and were appropriate to the condition and progress of the building, a presumption would arise that it was understood from the beginning that the 'material-man was to furnish the same' for the construction of the building as the same should be required; and the account therefor should be considered as one continuous

account and one demand; and the last item thereof would be the date from which the limitations of the time of filing should be taken."

<sup>7</sup> *Hazard Powder Co. v. Loomis*, 2 Disney (Ohio) 544, 13 Ohio Dec. 333; *Page v. Bettes*, 17 Mo. App. 366; *Bruce v. Berg*, 8 Mo. App. 204; *Hofer's App.*, 116 Pa. St. 360, 9 Atl. 441; *Diller v. Burger*, 68 Pa. St. 432; *Singerly v. Doerr*, 62 Pa. St. 9; *State Sash Manfg. Co. v. Norwegian Seminary*, 45 Minn. 254, 47 N. W. 706; *Tonopah Lumber Co. v. Nevada Amusement Co.*, 30 Nev. 445, 97 Pac. 636; *Watkins v. Bugge*, 56 Nebr. 615, 77 N. W. 83; *Nye & Co. v. Berger*, 52 Nebr. 758, 73 N. W. 274; *Union Trust Co. v. Casserly*, 127 Mich. 183, 86 N. W. 545; *Patton v. Matter*, 21 Ind. App. 277.

mencement that the work should be done or the materials should be furnished whenever required. If the work was done or the materials furnished for separate and distinct purposes, or under distinct contracts or orders, though in executing one and the same contract with the owner, there is no presumption of a continuous account, and the right of lien must date from the time of doing the different jobs of work, or furnishing the different parcels of materials. But if there was a continuous dealing and running account, and the work was done and the materials furnished at short intervals, and were appropriate to the condition and progress of the building, a presumption arises that it was understood from the beginning that the claimants were to do the work or furnish the materials for the construction of the building as the same should be required; and in such case the last item of the account is the date from which the limitation of the time of filing of the lien is to be taken.<sup>8</sup>

§ 1436. **Continuous contract.**—Where it is to be inferred from the evidence that all the articles furnished by a contractor for the construction or repair of a house or other improvement were furnished under one contract, it is immaterial that the furnishing of the articles may have extended over a long period, or that several months may have elapsed between two items of the account.<sup>9</sup> “Where it is

<sup>8</sup> *German Luth. Church v. Heise*, 44 Md. 453, per Alvey, J.; *Matthews v. Wagenhaeuser Brewing Assn.*, 83 Tex. 604, 19 S. W. 150. But see *Stone v. Juvinall*, 125 Ill. App. 562, which holds claim must be filed within four months after first work is done. Contract was not continuous in *National Life Ins. Co. v. Ayres*, 111 Iowa 200, 82 N. W. 607; *Fitzpatrick v. Ernst*, 102 Minn. 195, 113 N. W. 4. Knowledge by the seller that a building

is being erected and his supplying suitable materials therefor is not the furnishing of materials under one contract. *Kunkle v. Reeser*, 5 Ohio N. P. 401. See also, *Calhoun Brick Co. v. Pattillo Lumber Co.*, 10 Ga. App. 181, 73 S. E. 23.

<sup>9</sup> *Fulton Iron Works v. North Centre Creek M. & S. Co.*, 80 Mo. 205; *Allen v. Frumet M. & S. Co.*, 73 Mo. 688; *Madison County Coal Co. v. Steamboat Colona*, 36 Mo. 446; *Stine v. Austin*, 9 Mo. 558;



specially agreed or impliedly understood between the parties that the account is to be kept open and continued as one, and the same continuous transaction and course of dealing, the account will be considered as one continuous account and one demand."<sup>10</sup>

§ 1437. **Presumption that accounts are based upon independent contracts.**—Where there is no immediate dependence of the parts of an account, it is true that a presumption may arise, from the lapse of a very long time between the dates of items, that they are based upon independent contracts. But this is a mere presumption, which would, of course, give way to evidence that all the items were under one continuous contract.<sup>11</sup> In a case where there had been a cessation of a year and more after part of the work was done before it was resumed, it was held that the effect of the cessation was not a question of law, but that it should be submitted to the jury to decide as a matter of fact whether

Carson v. Steamboat Daniel Hillman, 16 Mo. 256; Squires v. Fithian, 27 Mo. 134; Ballou v. Black, 17 Nebr. 389, 23 N. W. 3, 21 Nebr. 131, 31 N. W. 673; Gray v. Elbling, 35 Nebr. 278, 53 N. W. 68; Kizer Lumber Co. v. Mosely, 56 Ark. 544, 20 S. W. 409; New Ebenezer Assn. v. Gress Lumber Co., 89 Ga. 125, 14 S. E. 892; Miller v. Barroll, 14 Md. 173; Ortwine v. Caskey, 43 Md. 134; Taylor v. Doll Lead & Zinc Co., 131 Wis. 348, 111 N. W. 490; Treusch v. Shryock, 51 Md. 162. The court in this case say: "If the materials were delivered under a continuous contract, the court had no right to exclude certain items on the ground that they were delivered at long intervals. Such deliveries were matters for the consideration of the jury,

in determining whether the materials were furnished under a continuous contract, or under separate contracts with the builder."

<sup>10</sup> Boyland v. Victory, 40 Mo. 244, per Holmes, J.; Hazard Powder Co. v. Loomis, 2 Disney (Ohio) 544, 13 Ohio Dec. 333.

<sup>11</sup> Page v. Bettes, 17 Mo. App. 366; Jones v. Swan, 21 Iowa 181 (the items in the account in this case extended over a period of two and a half years); Lamb v. Hanneman, 40 Iowa 41; Allen v. Frumet M. & S. Co., 73 Mo. 688; Choteau v. Thompson, 2 Ohio St. 114; Miller v. Barroll, 14 Md. 173. And see German Luth. Church v. Heise, 44 Md. 453; Greenway v. Turner, 4 Md. 296; Smaltz v. Hagy, 4 Phila. (Pa.) 99.

the work last done was done under the original agreement with the consent of the owner, or under a distinct contract.<sup>12</sup>

**§ 1438. Abandonment of work deemed completion of work.**—The owner's or contractor's abandonment of the work upon a building is to be deemed a completion of it for the purpose of the filing of mechanics' liens by subcontractors, material-men, and laborers.<sup>13</sup> "It would be inequitable and unreasonable, and contrary to the spirit of the law, to hold that parties are absolutely barred of all rights to the lien law, where the work is prematurely stopped or abandoned without fault of such parties. Such a construction would place material-men and laborers at the mercy of the dishonesty, fickleness, or misfortunes of the owner or contractor." The abandonment should be stated in the claim of lien, and should be alleged and proved in the suit to enforce the lien.<sup>14</sup>

Under a statute which provides that a cessation from labor upon an unfinished building for thirty days shall be deemed equivalent to a completion of it, the time from which his claim must be filed runs from the end of the thirty days.<sup>15</sup>

As between the owner and the original contractor, if the abandonment of work upon a building is caused either by

<sup>12</sup> Holden v. Winslow, 18 Pa. St. 160. And see Fordham's App., 78 Pa. St. 120. Where more than thirty days elapsed between dates of employment, it was held that the subsequent labor did not revive the lien. Darrington v. Moore, 88 Maine 569, 34 Atl. 419.

<sup>13</sup> Catlin v. Douglass, 33 Fed. 569; Davis v. Bullard, 32 Kans. 234, 4 Pac. 75; Schwartz v. Knight, 74 Cal. 432, 16 Pac. 235; Basham v. Toors, 51 Ark. 309, 11 S. W. 282; Shaw v. Stewart, 43 Kans. 572, 23

Pac. 616, quoting text. Chicago Lumber Co. v. Merrimack &c. Bank, 52 Kans. 410, 34 Pac. 1045, holding the time of actual abandonment is the test, not the secret purposes of the owners. California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692, 118 Pac. 103, 113.

<sup>14</sup> Harmon v. Ashmead, 68 Cal. 321, 322, 9 Pac. 183; Germania B. & L. Assn. v. Wagner, 61 Cal. 349.

<sup>15</sup> Kerekhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 24 Pac. 648.

the consent or fault of the owner, the building is to be deemed completed for the purpose of filing a mechanic's lien.<sup>16</sup>

In like manner, if the building is destroyed without the contractor's fault while in process of construction under a contract for a stipulated compensation, payable in several specific instalments according to the progress of the work, the last, including a sum retained by the owner as security for faithful performance, being payable on the completion of the house, the owner's obligation to repay the sum retained as security accrued on the destruction of the house, and the lien must be enforced within the time limited computed from the time of such destruction.<sup>17</sup>

**§ 1439. Suspension of work and its resumption not commencement of the work.**—The suspension of the work for a short period, and its subsequent resumption without change of its original design and character, do not constitute a new commencement of the work, or affect a lien which attached when the building was originally commenced.<sup>18</sup> The work may be interrupted on account of the season of the year, and the interruption may continue for months without affecting the right of one who resumes

<sup>16</sup> *Shaw v. Stewart*, 43 Kans. 572, 23 Pac. 616; *Catlin v. Douglass*, 33 Fed. 569; *Trammell v. Mount*, 68 Tex. 210, 4 S. W. 377, 2 Am. St. 479; *Henderson v. Sturgis*, 1 Daly (N. Y.) 336.

<sup>17</sup> *Cutcliff v. McAnnally*, 88 Ala. 507, 7 So. 331.

<sup>18</sup> *Gordon v. Torrey*, 15 N. J. Eq. 112, 82 Am. Dec. 273; *Hern v. Hopkins*, 13 Serg. & R. (Pa.) 269; *American F. Ins. Co. v. Pringle*, 2 Serg. & R. (Pa.) 138; *D. L. Billings Co. v. Brand*, 187 Mass. 417, 73 N. E. 637, holding thirty-four days suspen-

sion of work was not too long. *Savoy v. Dudley*, 168 Mass. 538, 47 N. E. 424. Where interruptions were not frequent and no single suspension was for more than fourteen days and there was no change in the construction plan, it is held that the performance of the labor and furnishing the material were continuous and the lien will attach even though the work and materials were done and performed under two or more contracts. *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744.

work to claim a lien from the original commencement of the building.<sup>19</sup>

Whether there was a continuance of work during a certain period, or a cessation for a definite period, are questions of fact, and not conclusions of law, where the material point is whether or not the liens were filed in time.<sup>20</sup>

If the work upon a building is suspended in order to give the owner an opportunity to raise money with which to pay for completing the building, the contract being treated by both parties as still in force, the contractor continuing from time to time to do a small amount of work on the contract to keep his lien alive in case the owner failed to raise the money, the contractor may file his lien within the limited time after the performance of the last item of work.<sup>21</sup>

**§ 1440. No lien for work under abandoned contract.**—Where a contract has been abandoned by the parties after some work has been done under it, and a new, independent contract has been made in its place, no lien for work under the former contract can be sustained after the lapse of the time within which a lien could be enforced under the former contract standing by itself. If the provisions of the second

<sup>19</sup> *Manhattan L. Ins. Co. v. Paulison*, 28 N. J. Eq. 304.

<sup>20</sup> *Marble Lime Co. v. Lordsburg Hotel Co.*, 96 Cal. 322, 31 Pac. 164. In this case there were consolidated actions to enforce mechanics' liens. It appeared that the contractor abandoned the work in July, 1888; that defendant, the owner, continued the construction of the building thereafter; that he employed a man as keeper, and to paint the building; that the latter lived in it until July 3, 1889; that he continued painting in May, 1889, did at least three days' work in June, and did his last work on

July 3d of the same year; that no work was done thereafter; that the basement was not painted because of a dispute between defendant and the painter; that without such painting the building was not completed; that the painter did not remove his painting material, or any of his implements, prior to July 3, 1889. It was held that a finding that work on the building continued until July 3, 1889, without cessation for a period of thirty consecutive days, was not erroneous.

<sup>21</sup> *McCarthy v. Groff*, 48 Minn. 325, 51 N. W. 218.

contract are only additional to those of the first, they may be treated as one. But if they are of different date, and are inconsistent and irreconcilable, though upon the same subject-matter, the latter contract is not supplementary, but is a new and independent contract; and a lien acquired under such contract can not refer back to the former contract.<sup>22</sup>

After the suspension of the work, a claimant who is not himself in fault for the suspension may file his claim of lien, without waiting for the completion of the work; <sup>23</sup> and he may enforce it for the value of his labor performed or materials furnished up to the time of the suspension or abandonment of the work. If a subcontractor is prevented from performing the whole of his contract by reason of the failure of the contractor, the subcontractor may enforce his lien if the owner was then indebted to the contractor.<sup>24</sup>

**§ 1441. Contract for additional work or material.**—Where a mechanic furnishes labor and materials under different contracts which relate to similar kinds of work, and are in fact additional to the original contract, and are made before the work under that contract is completed, the services are regarded as continuous, and a statement may be filed within the time limited after the entire work is done, though the work under some of the contracts has ceased more than that time before the filing of the statement.<sup>25</sup>

<sup>22</sup> *Coheco Bank v. Berry*, 52 Maine 293; *Basham v. Toors*, 51 Ark. 309, 11 S. W. 282. See *Chicago & E. I. R. Co. v. Moran*, 187 Ill. 316, 58 N. E. 335, affg. 85 Ill. App. 543.

<sup>23</sup> *Knight v. Norris*, 13 Minn. 473.

<sup>24</sup> *Henderson v. Sturgis*, 1 Daly (N. Y.) 336; *Dennistoun v. McAlister*, 4 E. D. Smith (N. Y.) 729.

<sup>25</sup> *Miller v. Batchelder*, 117 Mass. 179; *Capron v. Strout*, 11

Nev. 304; *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219, 220; *Jones & Magee Lumber Co. v. Murphy*, 64 Iowa 165, 19 N. W. 898; *Rush v. Able*, 90 Pa. St. 153; *State Sash Manfg. Co. v. Norwegian Seminary*, 45 Minn. 254, 47 N. W. 796; *Mellor v. Valentine*, 3 Colo. 255; *Albright v. Smith*, 2 S. Dak. 577, 51 N. W. 590; *Minneapolis Trust Co. v. Great Northern R. Co.*, 74 Minn. 30, 76 N. W. 953.

A mechanic, while erecting a building under a written contract, orally agreed with the owner to build an additional room, and did build it, and was held to be entitled to a lien on the whole building for the work done under the oral agreement.<sup>26</sup>

Again, a brick-maker, under a contract as to price and quantity, furnished several thousand brick in the month of July to a contractor for use in a certain building. In September the contractor, having erred in his computation as to quantity, ordered and received several thousand more for the same use, for which the maker charged a greater price. It was held that the filing of the lien account within the time limited after the delivery in September was sufficient.<sup>27</sup>

Extra work done, and extra material furnished, by a contractor during the performance of his agreement, may be included in, and made a part of, his claim, if this be filed within the time allowed by statute.<sup>28</sup> Such work and materials, though outside the contract, are so closely connected with it that, in filing the claim, they may be included with the work done and materials furnished under the contract.<sup>29</sup> A contract for extra work, or for the extension of time, under a building contract, need not be in writing.<sup>30</sup>

§ 1442. **Date of last material supplied but not used.**—A person who furnishes lumber at a certain price per thousand feet, at different times, under an entire contract, for use in erecting a building, loses his lien if he neglects to file his statement of the amount due him within thirty days after the last item was furnished which was actually used in the erection of the building, although it is filed within thirty days after the petitioner shipped the last carload of lumber,

<sup>26</sup> *Sontag v. Doerge*, 14 Mo. App. 577.

<sup>27</sup> *St. Paul & M. Pressed Brick Co. v. Stout*, 45 Minn. 327, 47 N. W. 974.

<sup>28</sup> *Rush v. Able*, 90 Pa. St. 153.

<sup>29</sup> *Sontag v. Doerge*, 14 Mo. App. 577.

<sup>30</sup> *Mulrey v. Barrow*, 11 Allen (Mass.) 152; *Barilari v. Ferrea*, 59 Cal. 1.

no part of which, however, was used in the building, and the petitioner had no knowledge of the failure to use the last carload to complete the building for which it was furnished.<sup>31</sup>

To preserve a lien, a claim or statement must be filed within the time limited by statute, which is generally thirty or sixty days after the date of the last item furnished which is actually used in the construction or repair of the building. Articles furnished which are not so used, and are not furnished at the building, or on the land on which the building is situated, are not within the meaning of the statute, and do not enlarge the time within which the statement may be filed.<sup>32</sup>

**§ 1443. The lien relates back to the beginning of the work.**—When the claim or notice of lien is filed within the time limited from the furnishing the last item, the lien extends back to the beginning of the furnishing of labor or materials under the same contract, though this be to the beginning of the work upon the building. There is no requirement that notice shall be given within the stipulated time after each item of the work is performed, or each item of the materials furnished, but within that time after all shall have been done or furnished. The contract under which all the items are furnished is treated as entire. Where there is a continuous, open, current account, the cause of action under a statute of limitations is deemed to have accrued as to all on the date of the last item. And so with a mechanic's lien: while the lien attaches from the commence-

<sup>31</sup> *Kennebec Framing Co. v. Pickering*, 142 Mass. 80, 7 N. E. 30; *North v. Globe Fence Co.*, 144 Mich. 557, 108 N. W. 285; *Contra, John Paul Lumber Co. v. Hormel*, 61 Minn. 303, 63 N. W. 718.

<sup>32</sup> *Gale v. Blaikie*, 129 Mass. 206. See *Battle Creek Lumber Co. v.*

*Poland*, 150 Mich. 690; *United States Water Co. v. Sunny Slope Realty Co.*, 152 Mo. App. 300, 133 S. W. 371; *Big Horn Lumber Co. v. Davis*, 14 Wyo. 455, 84 Pac. 900, 85 Pac. 1048; *O'Neil v. Taylor*, 59 W. Va. 370, 53 S. E. 471.

ment of the work, the limitation for notice commences on the date when all the work has been performed, or all the material has been furnished.<sup>33</sup>

§ 1444. **Filing lien after substantial completion.**—Under statutes which provide for the filing of a statement or certificate of lien within a certain time after the completion of the work, it is material to determine whether work done after the substantial completion of the work was an essential part of the work contracted to be performed, or was done for the mere purpose of preserving a lien, and whether there was any unreasonable or unnecessary delay, after the substantial completion of the contract, in fully completing the work to be done.<sup>34</sup> A builder substantially completed a house on the sixth day of August, and the owner went into and occupied it later in that month. Some time in the following month of September the builder furnished and hung the blinds; and on the twenty-second of November, at the request of the owner, he furnished materials and performed work, such as making a frame for an inside cellar door, putting glass into the cellar windows, and putting up clothes-hooks, brackets, and a shelf. This work was found to be necessary to the comfortable use of the house; and no rights of third persons having intervened, it was held that

<sup>33</sup> *Jones v. Swan*, 21 Iowa 181; *Iowa Mortgage Co. v. Shanquest*, 70 Iowa 124, 29 N. W. 820; *Keating Machine Co. v. Marshall Electric L. & P. Co.*, 74 Tex. 605, 12 S. W. 489; *Trammell v. Mount*, 68 Tex. 210, 215, 4 S. W. 377, 2 Am. St. 479; *Schultze v. Alamo &c. Brew. Co.*, 2 Tex. Civ. App. 236, 21 S. W. 160; *Northwestern Loan & Investment Assn. v. McPherson*, 23 Ind. App. 250, 54 N. E. 130; *Culmer v. Caine*, 22 Utah 216, 61 Pac. 1008.

<sup>34</sup> *Flint v. Raymond*, 41 Conn. 510; *Sanford v. Frost*, 41 Conn. 617; *Cole v. Uhl*, 46 Conn. 296; *The Burleigh Bldg. Co. v. Merchant Brick &c. Co.*, 13 Colo. App. 455, 39 Pac. 83. The labor is not necessarily colorable because it is trifling in amount. *Monaghan v. Putney*, 161 Mass. 338, 31 N. E. 171; *Miller v. Wilkinson*, 167 Mass. 136, 44 N. E. 1083; *Coffey v. Smith*, 52 Ore. 538, 97 Pac. 1079.



the final work was to be regarded as sufficient to preserve the lien.<sup>35</sup>

It is generally a sufficient reason for delay in the final completion of the work, as against the owner, that the delay has occurred at his special instance or request.<sup>36</sup>

But the fact that, after the completion of a building, the owner finds it necessary to make some alterations and additions thereto, does not have the effect of extending the time for filing a mechanic's lien against the building on account of its original construction.<sup>37</sup> Where, in a mechanic's lien filed for materials furnished by a subcontractor, the only items charged for, as furnished within six months before the filing, were two hearths, supplied gratuitously in the place of defective hearths furnished and charged for more than six months before, and a portable stove in no sense used or intended to be used in the construction of the building, these items were held not to operate to extend the statutory time for filing the claim, and the plaintiff was not entitled to the lien claimed.<sup>38</sup>

<sup>35</sup> *Nichols v. Culver*, 51 Conn. 177. To similar effect see *McLean v. Wiley*, 176 Mass. 233, 57 N. E. 347.

<sup>36</sup> *Cole v. Uhl*, 46 Conn. 296. But in *Bruce v. Berg*, 8 Mo. App. 204, it was held that, if the owner or his agent or architect refuses to accept some part of the work, such as the stone steps to a house, and the contractor, after an interval of some months after the substantial completion of the house, replaces the steps with others, this item is sufficiently connected with the other items of his account, and may constitute the last item of his account from which to date the filing of his statement or account.

<sup>37</sup> *Harman's App.*, 124 Pa. St.

624, 17 Atl. 140; *Ryman's App.*, 124 Pa. St. 635, 17 Atl. 180.

<sup>38</sup> *Women's Homoeopathic Assn. v. Harrison*, 120 Pa. St. 28, 13 Atl. 501; *Harrison v. Women's Homoeopathic Assn.*, 134 Pa. St. 558, 19 Atl. 804; *Van Nest Woodworking Co. v. Winka*, 116 N. Y. S. 619; *Delany v. Carpenter*, 62 Misc. (N. Y.) 416, 114 N. Y. S. 990; *Woodruff v. Honey*, 91 Maine 116, 39 Atl. 169; *Hartley v. Richardson*, 91 Maine 424, 40 Atl. 336; *Farnham v. Richardson*, 91 Maine 559, 40 Atl. 553; *O'Driscoll v. Bradford*, 171 Mass. 231, 50 N. E. 628; *Jones v. Balsley*, 27 Okla. 220, 111 Pac. 942; *Burleigh Bldg. Co. v. Merchant Brick & Building Co.*, 13 Colo. App. 455, 59 Pac. 83; *Joost v. Sullivan*, 111 Cal. 286,

Where the lien was for an engine and machinery for a brewery, the erection of the machinery was completed and the engine started on or about June 13th, but the builder's engineer remained in charge, making alterations, until June 21st, when it worked satisfactorily, and, at the engineer's request, was accepted by the owner on June 23d. It was held that a lien filed within the proper time after June 21st was a compliance with the provision requiring liens to be filed within such time after the completion of the work.<sup>39</sup>

§ 1445. **Lien filed within time limited from completion of additional work.**—Where additional work is done at the request of the owner to make the previous work satisfactory, such additional work is a continuation of the previous work, and the lien may be filed within the time limited from the completion of such additional work.<sup>40</sup> The lien for the extra work in such case takes precedence of a mortgage executed before the extra work was commenced.<sup>41</sup>

In determining whether a mechanic's lien against railroad property was filed within the time limited from the completion of the work, it is proper to count as part of the work, labor performed by direction of the chief engineer in removing materials wrongfully placed upon the lands of another by the contractor, for in such case the latter's obligations

43 Pac. 896; Valley Lumber & Mfg. Co. v. Nickerson, 13 Idaho 682, 93 Pac. 24. But see, Rieflin v. Grafton, 63 Wash. 387, 115 Pac. 851.

<sup>39</sup> Watts-Campbell Co. v. Yuengling, 125 N. Y. 1, 25 N. E. 1060. As to contract to install and keep in repair a year where repairs are made the last day of the year and time for filing, see Shaw v. Fjellman, 72 Minn. 465, 75 N. W. 705.

<sup>40</sup> McIntyre v. Trautner, 63 Cal.

429; Coughlan v. Longini, 77 Minn. 514, 80 N. W. 695; Scheible v. Schickler, 63 Minn. 471, 65 N. W. 920; Minneapolis Trust Co. v. Great Northern R. Co., 74 Minn. 30, 76 N. W. 953, 81 Minn. 28, 83 N. W. 463; Stidger v. McPhee, 15 Colo. App. 252, 40 Ind. App. 119, 81 N. E. 106. The trifling nature of such work is immaterial. Farnham v. Richardson, 91 Maine 559, 40 Atl. 553.

<sup>41</sup> Soule v. Dawes, 14 Cal. 247.

to the company did not terminate until such removal was completed.<sup>42</sup>

Even when further work is done after the contract has been substantially performed and a bill rendered, but the proper performance of the contract calls for such further work, the time of performing such further work may be taken as the date from which to compute the time allowed for filing a statement of lien: provided such work is honestly done in fulfilment of the contract, and not for the purpose of fixing a later date from which to compute the last work done.<sup>43</sup>

Where, after the substantial completion of a building, the builder does additional work at his own instance, apparently for the mere purpose of saving his lien, such additional work will not have the effect intended. Neither would such additional work be allowed to affect the rights of third persons who in good faith had in the meantime acquired an interest in the property for a valuable consideration.<sup>44</sup>

The time for filing a claim for lien is not extended by sending new material to replace alleged defective material, when such new material is not suited to the purpose and is rejected.<sup>44a</sup>

**§ 1446. Alterations and repairs made after substantial completion.**—Mere alterations and repairs made after the substantial completion of a building do not relate back to the previous construction, so as to give a lien therefor priority of a mortgage made just before the alterations and

<sup>42</sup> *Gordon Hardware Co. v. San Francisco & S. R. Co.*, 86 Cal. 620, 25 Pac. 125.

<sup>43</sup> *Hubbard v. Brown*, 8 Allen (Mass.) 590; *Conlee v. Clark*, 14 Ind. App. 205, 42 N. E. 762; *Home Brew. Co. v. Johnson*, 41 Ind. App. 44, 83 N. E. 358.

<sup>44</sup> *Nichols v. Culver*, 51 Conn.

177, per Loomis, J.; *Dole v. Bangor Auditorium Assn.*, 94 Maine 532, 48 Atl. 115; *Woodruff v. Hovey*, 91 Maine 116, 39 Atl. 169; *Cooley v. Holcomb*, 68 Conn. 35, 35 Atl. 765; *O'Driscoll v. Bradford*, 171 Mass. 231, 50 N. E. 628.

<sup>44a</sup> *Snitzler v. Filer*, 135 Ill. App. 61.

repairs were commenced. Thus an iron furnace on a new plan was built, its air and water pipes were laid, but the connections were not made. The furnace was put into operation, was worked for a time, and then blown out, on account of a defect in its plan and construction. Money was then raised on a mortgage by which all the mechanics' claims then due except one were paid. Other work was done, altering the construction, building new kilns, and the like. It was held that, under the circumstances of the case, the building was finished at the date of the mortgage, and the liens for work after that time were postponed to the mortgage.<sup>45</sup>

Where a building costing forty-seven hundred dollars was completed on the seventh day of March, with the exception of about seven dollars' worth of alterations, which were made a month later, the building was held to have been completed on March seventh.<sup>46</sup>

**§ 1447. Completion of contract after possession given to owner.**—Though possession of the building has been delivered to the owner, if defects and omissions are discovered which the architect supervising the work requires the builder to supply in order to complete his contract, and this is done by subcontractors under their contracts, it can not be said that their contracts were completed until such work was done; and notice of liens may be given by such subcontractors with reference to the time of completion of the building after such defects and omissions were supplied.<sup>47</sup>

<sup>45</sup> Thoma's Estate, 76 Pa. St. 30.

<sup>46</sup> Santa Clara Valley Mill Co. v. Williams, 96 Cal. XVIII, 31 Pac. 1128. The Code of Civil Procedure, 1906, § 1187, provides that "any trivial imperfection in \* \* \* the construction of any building \* \* \* shall not be deemed such a lack of completion as to prevent

the filing of any lien." In Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. 686, it was held that a defect in work which could be perfected at an expense of \$5 was trivial compared with the contract price of \$145.

<sup>47</sup> St. Louis Nat. Stock Yards v. O'Reilly, 85 Ill. 546.

Similarly the building of a mantel by a different contractor postpones the time of the completion of the work, although the lien claimant claims through the principal contractor who has already completed his contract. The lien may be filed at any time within the statutory period after the completion of the building, even though the principal contractor has only contracted to do part of the work.<sup>48</sup>

In California it is provided by statute that any trivial imperfection in the work, or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and in case of contracts, the occupation or use of the building, improvement, or structure by the owner or his representative, or the acceptance by said owner or his agent of said building, improvement, or structure, shall be deemed conclusive evidence of completion;<sup>49</sup> and cessation from labor for thirty days upon any unfinished contract, or upon any unfinished building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter.<sup>50</sup> Where a contractor engaged in preparing a flume-bed, surface ditch, and terminal approaches for a water-works company abandoned the contract with the consent of the company, it was held, that the company, by releasing the contractor and taking control of the work for the purpose of completing it, "occupied" and "accepted" it within this provision, and that a material-man who filed his lien within thirty days after the company assumed control of the work acquired a valid lien for material furnished the contractor.<sup>51</sup>

<sup>48</sup> *Lichty v. Houston Lumber Co.*, 39 Colo. 53, 88 Pac. 846.

<sup>49</sup> *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419.

<sup>50</sup> Code Civ. Proc. 1906, § 1187.

Construed in *Schindler v. Green*, 149 Cal. 752, 87 Pac. 626.

<sup>51</sup> *Giant Powder Co. v. San Diego Flume Co.*, 88 Cal. 20, 25 Pac. 976.

§ 1448. **Extension of time for filing lien by delivery of material at house after its completion.**—Materials delivered at a house, or work done upon it after its completion, for the purpose of preserving the right of lien upon it, will not have that effect.<sup>52</sup> Such was the case where the owner of a house sold it before its completion, and then, several days after its completion, by arrangement between the vendor and one who had furnished materials for the construction of several houses, of which the house sold was one, the material-man delivered at the house a small additional lot of lumber, which was not used upon the house, and was furnished without the knowledge of the purchaser, merely to preserve the material-man's lien.<sup>53</sup>

Repairs made in good faith to fulfil the contractor's warranty are a part of the original contract, and the lien may be filed within the time limited after such repairs. A person having a contract to purchase land, and to build a house upon it within a limited time, contracted with a mason to build a cellar wall, which was warranted to stand. The wall was completed in November. During the winter it was injured by the frost, and the mason repaired it on the seventeenth day of April. The time within which the purchaser could complete the building and demand a conveyance expired on the first day of April. The owner had so far consented to the work under the contract for the wall that a lien could be maintained against the property if the statement was filed in due season. The statement was in fact filed more than thirty days after the completion of the wall, but within thirty days after making the repairs upon it. It was held that, if the repairs were made without the authority of the owner, the petitioner could not enforce a lien; but that if they were made in good faith to fulfil the

<sup>52</sup> *Duffy v. Baker*, 17 Abb. N. Cas. (N. Y.) 357; *Hartley v. Richardson*, 91 Maine 424; *Valley Lumber &c. Co. v. Nickerson*, 13

Idaho 682, 93 Pac. 24; *Valley Lumber &c. Co. v. Driessel*, 13 Idaho 662, 95 Pac. 765.

<sup>53</sup> *Heath v. Tyler*, 44 Md. 312.

warranty, at the request of the owner with knowledge of the terms of the contract, the statement was filed in season and a lien could be enforced.<sup>54</sup>

Occasional repairs or additions made to a building, several months after its substantial completion, do not serve to render the whole work one continued performance, for which a single lien can be claimed within the time limited after the last repairs.<sup>55</sup>

**§ 1449. Whether lien is filed in time question of fact.—**

Whether a claim of lien has been filed within the time limited by statute is a question of fact for the jury,<sup>56</sup> or for the court in equitable proceedings. It is also a question of fact for the jury whether work was done colorably, for the purpose of reviving the lien.<sup>57</sup> Whether additional work done by order of the owner was done under a new contract, or under the original contract, is a question for the jury.<sup>58</sup> The burden of proving that any part of the work was performed or any part of the materials was furnished within the time limited, preceding the filing of the lien, is upon the claimant.<sup>59</sup> Parol evidence is admissible to show that the statement of the lien was filed within the time limited.<sup>60</sup>

A statement of lien required to be filed in the office of the town clerk within a specified time may be received by the clerk at his house; and if he there minutes upon the paper the time of his receiving it, the filing of the lien

<sup>54</sup> *Worthen v. Cleaveland*, 129 Mass. 570.

<sup>55</sup> *Davis v. Alvord*, 94 U. S. 545, 24 L. ed. 283; *Schulenburg v. Vrooman*, 7 Mo. App. 133; *Scott v. Cook*, 8 Mo. App. 133.

<sup>56</sup> *Turner v. Wentworth*, 119 Mass. 459; *Galland v. Schroeder*, 21 Wkly. N. Cas. (Pa.) 103, 12 Atl. 866; *Johnston v. Harrington*, 5 Wash. 73, 31 Pac. 316.

<sup>57</sup> *Turner v. Wentworth*, 119 Mass. 459.

<sup>58</sup> *Cole v. Barron*, 8 Mo. App. 509; *Diller v. Burger*, 68 Pa. St. 432.

<sup>59</sup> *Ortwine v. Caskey*, 43 Md. 134.

<sup>60</sup> *Goulding v. Smith*, 114 Mass. 487.

can not be impeached, although the paper is not actually taken to his office and recorded until after the time limited has expired.<sup>61</sup> If the claim is filed with the time limited, it does not matter that the actual record is not made till after that time has expired.<sup>62</sup>

A certificate made by the owner's architect, reciting that the contractor has finished the building and is entitled to final payment, is no evidence of the time of completion of the building, when the certificate is issued in compliance with a provision of the contract which made it a condition of the issuance of the certificate that receipted bills for all labor and materials furnished shall be produced at the time of payment. The purpose of the certificate was to indicate the time of the final payment, not to show that the building was completed.<sup>63</sup>

§ 1450. **Rule for computing time.**—In computing the time within which the lien should be filed, either the day on which the last work was done or materials furnished, or the day on which the claim is filed, should be excluded.<sup>64</sup> The result is the same whether the one or the other be excluded. Thus, if the last work was done on the first day of January, and the claim must be filed within six months, or at or before the expiration of six months, the last day for filing is the first day of July following.

Where materials are ordered from a distance, they are furnished from the time they are loaded on the cars, and the time limited for filing a lien runs from that date. The materials need not be delivered to start the short period of limitation running.<sup>65</sup>

<sup>61</sup> Wood v. Simons, 110 Mass. 116.

<sup>62</sup> Bassett v. Brewer, 74 Tex. 554, 12 S. W. 229.

<sup>63</sup> Washburn v. Kahler, 97 Cal. 58, 31 Pac. 741.

<sup>64</sup> German Lutheran Church v. Heise, 44 Md. 453; In re Martin,

4 Fed. 208; Jones v. Kern, 101 Ga. 309, 28 S. E. 850. See, also, Stewart v. Gogoza, 3 Hughes (U. S.) 459, 18 L. ed. 894, Fed. Cas. No. 13428; Canal Co. v. Gordon, 6 Wall. (U. S.) 561, 18 L. ed. 894.

<sup>65</sup> McEwen v. Union Bank & Co., 35 Mont. 470, 90 Pac. 359.



Giving credit merely postpones the beginning of a proceeding to enforce the lien, not the time within which the notice must be filed.<sup>66</sup>

**§ 1451. In general.**—A verification of the claim substantially as required by statute is essential to its validity.<sup>67</sup> The verification of the demand contemplated by statute is an oath or affirmation taken and administered by and before an officer having authority by law to administer and certify oaths and affirmations. A verification of a demand before a notary public in another state is not a compliance with the statute, and does not confer the lien provided for by the statute.<sup>68</sup> Unless conferred by statute, a notary public has no authority to administer oaths or affirmations required by special statutory enactments, and not in the transaction of commercial affairs. Until the contrary is shown, the presumption is that, in another state, a notary public has no other authority than that which is derived from the commercial law.

If the jurat is not attested by the officer under his seal, in case he is not authorized to act except by attesting his act under seal, so as to entitle the instrument to be recorded, the verification will be insufficient to preserve the lien.<sup>69</sup>

The act of the magistrate in administering the oath is substantially ministerial, and not judicial. The oath may therefore be administered by an attorney of the petitioner, the attorney being a justice of the peace.<sup>70</sup> But the affi-

<sup>66</sup> *Matter of Froment*, 125 App. Div. (N. Y.) 647, 109 N. Y. S. 1073.

<sup>67</sup> *Lindsay v. Huth*, 74 Mich. 712, 42 N. W. 358; *Minor v. Marshall*, 6 N. Mex. 194, 27 Pac. 481; *McPhee v. Kay*, 30 Nebr. 62, 46 N. W. 223; *Kleinert v. Knoop*, 147 Mich. 387, 110 N. W. 941; *Wilson-Reheis-Rolfes Lumber Co. v.*

*Ware*, 158 Mo. App. 179, 138 S. W. 690.

<sup>68</sup> *Chandler v. Hanna*, 73 Ala. 390.

<sup>69</sup> *Colman v. Goodnow*, 36 Minn. 9, 29 N. W. 338.

<sup>70</sup> *McDonald v. Willis*, 143 Mass. 452, 9 N. E. 835; *Carr v. Hooper*, 48 Kans. 253, 29 Pac. 398.

davit can not be sworn to before one partner of the firm putting in the mechanic's lien and such a verification is not a valid one.<sup>71</sup>

§ 1452. **Form of verification of claim.**—As to the form of the verification, if the statute does not prescribe it, or the general purport of the affidavit, the better practice is to annex a declaration under oath to the effect that the facts stated are true; but it is held that a claim signed by the claimant with the informal certificate, "Sworn to," annexed, is sufficient.<sup>72</sup> A statement in the form of an affidavit, instead of a statement with an affidavit attached, is not void because of the form.<sup>73</sup> An affidavit which in substance complies with the statute is sufficient.<sup>74</sup>

If the form and contents of the affidavit of claim be prescribed by statute, this form, though it may be varied to suit the circumstances of the case, must be followed in all matters of substance.<sup>75</sup>

If the affidavit immediately follows the statement, and the affidavit is signed though the statement is not, the omission of the signature is unimportant.<sup>76</sup>

Under a statute which provides that the claimant shall file a statement "setting forth the times when such material was furnished, or labor performed, verified by affidavit," an affidavit stating that the claimant "has performed the labor, and furnished the materials, set forth in the above

<sup>71</sup> *McGillivray v. Case*, 107 Iowa 17, 77 N. W. 483.

<sup>72</sup> *Grey v. Vorhis*, 8 Hun (N. Y.) 612; *Kezartee v. Marks*, 15 Ore. 529, 16 Pac. 407; *Laswell v. Church*, 46 Mo. 279; *Deatherage v. Woods*, 37 Kans. 59, 14 Pac. 474.

<sup>73</sup> *Bethell v. Chicago Lumber Co.*, 39 Kans. 230, 17 Pac. 813;

*Wertz v. Lamb*, 43 Mont. 477, 117 Pac. 89.

<sup>74</sup> *Bassett v. Brewer*, 74 Tex. 554, 12 S. W. 229; *Nordine v. Knutson*, 62 Minn. 264, 64 N. W. 565.

<sup>75</sup> *Keller v. Houlihan*, 32 Minn. 486, 21 N. W. 729.

<sup>76</sup> *Deatherage v. Woods*, 37 Kans. 59, 14 Pac. 474.

statement," is not a sufficient verification to sustain a lien, since it does not verify the dates given in the statement.<sup>77</sup>

Under the statute requiring that the verification of a notice of claim of mechanic's lien shall be "to the effect that affiant believes the same to be true," a verification stating that the claimant "has read the foregoing notice, knows the contents thereof, that said claim is just and correct," is sufficient.<sup>78</sup>

The certificate of the officer before whom the statement is sworn to must be complete, and duly executed under his official signature, and also under his official seal, if he is required to have such a seal.<sup>79</sup>

An affidavit to a statement of account for a mechanic's lien, sworn to before a notary in another state, and authenticated by his official seal, is sufficient.<sup>80</sup>

**§ 1453. Affidavit made by agent.**—The affidavit may be made by an agent, or other person having knowledge of the facts, in behalf of the claimant.<sup>81</sup> One member of a partnership, or its manager, may make the affidavit in behalf of the partnership.<sup>82</sup> If the claimant is a corporation,

<sup>77</sup> McDonald v. Rosengarten, 134 Ill. 126, 25 N. E. 429.

<sup>78</sup> Johnston v. Harrington, 5 Wash. 73, 31 Pac. 316, 318.

<sup>79</sup> Colman v. Goodnow, 36 Minn. 9, 29 N. W. 338; Stetson & P. Mill Co. v. McDonald, 5 Wash. 496, 32 Pac. 108.

<sup>80</sup> Wood v. St. Paul City R. Co., 42 Minn. 411, 44 N. W. 308, 7 L. R. A. 149.

<sup>81</sup> Lamb v. Hanneman, 40 Iowa 41; Ainslie v. Kohn, 16 Ore. 363, 19 Pac. 97. See, also, as to sufficiency of form, Great Western Mfg. Co. v. Hunter, 15 Nebr. 32, 16 N. W. 759; Williams v. Webb, 2 Dis. (Ohio) 430, 13 Ohio Dec. 264; Delahay v. Goldie, 17 Kans.

263; Fullerton v. Leonard, 3 S. Dak. 118, 52 N. W. 325; Hug v. Hintrager, 80 Iowa 359, 45 N. W. 1035; Parke & Lacy Co. v. Inter Nos Oil & Devel. Co., 147 Cal. 490, 82 Pac. 51.

<sup>82</sup> Deatherage v. Woods, 37 Kans. 59, 14 Pac. 474; Chicago Lumber Co. v. Osborn, 40 Kans. 168, 19 Pac. 656; Sharon Town Co. v. Morris, 39 Kans. 377, 18 Pac. 230. An affidavit purporting to be made by one member of the firm, but signed in the firm name is not sufficient notice of a lien under a statute requiring claimant to file a sworn statement of account. McGillivray v. Case, 107 Iowa 17, 77 N. W. 483.

the affidavit may be made by any one of its officers having knowledge of the facts.<sup>83</sup>

An affidavit can be amended only by attaching a sufficient affidavit to the statement within the time allowed for filing it.<sup>84</sup>

**§ 1454. Verification to the best of one's knowledge or belief.**—Under a statute which requires that the verification shall be true to the knowledge of the person making the same, a verification that "the same is true to the best of his knowledge" is insufficient to confer a lien.<sup>85</sup> A verification that the statements in the notice are true to the "knowledge, information, and belief" of affiant, is sufficient.<sup>86</sup> But such a verification has been held to be sufficient under a statute which provides for a verification by oath that the same is true.<sup>87</sup> There are cases, however, which hold that an affidavit should be positive, though the statute merely

<sup>83</sup> *Globe Iron Roofing Co. v. Thacher*, 87 Ala. 458, 6 So. 366; *Cooper Mfg. Co. v. Delahant*, 36 Ore. 402, 60 Pac. 1; *Independent Sash & Lumber Co. v. Bradfield*, 155 Mo. App. 527, 134 S. W. 118.

<sup>84</sup> *Dorman v. Crozier*, 14 Kans. 224; *McDonald v. Rosengarten*, 134 Ill. 126, 25 N. E. 429. The fact that a notary public, before whom a claim of lien is verified, fails to add after his official signature the date of expiration of his commission, as required by statute, does not render such lien void, for the statute merely subjects the notary to a penalty therefor. *Phelps Windmill Co. v. Baker*, 49 Kans. 434, 30 Pac. 472.

<sup>85</sup> *Keogh v. Main*, 18 J. & S. (N. Y.) 183; *Fogarty v. Wick*, 8 Daly (N. Y.) 166; *Conklin v. Wood*, 3 E. D. Smith (N. Y.) 662; *Childs v. Bostwick*, 65 How. Pr. (N. Y.)

146, 12 Daly (N. Y.) 15; *Dorman v. Crozier*, 14 Kans. 224; *Globe Iron Roofing Co. v. Thacher*, 87 Ala. 458, 6 So. 366; *Dennis v. Coker*, 34 Ala. 611; *Western Plumbing Co. v. Fried*, 33 Mont. 7, 81 Pac. 394, 114 Am. St. 799.

<sup>86</sup> *Kealey v. Murray*, 61 Hun (N. Y.) 619, 15 N. Y. S. 403, 40 N. Y. St. 23; *McDonald v. Mayor*, 170 N. Y. 409, 63 N. E. 437, revg. 58 App. Div. (N. Y.) 73, 68 N. Y. S. 462; *Grace v. Oakland Bldg. Assn.*, 166 Ill. 637, 46 N. E. 1102, revg. 63 Ill. App. 339. Under such a statute a statement that "the affidavit is true as he verily believes" is sufficient. *Gutshall v. Kornaley*, 38 Colo. 195, 88 Pac. 158.

<sup>87</sup> *Grey v. Vorhis*, 8 Hun (N. Y.) 612; *Arata v. Tellurium Gold & S. M. Co.*, 65 Cal. 340, 4 Pac. 195.

provides that the statement shall be sworn to, or verified by affidavit; and accordingly under such a statute an affidavit made by an agent stating that "the facts as above set forth are true and correct according to the best of his knowledge and belief," without showing that he had any knowledge on the subject, was held insufficient.<sup>88</sup>

A statement in the certificate of a recorder that a lien was duly sworn to is conclusive evidence of that fact. An indorsement by a recorder upon a notice of lien is at least prima facie evidence of its filing and the date of its recording.<sup>89</sup>

**§ 1455. Notice or claim not to be amended after filing.**<sup>90</sup>—The claim is not in the nature of an instrument in writing which a court of equity may reform in appropriate cases. It is rather a prerequisite to the maintenance of a proceeding which gives a plaintiff an extraordinary remedy, and to secure the benefit of this he must comply with the terms on which the statute affords this remedy.<sup>91</sup> If the statement shows upon its face that it was filed too late, even though the fact may have been otherwise, it is ineffectual.<sup>92</sup> Certainly, as against third persons, no material alterations or amendments can be allowed in the notice or claim upon the

<sup>88</sup> *Dorman v. Crozier*, 14 Kans. 224. "The construction of the verification most favorable to the lien would be, that some of the facts were known to be true, and others, though not within the knowledge of the affiant, were believed to be true." *Globe Iron Roofing Co. v. Thacher*, 87 Ala. 458, 466, 6 So. 366, per McClellan, J.

<sup>89</sup> *Silvester v. Coe Quartz Min. Co.*, 80 Cal. 510, 22 Pac. 217.

<sup>90</sup> *Hallagan v. Herbert*, 2 Daly (N. Y.) 253; *Conklin v. Wood*, 3

*E. D. Smith* (N. Y.) 662; *James v. Van Horn*, 39 N. J. L. 353; *Drake v. Green*, 48 Kans. 534, 29 Pac. 584; *Perkins v. Boyd*, 37 Colo. 265, 86 Pac. 1045. Lien claimant is estopped to set up that his lien attached eight days before the date alleged in his notice of claim. *Hartford Bldg. &c. Assn. v. Goldreyer*, 71 Conn. 95, 41 Atl. 659.

<sup>91</sup> *Goss v. Strelitz*, 54 Cal. 640; *Lindley v. Cross*, 31 Ind. 106, 99 Am. Dec. 610.

<sup>92</sup> *Olson v. Heath Lumber Mfg. Co.*, 37 Minn. 298, 33 N. W. 791.

filing of a complaint.<sup>93</sup> But if the claim is corrected within the time allowed for filing the claim, the corrected claim may in effect amount to the filing of a new and valid claim.<sup>94</sup>

A claimant can not, after the expiration of the time allowed for filing his lien, alter or amend his claim for the purpose of preserving it by changing the locality of the building.<sup>95</sup>

A mechanic's lien after the filing of the claim is a lien of record within the meaning of a statute relating to the distribution of a balance of funds arising from a sheriff's sale.<sup>96</sup>

**§ 1456. Effect of amendment when allowed by statute to restore lien which has been lost by failure to give notice.—**

Under a statute which provides for the amendment of a lien claim in matters of substance as well as in matters of form, there can be no amendment which will restore a lien, which has been discharged by failure to give notice, by indorsing the time of issuing the summons in the suit to enforce the lien, on the lien claim, as required by the statute. The defect in such case is not in the claim, but in the failure to give notice as required.<sup>97</sup>

<sup>93</sup> *Wade v. Reitz*, 18 Ind. 307.

<sup>94</sup> *Sarles v. Sharlow*, 5 Dak. 100, 37 N. W. 748.

<sup>95</sup> *Gault v. Wittman*, 34 Md. 35.

<sup>96</sup> *Watt v. Vezin*, 15 Phila. (Pa.) 180, 212.

<sup>97</sup> *Wheeler v. Almond*, 46 N. J. L. 161; *James v. Van Horn*, 39 N. J. L. 353; *Hall v. Spaulding*, 40 N. J. L. 166. In Kansas it is provided that any lien statement may be amended by leave of the court in furtherance of justice, the same as pleadings, except as to the amount claimed. Gen. Stats.

1909, § 6248. But it was held that the statute could not be applied to a statement filed before the law went into effect, so as to change the description of the property sought to be charged to a distinct and separate lot from that described in the statement as originally filed. The enactment is prospective in its nature, and can not be well construed to have a retrospective operation. *Drake v. Green*, 48 Kans. 534, 29 Pac. 584, 585.

## CHAPTER XXXVI.

### MECHANICS' LIENS: PRIORITY AS REGARDS MORTGAGES AND OTHER INCUMBRANCES AND LIENS.

Sec.	Sec.
1457. Building as part of realty.	1473. Necessity that work should be done with intention of continuing it.
1458. A mortgage for purchase-money.	1474. Work not done on the premises.
1459. Priority of recorded mortgage.	1475. Effect of stopping work by owner after building is commenced.
1460. Recordation of mortgage as dependent on statutes.	1476. Enlargement of contract after work is commenced.
1461. Marshalling securities.	1477. Right of mortgagor to subject property to lien as against mortgagee.
1462. Priority as to building alone.	1478. Repairs or additions made to completed building.
1462a. Improvement placed on mortgaged land.	1479. Mortgage attaches to after acquired property but subject to existing conditions.
1463. Conveyance of land to secure a debt.	1480. Rule as to priority in states in which a lien attaches from commencement of work.
1464. Machinery attached to such building.	1481. Meaning of phrase "commencement of work."
1465. Priority of mechanic's lien as dependent on priority of contract under some statutes.	1482. Labor and materials performed and furnished under one contract.
1466. Contract too moderate to create prior lien.	1483. Time of performing labor or furnishing materials.
1467. Relief of mechanic against a mortgage.	1484. Merger of mortgage having priority over mechanic's lien.
1468. Impairment of mortgagee's rights by prior contract.	1485. Estoppel of lienor by his acts or agreement.
1469. Priority of lien from commencement of the building.	1486. Mortgage given precedence of a lien by reason of estoppel.
1470. Lien dates from commencement of building.	
1471. Application of rule in favor of subcontractors as well as contractors.	
1472. Excavation for the foundation of a building a commencement of the building.	

Sec.		Sec.	
1486a.	A mortgage under some circumstances subordinated to subsequent liens.	1490.	Precedence of prior attachment.
1487.	Vendor's lien for purchase-money superior to mechanic's lien.	1491.	Judgment lien acquired during the construction of building.
1488.	Subsequent conveyance.	1492.	No priority among different persons having mechanics' liens upon the same building.
1489.	Sale of property subject to lien.		

§ 1457. **Building as part of realty.**—As a general statement of common law, a building erected by the owner of land becomes a part of the realty as soon as it is annexed to the land. It also becomes subject to an existing recorded mortgage of the land.<sup>1</sup> The mortgagee, in a suit to foreclose his mortgage, can not be compelled to sell the building separate from the land, and to allow the proceeds of the building to be applied in satisfaction of a mechanic's lien, before obtaining satisfaction of the mortgage debt.

Moreover, the materials furnished by a material-man, upon his filing his claim of lien, become subject not only to his own lien, but also subject to the liens of other material-men and mechanics in whose favor liens attach to the premises; for the materials become a part of the entire structure as soon as they are annexed to it.<sup>2</sup>

A law which attempts to make a mortgage existing prior to the making of any contract for the erection of a building upon the land subject to liens under the statute is unconstitutional. Although the statute declares that the incumbrance shall not operate upon the building erected or

<sup>1</sup> *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. ed. 199; *Moran v. Schnugg*, 7 Ben. (U. S.) 399, Fed. Cas. No. 9786; *Homans v. Coombe*, 3 Cranch (U. S.) 365, Fed. Cas. No. 6654; *Inverarity v. Stowell*, 10 Ore. 261; *Equitable Life Ins. Co. v. Slye*, 45 Iowa 615;

*Getchell v. Allen*, 34 Iowa 559; *Ferguson v. Miller*, 6 Cal. 402; *National Bank v. Danforth*, 80 Ga. 55, 7 S. E. 546; *Elder v. Clark*, 51 Fed. 117; *Zehner v. Johnston*, 22 Ind. App. 452, 53 N. E. 1080.

<sup>2</sup> *Equitable Life Ins. Co. v. Slye*, 45 Iowa 615.



material furnished until the lien is satisfied, the lien created is construed to include, as subject to the lien, the ground appurtenant to the building which is reasonably necessary for its enjoyment. Moreover, the constitutional objection would not be obviated by limiting the lien to the building.<sup>3</sup>

Where mechanics or material-men have notice of the existence of a mortgage which is given to secure funds to construct an improvement and know that the funds thus obtained are expended in that way, their rights are held subordinate to that of the mortgagee. They are bound by such an arrangement to the extent that funds are advanced and applied.<sup>4</sup>

**§ 1458. A mortgage for purchase-money.**—A mortgage for the purchase-money of land, made simultaneously with the conveyance, takes precedence of any lien to which the purchaser may subject the land.<sup>5</sup> The mortgage may se-

<sup>3</sup> *Meyer v. Berlandi*, 39 Minn. 438, 443, 40 N. W. 513, 1 L. R. A. 777, 12 Am. St. 663. *Mitchell, J.*, delivering the judgment, said: "This is a manifest attempt to displace all prior incumbrances upon, and vested interests in, the property, or at least to postpone them to liens under the statute subsequent in time, so that, for example, a mortgagor and a material-man or laborer, as a result of some arrangement between themselves, without the knowledge or consent of the mortgagee, might improve him out of his prior lien in the premises. \* \* \* No case ever held that a mortgagor could, without the authority of the mortgagee, expressed or implied, create a lien on the mortgaged property so as to give it precedence of the mortgage."

<sup>4</sup> *Joralmon v. McPhee*, 31 Colo. 26, 71 Pac. 419; *James River & Co. v. Danner*, 3 N. Dak. 470, 57 N. W. 343; *Kiene v. Hodge*, 90 Iowa 212, 57 N. W. 717; *Patrick Land Co. v. Leavenworth*, 42 Nebr. 715, 60 N. W. 954.

<sup>5</sup> *Macintosh v. Thurston*, 25 N. J. Eq. 242; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *Hazelhurst v. Sea Isle City Hotel Co.* (N. J.), 25 Atl. 201; *Ettridge v. Bassett*, 136 Mass. 314; *Middletown Sav. Bank v. Fellowes*, 42 Conn. 36, 49; *Thorpe v. Durbon*, 45 Iowa 192; *Oliver v. Davy*, 34 Minn. 292, 25 N. W. 629; *Hill v. Aldrich*, 48 Minn. 73, 50 N. W. 1020; *Moody v. Tschabold*, 52 Minn. 51, 53 N. W. 1023; *Gillespie v. Bradford*, 7 Yerg. (Tenn.) 168, 27 Am. Dec. 494; *Guy v. Carriere*,

cure future advances as well as purchase-money. If, moreover, the parties at the same time agree that the purchaser shall erect a building upon the land within a specified time,<sup>6</sup> it can not be inferred from such an agreement that the mortgagee assented that any lien for labor done or material furnished for such building should take precedence of the mortgage. Where the title to land is not in the person who causes the building to be erected, and he has no legal consent from the owner, mechanics' liens thereon must be postponed to a purchase-money mortgage given afterwards by the purchaser when he has acquired title, although the building be then almost finished.<sup>7</sup> If a vendor sells land and takes a mortgage at the time for the purchase-money, and for advances he has agreed to make to enable the purchaser to build upon the land, and the deed and mortgage are recorded before the building is commenced, the advances being made during the progress of the building, the mortgage has priority of any lien on the property for labor or materials.<sup>8</sup>

But if the mortgage for purchase-money be not simultaneous with the conveyance, but subsequent, and before it is executed and recorded the purchaser enters into a contract for the erection of a building upon the land, the mechanic's lien is superior to the lien of the mortgage.<sup>9</sup> If a

5 Cal. 511; *Stoner v. Neff*, 50 Pa. St. 258; *Seely v. Neill*, 37 Colo. 198, 86 Pac. 334. See, however, *Rosenthal v. Maryland Brick Co.*, 61 Md. 590.

<sup>6</sup> Advances are invalid as to subcontractors in:—California: See ante, § 1190. District of Columbia: See ante, § 1105. Comp. Stats. 1910, p. 3298, § 5. See otherwise before the statute. *Platt v. Griffith*, 27 N. J. Eq. 207. New York: See ante, § 1218.

<sup>7</sup> *Gibbs v. Grant*, 29 N. J. Eq. 419; *Lamb v. Cannon*, 38 N. J. Eq. 362; *National Bank v. Sprague*, 20

N. J. Eq. 13; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *Macintosh v. Thurston*, 25 N. J. Eq. 242; *Paul v. Hoeft*, 28 N. J. Eq. 11; *Ellenwood v. Burgess*, 144 Mass. 534, 11 N. E. 755.

<sup>8</sup> *Hill v. Aldrich*, 48 Minn. 73, 50 N. W. 1020; *Birmingham Building & Loan Assn. v. Boggs*, 116 Ala. 587, 22 So. 852, 67 Am. St. 147.

<sup>9</sup> *Ansley v. Pasahro*, 22 Nebr. 662, 35 N. W. 885; *Kittredge v. Neumann*, 26 N. J. Eq. 195; *Soule v. Hurlbut*, 58 Conn. 511, 20 Atl. 610; *Nixon v. Cydon Lodge*, 56 Kans. 298, 43 Pac. 236; *Osborne v.*

purchaser under a contract of sale enters into possession, and materials are furnished to him for erecting a building, and afterwards he obtains a deed and makes a mortgage for a part of the purchase-money, the lien for materials has priority of the mortgage.<sup>10</sup> The lien takes priority of a mortgage made subsequently to the contract, though neither the labor is performed nor the materials furnished until after the making of the mortgage.<sup>11</sup>

The cases on this point are not, however, wholly in accord, partly because the statutes are unlike. Under most of the statutes the contracting party can subject only his own interest to a lien; and one having only an equitable title can not subject the title of the legal owner to a lien without his consent. The mortgage of an equitable owner, under a contract of purchase, made to secure a part of the purchase-money in accordance with the contract of purchase, takes precedence of a lien for work done, or materials furnished to the equitable owner before the making of the mortgage. This is especially the case if the contract of sale stipulates that, until the conveyance to the purchaser is executed, he shall not subject the property to any lien.<sup>12</sup>

But it is not essential that there should be any express limitation of the authority of one in possession, under a contract of purchase, to create liens as against the estate

Barnes, 179 Mass. 597, 61 N. E. 276.

<sup>10</sup> Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. 272; Carew v. Stubbs, 155 Mass. 549, 30 N. E. 219.

<sup>11</sup> Carew v. Stubbs, 155 Mass. 549, 30 N. E. 219.

<sup>12</sup> Chicago Lumber Co. v. Schweiter, 45 Kans. 207, 210, 25 Pac. 502. Per Johnston, J.: "To create a valid lien for material or labor, it is necessary that the person for whom they are furnished

should be an owner within the meaning of the statute, and have a right at the time the contract for the same is made to create a lien. The only claim which [the purchaser] Jones had upon the land was derived from his contract with the owner, and any one who relies on the contract to establish ownership in [him] Jones must be governed by the limitations and conditions therein contained."

of the legal owner. Thus the owner of land made an oral agreement for the sale of it, and gave immediate possession to the purchaser. The latter made a contract with a builder to repair and enlarge the buildings on the premises, and he began work under his contract. After this the owner conveyed the land to the purchaser, who at the same time gave back a mortgage for a portion of the purchase-money, both instruments being dated as of the day when the parol contract of sale was made. It was held that the mortgage took precedence of the lien for repairs. The deed, although dated back, took effect only from its delivery, which was after the date of the building contract. The seizin of the purchaser was instantaneous only. He had only an equity of redemption from the beginning, and he could not create a lien that could take precedence of the mortgage, except with the consent of the mortgagee.<sup>13</sup>

A landowner contracted to sell land, to be paid for partly in cash, and the balance to be secured by mortgage on the land. The contract provided that the purchaser might execute a mortgage to a third person, which should be superior to the purchase-money mortgage. The purchaser commenced the erection of a building on the land, and mechanics' liens attached to his interest in the property. Subsequently the purchaser executed a first mortgage to a third person, and a second mortgage for purchase-money to the vendor. In an action to enforce the mechanics' liens, it was held that upon a sale of the property there should be paid out of the proceeds—1, the first mortgage to the extent of the amount due on the vendor's mortgage; 2, the mechanics' liens; 3, the balance of the first mortgage, and 4, the vendor's mortgage.<sup>14</sup>

<sup>13</sup> Perkins v. Davis, 120 Mass. 408; Thaxter v. Williams, 14 Pick. (Mass.) 49. And see Middletown Savings Bank v. Fellowes, 42 Conn. 36; Patrick Land Co. v.

Leavenworth, 42 Nebr. 715, 60 N. W. 954.

<sup>14</sup> Malmgren v. Phinney, 50 Minn. 457, 52 N. W. 915, practically overruling Reilly v. Williams, 47 Minn. 590, 50 N. W. 826.

But in Maryland it was held that a lease for a long term of years, executed on the thirtieth day of November, but not recorded till the sixteenth day of December, at which time also a mortgage of the leasehold estate was executed and recorded to the lessor to secure purchases of lumber for the house, was held to take effect from its date, and to be subject to mechanics' liens for work and materials furnished in the construction of a house commenced after the agreement for the lease, but before its execution.<sup>15</sup>

Under a statute in New Jersey a mortgage to secure funds to repair or erect a building and actually used for such purpose, has priority over a mechanic's lien on the building.<sup>16</sup>

**§ 1459. Priority of recorded mortgage.**—A mortgage executed and put upon record in pursuance of a prior contract for a loan, and afterwards delivered to the mortgagee when the money is advanced on the mortgage, has priority over liens for work and materials furnished after the mortgage was recorded, for the erection of a building commenced between the time of recording the mortgage and its delivery, in case the mortgagee had no knowledge of the commencement of the building when he parted with his money.<sup>17</sup> The

<sup>15</sup> *Rosenthal v. Maryland Brick Co.*, 61 Md. 590.

<sup>16</sup> *Young v. Haight*, 69 N. J. L. 453, 55 Atl. 100.

<sup>17</sup> *Jacobus v. Mut. Benefit L. Ins. Co.*, 27 N. J. Eq. 604; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Sheldon v. Smith*, 28 Barb. (N. Y.) 593; *Payne v. Wilson*, 74 N. Y. 348, affg. 11 Hun (N. Y.) 302; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *National Bank v. Sprague*, 20 N. J. Eq. 13. The renewal of a prior recorded mortgage is superior to a mechanic's lien acquired after the recording of the first mortgage. *Title Guarantee & Trust Co. v. Wrenn*, 35

Ore. 62, 56 Pac. 271, 76 Am. St. 454. A recorded mortgage has priority over a mechanic's lien. *Thorp Block Sav. & c. Assn. v. James*, 13 Ind. App. 522, 41 N. E. 978; *Dunavant v. Caldwell & N. R. Co.*, 122 N. Car. 999, 29 S. E. 837; *Monticello Bank v. Sweet*, 64 Ark. 502, 43 S. W. 500; *Anglo-American Savings & L. Assn. v. Campbell*, 13 App. D. C. 581, 43 L. R. A. 622. But a mechanic's lien holder can not have a prior claim to that held by a mortgagee, where he procured the mortgage to be executed. *Ponder v. Safety B. & L. Co.*, 22 Ky. L. 1074, 59 S. W. 523, 858.

mortgage when delivered relates back to the agreement for the loan. It is immaterial that the money loaned on the mortgage is payable by instalments, all of which are made payable after the commencement of the building.<sup>18</sup> But a mortgage recorded before delivery, as for instance a mortgage made and put upon record ready for delivery when the mortgagor should obtain a loan, and without any previous agreement for a loan, is not a recorded mortgage so as to be notice to lien claimants until the loan is made and the mortgage is delivered.<sup>19</sup>

§ 1460. **Recordation of mortgage as dependent on statutes.**—Whether a mortgage must be recorded as well as executed before a mechanic's lien has attached must depend very much upon the terms of the different statutes. Recording is not necessary to give the mortgage priority of such lien under recording acts which make the recording necessary only as against subsequent purchasers and mortgagees.<sup>20</sup> Thus, where a mechanic's lien attaches to property by the commencement of work upon the premises after the execution of a mortgage, but before the recording of it, the mortgage is superior by virtue of the prior execution.<sup>21</sup> But in some states it is expressly provided that a mortgage must be recorded before a mechanic's lien attaches in order to give it priority.<sup>22</sup> Generally it may be said that it is the

<sup>18</sup> *Taylor v. La Bar*, 25 N. J. Eq. 222; *Barnett v. Griffith*, 27 N. J. Eq. 201; *Platt v. Griffith*, 27 N. J. Eq. 207; *Moroney's Appeal*, 24 Pa. St. 372; *Bartlett v. Bilger*, 92 Iowa 732, 61 N. W. 233.

<sup>19</sup> *Mutual Benefit L. Ins. Co. v. Rowand*, 26 N. J. Eq. 389, *affd.* 27 N. J. Eq. 604; *Freeman v. Schroeder*, 43 Barb. (N. Y.) 618; *Jacobus v. Mutual Benefit L. Ins. Co.*, 27 N. J. Eq. 604, *per* Dixon, J.

<sup>20</sup> *Rose v. Munic*, 4 Cal. 173;

*Munger v. Curtis*, 42 Hun (N. Y.) 465, 4 N. Y. St. 847, *per* Pratt, J.; *Payne v. Wilson*, 11 Hun (N. Y.) 302, *affd.* 74 N. W. 348; *Oliver v. Davy*, 34 Minn. 292, 25 N. W. 629; *Miller v. Stoddard*, 50 Minn. 272, 52 N. W. 895.

<sup>21</sup> *Root v. Bryant*, 57 Cal. 48; *Miller v. Stoddard*, 50 Minn. 272, 52 N. W. 895; *Noerenberg v. Johnson*, 51 Minn. 75, 52 N. W. 1069.

<sup>22</sup> Mechanics' liens have priority of mortgages unrecorded, and of

policy of the record system to do away with secret liens, and to require a record of every lien and conveyance, not only as against subsequent purchasers and mortgagees, but as against other lien claimants and creditors. The record of a mortgage is accordingly notice to subsequent claimants of mechanic's liens.<sup>23</sup> Actual notice by a lien claimant of an unrecorded mortgage has the same effect as a prior record of the mortgage.<sup>24</sup>

In the case of a mortgage for purchase-money, the omission of the mortgagee to record his mortgage until the deed is recorded is not to be construed as a waiver or estoppel, so as to subordinate it to the lien of a mechanic who had notice of the execution of the deed but not of the mortgage,

which the lienor had no notice when the lien attached, in:—Arizona: See ante, § 1188. Arkansas: See ante, § 1189. California: See ante, § 1190. Colorado: See ante, § 1191. District of Columbia: See ante, § 1195. Idaho: See ante, § 1198. Illinois: *St. Louis & C. R. Co. v. Kerr*, 153 Ill. 182, 38 N. E. 638. Maryland: See ante, § 1206; *Brooks v. Lester*, 36 Md. 65. Massachusetts: See ante, § 1207; *Dixon v. Hyndman*, 177 Mass. 506, 59 N. E. 73, even though the lienor had notice of the mortgage. Nevada: See ante, § 1214. New York: See ante, § 1218. Oregon: See ante, § 1221. South Carolina: See ante, § 1224. Utah: See ante, § 1227. Washington: See ante, § 1230. In Pennsylvania, prior record of the mortgage seems to be essential to its priority. *Pepperday's App.*, 152 Pa. St. 621, 25 Atl. 568. In New Jersey, upon a sale under proceedings to enforce the lien, the title of the owner passes subject only to all mortgages and

other incumbrances created and recorded, or registered prior to the commencement of the improvement; and in case of gearing or machinery, the bringing of the same upon the premises is such commencement. Prior incumbrances have priority to all subsequent builders' liens upon the land and the erections thereon, except such as may be removable as between landlord and tenant, which may be sold and removed by virtue of any building lien for the construction of the same free from such prior incumbrances. *Comp. Stats.* 1910, p. 3310, § 28. The exception applies only to such buildings erected by tenants on leased land as are removable as between landlord and tenant. *Heidelberg v. Jacobi*, 28 N. J. Eq. 544.

<sup>23</sup> *Reid v. Bank of Tenn.*, 1 Sneed (Tenn.) 262.

<sup>24</sup> *Miller v. Stoddard*, 50 Minn. 272, 52 N. W. 895; *Bradford v. Anderson*, 60 Nebr. 368, 83 N. W. 173.

where neither instrument was recorded until after the work was performed or the materials delivered under which the lien is claimed.<sup>25</sup>

The statutes of some states provide that deeds shall take effect from the day they are executed, if they are recorded within a limited time thereafter. This is the law in Maryland. There the owner of the fee leased land for ninety-nine years, renewable forever, reserving an annual ground-rent, and the lease was recorded three days later. Work was begun upon a building on the leased land a few hours before the lease was recorded, but after its execution. It was held that a lien for materials furnished to the lessee for such building did not attach to the reversionary interest, but only to the interest of the lessee.<sup>26</sup>

**§ 1461. Marshalling securities.**—The doctrine of marshalling of securities is applied in favor of mechanic's lien claimants as against a mortgagee having a mortgage upon the same lot, and also upon another lot upon which there is no other lien. In such case the mortgagee will be required to apply in the first place to the satisfaction of his mortgage the proceeds of the lot upon which there is no other claim.<sup>27</sup>

**§ 1462. Priority as to building alone.**—In several states a prior mortgage retains its priority only upon the land, the mechanics' liens having priority upon the buildings or improvements erected upon the land.<sup>28</sup> Provisions are made

<sup>25</sup> *Oliver v. Davy*, 34 Minn. 292, 25 N. W. 629.

<sup>26</sup> *Beehler v. Ijams*, 72 Md. 193, 19 Atl. 646.

<sup>27</sup> *Hamilton v. Schwehr*, 34 Md. 107; *In re Olympic Theatre*, 2 Browne (Pa.) 275; *Kenny v. Gage*, 33 Vt. 302, 307. If the mortgagee fails to do this, his security will be postponed to the lien claim.

*McCarthy v. Miller*, 122 Ill. App. 299.

<sup>28</sup> In the following states the mechanic's lien has priority as to the building or other improvement over all other liens, mortgages, and incumbrances, whether prior or subsequent:—Alabama: See ante, § 1187. Colorado: See ante, § 1191. Illinois: See ante, § 1199. Indi-



in the statutes of these states for enforcing the liens against the buildings by a sale and removal of the buildings, or by a sale of land and buildings together, and a distribution of the proceeds between the mortgagee and the lienholders according to the respective values of the land and of the buildings. "As against a prior mortgage or incumbrance of the land, the equity and policy of the statute which secures the mechanic's and material-man's lien, rest upon the principle, that no injustice is done in preventing the holder of the older lien from appropriating the labor and material of others, by which his security is enhanced, without compensation."<sup>29</sup>

It is only when there is a prior lien upon the land that the court is authorized to order a sale of the building alone.<sup>30</sup>

ana: *Carriger v. Mackey*, 15 Ind. App. 392, 44 N. E. 266; *Building & L. Assn. v. Coburn*, 150 Ind. 684, 50 N. E. 885. Iowa: See ante, § 1201. It has been held that the mechanic's lien has priority only in case the building can be removed without injury. *Leach v. Minick*, 106 Iowa 437, 76 N. W. 751. See *Tower v. Moore*, 104 Iowa 345, 73 S. W. 823. The constitutionality of this sort of legislation is well settled. *Church v. Smithea*, 4 Colo. App. 175, 35 Pac. 267. Kansas: *McCrie v. Hixon Lumber Co.*, 7 Kans. App. 39, 51 Pac. 966. Kentucky: *Grainger v. Old Kentucky Paper Co.*, 105 Ky. 683, 49 S. W. 477, construing statute. Michigan: See ante, § 1208. Missouri: See ante, § 1211; *Schulenberg v. Hayden*, 146 Mo. 583, 48 S. W. 472. Montana: See ante, § 1212; *Grand Opera House Co. v. Maguire*, 14 Mont. 558, 37 Pac. 607. North Dakota: See

ante, § 1219a. Oklahoma: See ante, § 1220a. Oregon: See ante, § 1221. South Dakota: See ante, § 1219a. Texas: See ante, § 1226. Wyoming: See ante, § 1233. This lien has priority of purchase-money mortgages. *Claes v. Dallas &c. Loan Assn.*, 83 Tex. 50, 18 S. W. 421.

<sup>29</sup> It has been held that the mechanic's lien has priority only in case the building can be removed without injury. *Leach v. Minick*, 106 Iowa 437, 76 N. W. 751. See *Tower v. Moore*, 104 Iowa 345, 73 S. W. 823. The constitutionality of this sort of legislation is well settled. *Church v. Smithea*, 4 Colo. App. 175, 35 Pac. 267; *Wimberly v. Mayberry*, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305, per Coleman, J. Also see *Welch v. Porter*, 63 Ala. 225, 232.

<sup>30</sup> *Luce v. Curtis*, 77 Iowa 347, 42 N. W. 313.

The vendor's lien, while remaining the superior lien as to the land, is displaced by the mechanic's lien so far as the buildings are concerned.<sup>31</sup> In such case, the lien may be enforced by a sale of the land and buildings together, and applying so much of the proceeds as represent the value of the land to the payment of the vendor's lien, and the remainder, representing the value of the buildings, to the mechanic's lien. In a case where a vendor had reserved a lien in his deed, it was contended that the vendor's lien did not attach to the house, as it was not in existence when the conveyance was made and the lien retained; but the doctrine was declared to be elementary that improvements upon the land become a part of the real estate, and that a lien on land can be asserted as against all improvements placed upon it, either before or after the lien was created, unless a superior lien is given upon the improvements to mechanics.<sup>32</sup>

Such a provision has no application where the mortgage has been foreclosed and the premises sold thereunder before the materials for which the lien is claimed have been furnished; especially if it be provided that in such case the court may order the building or improvement to be sold separately, and the purchaser is given a reasonable time to remove the same; or that the court may take an account and make an equitable distribution of the proceeds: for it is impossible to carry out these provisions if the mortgage has been foreclosed and the property sold. In such case, the statutory right to redeem is the only right that can be enforced against the purchaser.<sup>33</sup>

§ 1462a. Improvements placed on mortgaged land.—These statutes apply only when a building or improvement

<sup>31</sup> Louisville Building Assn. v. Korb, 79 Ky. 190, 2 Ky. L. (Abst.) Korb, 79 Ky. 190; Stockwell v. 71.  
Carpenter, 27 Iowa 119.

<sup>33</sup> Shepardson v. Johnson, 60

<sup>32</sup> Louisville Building Assn. v. Iowa 239, 14 N. W. 302.

as an entirety is placed upon the mortgaged land.<sup>34</sup> "Where the improvement is a mere betterment, or where repairs are made upon a building or improvement upon which there is a valid lien, and the owner has only a qualified right, it would be unjust and inequitable in many cases, and against the plain provision of § 3018 [the statute], to enforce the lien and give it priority on the entire building or improvement. It would be appropriating one man's property to pay the debts of another, without his knowledge and consent."<sup>35</sup> A lien for labor done or materials furnished for the improvement or enlargement of a building does not take priority over an existing mortgage, even though the building be changed so that very little of the original structure remains.<sup>36</sup>

But in a case in Alabama it was held by a divided court that where a building on land already subject to a mortgage was repaired, the mortgage was a lien superior and prior to a mechanic's lien for the repairs, as to the property covered by the mortgage before the mechanic's lien attached, but subordinate to the mechanic's lien for what the mechanic added. In other words, the mechanic's lien in such case has priority to the extent of the value of the improvement, and is secondary only as to the property covered by the mortgage before the materials were added.<sup>37</sup>

The minority opinion, however, which holds that no lien can be enforced in such case, seems to be supported by sound reasoning and controlling authority. Chief Justice

<sup>34</sup> *Wimberly v. Mayberry*, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305; *Getchell v. Allen*, 34 Iowa 559; *Neilson v. Iowa Eastern R. Co.*, 44 Iowa 71, 77; *Crandall v. Cooper*, 62 Mo. 478; *Haeussler v. Thomas*, 4 Mo. App. 463; *Steininger v. Raeman*, 28 Mo. App. 594.

<sup>35</sup> *Wimberly v. Mayberry*, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305,

per Coleman, J.; *Christian-Craft Grocery Co. v. Kling*, 121 Ala. 292, 25 So. 629.

<sup>36</sup> *Equitable L. Ins. Co. v. Slye*, 45 Iowa 615.

<sup>37</sup> *Wimberly v. Mayberry*, 94 Ala. 240, 10 So. 157, 14 L. R. A. 305. Chief Justice Stone delivered a dissenting opinion, in which Judge Clopton concurred.

Stone states the following propositions: 1. That the mortgage being recorded is notice to the mechanic. 2. That the mechanic had no right either at law or in equity to compel the older mortgagee to enforce his lien, either by foreclosure or otherwise, in order that their junior interests might be carved out of it. The only right of any junior incumbrancer is to redeem the property from the older incumbrancer, and thereby secure subrogation to his rights. 3. There is no adjudged case which holds that a junior incumbrancer, although his labor or money may have enhanced the value of the security, can coerce the enforcement of the lien, as a means of carving his alleged interest or lien out of it, unless there is a statute conferring the right. The learned judge continues: "For the case we have in hand the statute points out no specific mode of enforcing the lien. It must, therefore, be determined on equitable principles. The claim of a mechanic or material-man is at least but a lien—a right to have the claim enforced as a charge. The statute makes it subordinate to all older valid liens; and if it did not, the constitutional barrier would have made it so."<sup>38</sup>

<sup>38</sup> The Iowa case cited in the dissenting opinion seems conclusive. In that case Chief Justice Beck, delivering the opinion, said: "In the case of a mortgage upon land, and the buildings thereon, made before the mechanic's lien attaches, the mortgagee will hold the property as against the mechanic. How is it when improvements in the nature of additions or repairs to the building are made after such mortgage? The mortgage binds the house; the improvements of the character indicated become a part of the house, and are, as it were, incorporated with it. After the improvements are made, they do not remain sepa-

rate and distinct from the building. They have lost their distinctive character; the house includes them, they are a part of the house, and as such are covered by the mortgage \* \* \* the mechanic's lien can not defeat the mortgagee's right. \* \* \* These views, we think, are based upon sound principles, and lead to equitable results. Should a contrary doctrine prevail, it would be within the power of a mortgagor to ruin the security of his creditor, by making improvements upon the building covered by the mortgage, which, in fact and in law, would be a part of the building itself. The case before us serves to illustrate the injustice

§ 1463. **Conveyance of land to secure a debt.**—Where an absolute conveyance of land is made to secure a loan, the grantee giving a bond to reconvey upon payment of the debt, and the equitable owner afterwards contracts for materials for building a house upon the land, the material-man has a lien prior to that of the equitable mortgagee as to the building, but subject to it as to the land. Where in such case a sale is necessary, the proportion of the value of the building to that of the whole property should first be ascertained, and so much as necessary of the value of the building should be applied to the satisfaction of the claims of the material-man.<sup>39</sup>

§ 1464. **Machinery attached to such building.**—Under statutes by which a lien, so far as the building is concerned, is entitled to preference over a prior mortgage, a lien for machinery which is furnished for a mill in its construction, and becomes a part of it, in like manner takes precedence over a prior mortgage.<sup>40</sup> So far as the land is concerned, the prior mortgage takes precedence of the lien, but it is subject to the lien on the building; and the lien is not affected by the foreclosure of the mortgage.

§ 1465. **Priority of mechanic's lien as dependent on priority of contract under some statutes.**—In several states the priority of a mechanic's lien depends upon the priority of

of such a rule. Another story is added to a house, already bound by the mortgage. The story can not be separated from the house; it is a part of it. It would be a great hardship to the mortgagee to permit his security to be defeated or impaired by the act of the mortgagor in thus adding to his building. The mechanic or material-man can not complain. He had notice of the mortgage and

knew or was bound to know the purposes for which the materials were furnished, or work was done by him." *Getchell v. Allen*, 34 Iowa 559.

<sup>39</sup> *Langford v. Mackay*, 12 Bradw. (Ill.) 223.

<sup>40</sup> *Hall v. Mullanphy Planing Mill Co.*, 16 Mo. App. 454; *Heidegger v. Atlantic Milling Co.*, 16 Mo. App. 327; *Hall v. St. Louis Mfg. Co.*, 22 Mo. App. 33.

the contract under which the labor is performed or the materials furnished. The lien has priority over a mortgage recorded after the making of the contract under which the lien is claimed. When the labor is performed or the materials are furnished under the contract, the lien attaches and relates back to the time of the contract, and takes priority of all mortgages subsequently made.<sup>41</sup>

On the other hand, if the mortgage be made and recorded before the time of making the building contract, the lien attaches only to the equity of redemption. The mortgagee is affected by such lien only in case he becomes expressly

<sup>41</sup> Illinois: *Stout v. Sower*, 22 Ill. App. 65; *Clark v. Moore*, 64 Ill. 273; *Thielman v. Carr*, 75 Ill. 385; *Brown v. Moore*, 26 Ill. 421, 425, 79 Am. Dec. 383; *Phoenix Mut. L. Ins. Co. v. Batches*, 6 Bradw. (Ill.) 621; Massachusetts: *Dunklee v. Crane*, 103 Mass. 470; *Howard v. Veazie*, 3 Gray (Mass.) 233; *Howard v. Robinson*, 5 Cush. (Mass.) 119; *The Granite State*, 1 Sprague (U. S.) 277, Fed. Cas. No. 5687. This includes not only bilateral contracts but also contracts created by agreement on one side and action on the other. Thus a contract to furnish all materials at an agreed price is such a contract. *Sprague v. McDougall*, 172 Mass. 553, 52 N. E. 1077; *Batchelder v. Hutchinson*, 161 Mass. 462, 37 N. E. 452. New Hampshire: *Pike v. Scott*, 60 N. H. 469; *Cheshire Provident Inst. v. Stone*, 52 N. H. 365. In the following states the lien attaches from the date of the contract, by statutory provisions:—Louisiana: See ante, § 1204. From date of recording the act containing the bargain, or the evidence of in-

debtedness. Mississippi: See ante, § 1210. From time of filing the contract for record. New York: See ante, § 1218. The lien attaches from the time of filing notice of the lien. Where it is expressly provided that a claim shall not be a lien except from the time of filing the claim, if the claim be filed after the death of the debtor, though within the time allowed for the filing of claims, it is not entitled to priority over the general debts of the decedent. *Hoff's Appeal*, 102 Pa. St. 218. Tennessee: When a contract to supply materials for building a house is made before a mortgage on the property is recorded, but the mortgage is recorded before the materials are actually furnished and no notice is given the mortgagee, the lien of the mortgage is superior to the lien of the materialman. *Rawlings v. New Memphis Gaslight Co.*, 105 Tenn. 268, 60 S. W. 206, 80 Am. St. 880. Vermont: The lien attaches from the time of filing a memorandum of the claim of lien. See ante, § 1228.

or tacitly a party to the contract. The mortgagee, in order to protect himself from liens under subsequent contracts, is not obliged to give the notice provided by statute whereby an owner not a party to the contract may prevent the attaching of a lien by giving written notice to the person performing the labor or furnishing the materials that he will not be responsible therefor. No agreement between the mortgagor and a mechanic after the mortgage is recorded can subject the property to any lien which shall displace the mortgage without the knowledge or against the will of the mortgagee.<sup>42</sup>

A person who honestly advances money upon a mortgage of land upon which there is no lien at the time under any existing contract for the building of a house upon the land, can not be prejudiced by a rescission of the contract, even if such rescission might operate to create a lien as against the owner.<sup>43</sup>

In Illinois, where a contract is made with the owner for labor or materials pending a bill to foreclose a prior mortgage on the land, a decree and sale under the mortgage will cut off all right of lien. The *lis pendens* is notice to the mechanic.<sup>44</sup>

### § 1466. Contract too indefinite to create prior lien.—

But the contract, though prior to the mortgage, may be too indefinite to create a prior lien. An agreement made prior to a mortgage of a house, to paint and paper it at a fair

<sup>42</sup> *Morse v. Dole*, 73 Maine 351; *Cocheco Bank v. Berry*, 52 Maine 293; *Sly v. Pattee*, 58 N. H. 102; *Foushee v. Grigsby*, 12 Bush (Ky.) 75; *Martsolf v. Barnwell*, 15 Kans. 612. In this case the mortgage was recorded August 21, and the contract under which the lien was claimed was executed August 23; and the mortgage was adjudged the prior lien. It was regarded as

immaterial that only a small part of the money was paid over at the time the mortgage was executed.

<sup>43</sup> *Welsh v. Woodbury*, 144 Mass. 542, 11 N. E. 762.

<sup>44</sup> *Green v. Sprague*, 120 Ill. 416, 11 N. E. 859; *Davis v. Connecticut Mut. L. Ins. Co.*, 84 Ill. 508; *Hards v. Connecticut Mut. L. Ins. Co.*, 8 Biss. (U. S.) 234.

price, which mentions the number of coats of paint to be placed upon the outside, but does not mention the number of coats upon the inside, nor the number of rooms, nor what rooms are to be papered, nor the kind and quality of the paper to be used, does not constitute a contract sufficiently precise to create a lien upon the land for the labor performed and materials furnished after the execution of the mortgage.<sup>45</sup>

§ 1467. **Relief of mechanic against a mortgage.**—A mechanic may have relief in equity against a mortgagee who has fraudulently obtained priority by inducing the mechanic to delay the signing of a building contract until the landowner has executed and recorded the mortgage. Such a mortgage could not be successfully set up against a purchaser under proceedings to enforce the lien. But in case nothing is due the mechanic under his contract until the completion of the building, the mechanic is entitled in the meantime to a decree in equity restraining the assignment of the mortgage, and compelling its cancellation.<sup>46</sup>

§ 1468. **Impairment of mortgagee's rights by prior contract.**—In some states a mortgagee's rights are not impaired by a prior contract of which he had no notice, and in regard to which he was not put on inquiry.<sup>47</sup> Where a mortgagee takes a mortgage with knowledge that a builder is erecting a house upon the land under a previous contract with the owner, or is chargeable with notice that would lead to such knowledge, and suffers the builder to go on and complete the work, the builder's lien is superior to the mortgage for all the work done by virtue of the contract, both for that done after the execution of the mortgage and for that done before.<sup>48</sup>

<sup>45</sup> *Manchester v. Searle*, 121 Mass. 418.

<sup>46</sup> *Hulsman v. Whitman*, 109 Mass. 411.

<sup>47</sup> *Sly v. Pattee*, 58 N. H. 102.

<sup>48</sup> *Cheshire Provident Inst. v. Stone*, 52 N. H. 365; *Chadbourn v. Williams*, 71 N. Car. 444; *Hahn v.*



§ 1469. **Priority of lien from commencement of the building.**—Under statutes which give priority to the lien from the commencement of the building, some open, visible act is required to fix and establish the precise time when the mechanic or material-man shall have such priority.<sup>49</sup> The attaching to the realty of any material used in the construction or repair of a building is such an act, and is the commencement of a lien for materials. Open, visible work upon a building is the commencement of a lien for work done.<sup>50</sup> Under this rule a person about to take a mortgage upon the property, or a conveyance of it, may determine with certainty, by an examination of the premises, whether his security is liable to be, or can be, impaired by liens of mechanics or material-men.<sup>51</sup> The work itself commenced upon the land is notice to all the world of the claims of the mechanics and material-men who have been or may be en-

Bonacum, 76 Nebr. 837, 107 N. W. 1001, 109 N. W. 368; Chapman v. Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. 779.

<sup>49</sup> In the following states the liens attach in preference to all incumbrances upon the land subsequent to the commencement of the building or improvement:—Alabama: See ante, § 1187. Arkansas: See ante, § 1189. District of Columbia: See ante, § 1195. Idaho: See ante, § 1198. Iowa: See ante, § 1201. Kansas: See ante, § 1202. Maryland: See ante, § 1206. Missouri: Elliott & Barry Engineering Co. v. Baker, 134 Mo. App. 95, 114 S. W. 71; Landau v. Cottrill, 159 Mo. 308, 60 S. W. 64. Nevada: See ante, § 1214. New Mexico: See ante, § 1217. North Dakota: See ante, § 1219a. Oklahoma: See ante, § 1220a. Ore-

gon: See ante, § 1221. Pennsylvania: See ante, § 1222. Rhode Island: See ante, § 1223. South Dakota: See ante, § 1224a. Utah: See ante, § 1227; Sanford v. Kunkel, 30 Utah 379, 85 Pac. 363, modified 85 Pac. 1012. Washington: See ante, § 1230. Wisconsin: See ante, § 1232.

<sup>50</sup> Mutual Benefit L. Ins. Co. v. Rowand, 26 N. J. Eq. 389; Brooks v. Lester, 36 Md. 65; Jessup v. Stone, 13 Wis. 466; Chapman v. Wadleigh, 33 Wis. 267; Hall v. Hinckley, 32 Wis. 362; Warden v. Sabins, 36 Kans. 165, 12 Pac. 520; Farmers' Bank v. Winslow, 3 Minn. 86, 74 Am. Dec. 740; Knox v. Starks, 4 Minn. 20.

<sup>51</sup> Conrad v. Starr, 50 Iowa 470; Monroe v. West, 12 Iowa 119, 79 Am. Dec. 524.

gaged upon it.<sup>52</sup> And on the other hand, in such states a mortgage executed before the commencement of the building or other improvement takes precedence of a lien for such improvement;<sup>53</sup> and a mortgage also takes precedence of a lien for repairs made subsequently.<sup>54</sup>

**§ 1470. Lien dates from commencement of building.**—A lien for the construction of a building dates from the commencement of it without regard to the time when, or the person by whom, the work was done or materials furnished. A mechanic's lien has priority over a mortgage executed after the commencement of the building or other improvement, though the particular work for which the lien is claimed was performed, or the materials for which the lien is claimed were furnished, subsequently to the execution of such mortgage.<sup>55</sup>

<sup>52</sup> Hahn's App., 39 Pa. St. 409; Gault v. Deming, 3 Phila. (Pa.) 337; Austin v. Wohler, 5 Bradw. (Ill.) 300; Warden v. Sabins, 36 Kans. 165, 12 Pac. 520.

<sup>53</sup> Crandall v. Cooper, 62 Mo. 478; Central Trust Co. v. Bartlett, 57 N. J. L. 206, 30 Atl. 583. In such case the mortgage must be recorded. Ortonville v. Greer, 93 Minn. 501, 101 N. W. 963, 106 Am. St. 445.

<sup>54</sup> Haeussler v. Thomas, 4 Mo. App. 463.

<sup>55</sup> Brooks v. Burlington & C. R. Co., 101 U. S. 443, 25 L. ed. 1057; Davis v. Bilsland, 18 Wall. (U. S.) 659. Alabama: Welch v. Porter, 63 Ala. 225, 232. Arkansas: Apperson v. Farrell, 56 Ark. 640, 20 S. W. 514. Iowa: Neilson v. Iowa Eastern R. Co., 44 Iowa 71; Taylor v. Burlington, C. R. & M. R. Co., 4 Dill. (U. S.) 570, Fed. Cas. Co. 13783; Davis v. Bilsland, 18 Wall. (U. S.) 659, 21 L. ed. 969;

Meyer v. Construction Co., 100 U. S. 457, 25 L. ed. 593; Brooks v. Burlington & C. R. Co., 101 U. S. 443, 25 L. ed. 1057, Meyer v. Hornby, 101 U. S. 728, 25 L. ed. 1078, Illinois: Interstate B. & L. Assn. v. Ayers, 71 Ill. App. 529, affd. 177 Ill. 9, 52 N. E. 342. Indiana: Zehner v. Johnston, 22 Ind. App. 452, 53 N. E. 1080. Kansas: Warden v. Sabins, 36 Kans. 165, 12 Pac. 520; Thomas v. Mowers, 27 Kans. 265; Chicago Lumber Co. v. Schweiter, 45 Kans. 207, 25 Pac. 592; Getto v. Friend, 46 Kans. 24, 26 Pac. 473; Kansas Mtg. Co. v. Weyerhaeuser, 48 Kans. 335, 29 Pac. 153; Flint & C. Mfg. Co. v. Douglass Sugar Co., 54 Kans. 455, 38 Pac. 566, holding mortgage executed after building commenced must yield to lien for machinery placed in building after mortgage is given. Followed in Keystone Iron-Works Co. v. Douglass Sugar Co., 55 Kans. 195, 40 Pac. 273. See, also, to same effect,

Within the period of time allowed by the statute for the lien to be fixed by being recorded, every person dealing with the property is charged with notice of the existence of the lien.<sup>56</sup> Alterations in the original plans and specifications for a building, although made after the execution of such mortgage, and not at that time contemplated by either

Nixon v. Cydon Lodge No. 5, K. of P., 56 Kans. 298, 43 Pac. 236. Kentucky: Humbolt Bldg. Assn. v. Volmering (Ky. App.), 47 S. W. 1084. Maryland: Wells v. Canton Co., 3 Md. 234; Rosenthal v. Maryland Brick Co., 61 Md. 590. Massachusetts: Sprague v. McDougall, 172 Mass. 553, 52 N. E. 1077. Michigan: Kay v. Towsley, 113 Mich. 281, 71 N. W. 490. Minnesota: Glass v. Freeberg, 50 Minn. 386, 52 N. W. 900, 16 L. R. A. 335; Gardner v. Leck, 52 Minn. 522, 54 N. W. 746; Ortonville v. Geer, 93 Minn. 501, 101 N. W. 963, 106 Am. St. 445. Missouri: Dubois v. Wilson, 21 Mo. 213; Crandall v. Cooper, 62 Mo. 478; Reilly v. Hudson, 62 Mo. 383; Douglas v. St. Louis Zinc Co., 56 Mo. 388. Montana: Mason v. Germaine, 1 Mont. 263; Mochon v. Sullivan, 1 Mont. 470; Merrigan v. English, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837; Davis v. Bilsland, 18 Wall. (U. S.) 659, 21 L. Ed. 969. Nebraska: Goodwin v. Cunningham, 54 Nebr. 11, 74 N. W. 315. See Portsmouth Savings Bank v. Riley, 54 Nebr. 531, 74 N. W. 838. New Jersey: In re Dey, 9 Blatch. (U. S.) 285, Fed. Cas. No. 3871; Mutual Benefit L. Ins. Co. v. Rowand, 26 N. J. Eq. 389; Morris County Bank v. Rockaway Mfg. Co., 14 N. J. Eq. 189; Gordon v. Torrey, 15 N. J. Eq. 112, 82 Am. Dec. 273. North Carolina: Burr v. Maultsby, 99

N. Car. 263, 6 S. E. 108, 6 Am. St. 517; Lookout Lumber Co. v. Mansion Hotel Co., 109 N. Car. 658, 14 S. E. 35; Pinkston v. Young, 104 N. Car. 102, 10 S. E. 133. North Dakota: Haxtun Steam-Heater Co. v. Gordon, 2 N. Dak. 246, 50 N. W. 708. Pennsylvania: American F. Ins. Co. v. Pringle, 2 S. & R. (Pa.) 138; Pennock v. Hoover, 5 Rawle (Pa.) 291; Hern v. Hopkins, 13 S. & R. (Pa.) 269; Reading v. Hopson, 90 Pa. St. 494. Rhode Island: Bassett v. Swarts, 17 R. I. 215, 21 Atl. 352, holding that a mortgage given on land after a cellar has been dug, and a foundation commenced for a building thereon, must yield to liens for work and material furnished in the erection of the building after recording the mortgage. Texas: Schultze v. Alamo &c. Brew. Co., 2 Tex. Civ. App. 236, 21 S. W. 160; Trammell v. Mount, 68 Tex. 210, 215, 4 S. W. 377, 2 Am. St. 479. Wisconsin: In re Cook, 3 Biss. (U. S.) 116, Fed. Cas. No. 3151; In re Hoyt, 3 Biss. (U. S.) 436, Fed. Cas. No. 6805; Rees v. Ludington, 13 Wis. 276, 80 Am. Dec. 741; Jessup v. Stone, 13 Wis. 466.

<sup>56</sup> Keating Imp. Co. v. Marshall Electric Light & Power Co., 74 Tex. 605, 12 S. W. 489; Pacific Mut. Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758.

party thereto, can not be effectual to deprive one who furnishes the labor and material for such alterations of the benefits of such superior lien, provided such alterations do not change the design and purpose of the building, so that the whole when finished is substantially a different building from that first commenced.<sup>57</sup>

A person in possession of land under a contract of purchase is regarded as an owner within the terms of the statutes, and may subject his interest to a lien; and if he commences the construction of a building, and afterwards acquires full title and makes a mortgage, the liens date from the commencement of the building, and are prior to the mortgage.<sup>58</sup>

§ 1471. **Application of rule in favor of subcontractors as well as contractors.**—As against a mortgage or other incumbrance, the lien of a subcontractor relates back to the date of the commencement of the erection of the building, and has priority over a mortgage placed upon the property after the work was begun.<sup>59</sup> The commencement of the building is a fact of which all persons may take notice. Any one afterwards taking a mortgage upon the property is bound to assume that the work commenced will be continued, and that liens may arise for work and materials furnished by subcontractors as well as by the original contractor. The statutes, so far as priority is concerned, make no distinction between the protection afforded to contractors and that afforded to subcontractors. This protection in both cases is from the “commencement of the buildings or improvements.”

<sup>57</sup> Norris' Appeal, 30 Pa. St. 122, Haxtun Steam Heater Co. v. Gordon, 72 N. Dak. 246, 50 N. W. 708. See, also, Pennock v. Hoover, 5 Rawle (Pa.) 291, 307; Equitable L. Ins. Co. v. Slye, 45 Iowa 615.

<sup>58</sup> Meyer Bros. Drug Co. v. Brown, 46 Kans. 543, 26 Pac. 1019;

Interstate B. & L. Assn. v. Ayers, 177 Ill. 9, 52 N. E. 342.

<sup>59</sup> In re Denkel's Est., 1 Pearson (Pa.) 213; Hydraulic Brick Co. v. Bormans, 19 Mo. App. 664. But see contra, Grand Island Banking Co. v. Koehler, 57 Nebr. 649, 78 N. W. 265.

§ 1472. **Excavation for the foundation of a building a commencement of the building.**<sup>60</sup>—This is constructive notice to all persons who may purchase the property, or may acquire any interest in it, that liens for labor and materials to be used in the construction of the building may attach and become entitled to priority. That the excavation is made by the owner himself or under his direction, and not under a contract, is immaterial.<sup>61</sup>

A building is also commenced before the excavation for the building when the timber for the structure has first been brought upon the ground, and this has been mortised or otherwise prepared for the erection of the building.<sup>62</sup> But the mere bringing of a considerable amount of lumber upon the premises, and beginning to build a fence around the lot, does not create a lien prior to a mortgage executed after the delivery of the lumber or the commencement of the fence, the work on the house not commencing until after the execution of the mortgage.<sup>63</sup>

Such preliminary work as clearing the land of stumps, and other material that would render the foundations of a structure upon it insecure, especially when done by the owner, is not the commencement of a building; and a mortgage on the premises executed after such work was done, and before the construction of the structure was begun, has priority over the mechanic's lien.<sup>64</sup>

<sup>60</sup> *Bassett v. Swarts*, 17 R. I. 215, 21 Atl. 352, quoting text; *Kansas Mtg. Co. v. Weyerhaeuser*, 48 Kans. 335, 29 Pac. 153; *Pennock v. Hoover*, 5 Rawle (Pa.) 291; *American F. Ins. Co. v. Pringle*, 2 Serg. & R. (Pa.) 138; *Hern v. Hopkins*, 13 S. & R. (Pa.) 269; *Brooks v. Lester*, 36 Md. 65; *Mutual Benefit L. Ins. Co. v. Rowand*, 26 N. J. Eq. 389; *Jacobus v. Mutual Benefit L. Ins. Co.*, 27 N. J. Eq. 604.

<sup>61</sup> *Mutual Benefit L. Ins. Co. v.*

*Rowand*, 26 N. J. Eq. 389.

<sup>62</sup> *James v. Van Horn*, 39 N. J. L. 353, 355, 363.

<sup>63</sup> *Middletown Savings Bank v. Fellowes*, 42 Conn. 36; *Kansas Mtg. Co. v. Weyerhaeuser*, 48 Kans. 335, 29 Pac. 153.

<sup>64</sup> *Central Trust Co. v. Cameron Iron & Coal Co.*, 47 Fed. 136. Filling a water lot to abate a nuisance is not a commencement of building. *Kiene v. Hodge*, 90 Iowa 212, 57 N. W. 717.

§ 1473. **Necessity that work should be done with intention of continuing it.**—The work must be done with the intention of continuing it to the completion of the building in order to constitute it a commencement of the building. The owner of a city lot graded it, and put in the foundation walls of a building, for the purpose of making the lot available for sale or lease. Some months after this work was done, the owner leased the lot so improved for ninety-nine years, and took a mortgage to secure the rent and advances to be made for the buildings, the lease and mortgage being part of the same transaction. The mortgage was recorded before the lessee began to build. It was held that the commencement of the building was not the putting in of the foundation walls by the vendor, but that in this case the first work done under the lessee in erecting the building was the commencement of it.<sup>65</sup>

§ 1474. **Work not done on the premises.**—Work not done upon the premises, such as the making of window frames or the like, can not be regarded as the commencement of the building as against a mortgage executed and recorded before any work is done upon the premises, though the work be done under a contract made before the execution of the mortgage.<sup>66</sup>

The measuring and laying off the ground, and the driving of stakes to mark the lines and corners for excavating for the foundations, do not constitute a commencement of the building.<sup>67</sup> Even if, in addition to this, some work be done in levelling the ground for the purpose of making a survey and location of the building, and not for the purpose of constructing the building at that time, it is not the commencement of the building within the terms of the statute.<sup>68</sup>

<sup>65</sup> *Jean v. Wilson*, 38 Md. 288.  
And see *Kelly v. Rosenstock*, 45 Md. 389.

<sup>67</sup> *Brooks v. Lester*, 36 Md. 65.

<sup>68</sup> *Kelly v. Rosenstock*, 45 Md. 389.

<sup>66</sup> *Taylor v. La Bar*, 25 N. J. Eq. 222.

Whether the work relied upon in any case constitutes a commencement of a building, is a question of fact to be determined by the evidence.<sup>69</sup>

**§ 1475. Effect of stopping work by owner after building is commenced.**—When the owner, after commencing a building, stops work, pays off all claims against it, and sells the land and unfinished building, and the purchaser, after an interval of several months, resumes work and finishes the building, liens for work done and materials furnished for the last purchaser can not be carried back beyond the recommencement of the work after the sale.<sup>70</sup> If a house be sold unfinished, and the same workmen go on to complete it for the purchaser, they have a lien which relates back to the commencement of the building, and takes precedence of a mortgage given for the purchase-money of such sale;<sup>71</sup> especially if the purchaser understood and agreed that the house should be finished in accordance with original contracts by the contractors and workmen originally employed. But after a house is finished, and the purchaser merely has it papered, the paperhanger's lien does not affect the mortgage given for the purchase-money.<sup>72</sup>

Whether the repairs or additions to a building made soon after its erection are a continuation of the original contract for the building, or are done under a new contract, is a question for the jury upon all the evidence.<sup>73</sup>

<sup>69</sup> *Kelly v. Rosenstock*, 45 Md. 389.

<sup>70</sup> *Fordham's App.*, 78 Pa. St. 120. "There was no identity of parties, estate or contract, and no unity in the subject of the lien, to enable the liens to relate back to the first commencement of the cellar."

<sup>71</sup> *American F. Ins. Co. v. Pringle*, 2 Serg. & R. (Pa.) 138. This decision as reported seems to be

doubtful law; for it is not expressly stated that the workmen who finished the building were the same who commenced it. This criticism of the case is made in *Stevenson v. Stonehill*, 5 Whart. (Pa.) 301.

<sup>72</sup> *McCree v. Campion*, 5 Phila. (Pa.) 9.

<sup>73</sup> *Diller v. Burger*, 68 Pa. St. 432.

§ 1476. **Enlargement of contract after work is commenced.**—Where the original contract is enlarged after the work has commenced, so as to include the erection of another building on another lot, the contractor is entitled to a lien upon both lots and all the buildings, as against the owner; but as against mortgagees of each lot, the lien attaches only from the commencement of work upon such lot.<sup>74</sup>

§ 1477. **Right of mortgagor to subject property to lien as against mortgagee.**—A mortgagor can not by a contract for the repair of the mortgaged premises subject the property to a lien as against the mortgagee without his consent or authority; and it is immaterial whether the mortgagee holds under a formal mortgage, or holds the title absolutely as security.<sup>75</sup> “The claim of a mechanic or material-man is, at last, but a lien,—a right to have the claim enforced as a charge. The statute makes it subordinate to all older valid liens; and, if it did not, the constitutional barrier would have made it so. Magna Charta made it so. Except to the extent the statute provides specially for its enforcement, it stands on no higher plane than other valid liens.”<sup>76</sup>

<sup>74</sup> Chapman v. Wadleigh, 33 Wis. 267. A mechanic's lien claimant will be given a superior lien to that of bondholders, even where the lien is based on a contract made after the claim of the bondholders arose where such a contract is supplemental to a previous improvement contract which was prior to the rights of the bondholders and where no burden was cast on the property in addition to that under the original improvement contract. Healy Ice Mach. Co. v. Parks, 155 Ill. App. 232.

<sup>75</sup> Challoner v. Bouck, 56 Wis. 652, 14 N. W. 810. Where a building situated on mortgaged premises is burned and the holder of the mortgage allows insurance money to be used in building a new building, a material-man who furnishes materials for the new building has a lien thereon superior to the mortgage lien. People's B., L. & Savings Assn. v. Clark (Tex.), 33 S. W. 881.

<sup>76</sup> Wimberly v. Mayberry, 94 Ala. 240, 10 So. 157, 165, 14 L. R. A. 305, per Stone, C. J.



**§ 1478. Repairs or additions made to completed building.**—In the case of repairs or additions made to a completed building, the preference dates from the commencement of such repairs or additions. The commencement of the building or improvement means in such case nothing more than the commencement of the repairs or additions.<sup>77</sup>

A lien for machinery set up in a mill already built commences when the machinist begins to put up the machinery, and is preferred only to subsequent incumbrances and liens, not to a mortgage already existing upon the property.<sup>78</sup>

**§ 1479. Mortgage attaches to after acquired property, but subject to existing conditions.**—Though a mortgage in express terms covers after-acquired property, it attaches to such property only in the condition in which it comes into the mortgagor's possession.<sup>79</sup> Therefore, if a mechanic puts machinery into a building as a part of its construction, and it becomes a part of the realty so that he has a lien upon the realty for it, the mechanic's lien takes precedence of the mortgage; for the lien attached to the building when the machinery was furnished, and the property came into the possession of the mortgagor charged with the lien.<sup>80</sup>

This principle has been applied to a water ditch or flume and it is there declared that such legislation as this has repeatedly been held constitutional.<sup>81</sup> The same rule applies to a mortgage of a canal to be constructed, and it is postponed to the lien of a laborer.<sup>82</sup>

<sup>77</sup> Hydraulic Press. Brick Co. v. Bormans, 19 Mo. App. 664; Reilly v. Hudson, 62 Mo. 383; Collins v. Mott, 45 Mo. 100, 102; Hall v. Mullanphy Planing Mill Co., 16 Mo. App. 454; Haeussler v. Thomas, 4 Mo. App. 463; White v. Chaffin, 32 Ark. 59; In re Thoma's Est., 76 Pa. 30; Kansas Mtg. Co. v. Weyerhaeuser, 48 Kans. 335, 29 Pac. 153.

<sup>78</sup> Denmead v. Bank of Balti-

more, 9 Md. 179; Wells v. Canton Co., 3 Md. 234, 241.

<sup>79</sup> Jones on Mortgages (6th ed.), § 158.

<sup>80</sup> Hall v. Mullanphy Planing Mill Co., 16 Mo. App. 454.

<sup>81</sup> Jarvis v. State Bank, 22 Colo. 309, 45 Pac. 505, 55 Am. St. 129.

<sup>82</sup> Creer v. Cache Valley Canal Co., 4 Idaho 280, 38 Pac. 653, 95 Am. St. 63.

Where machinery is furnished to a lessee for a mill, and a lien is claimed within proper time, this has priority over a chattel mortgage made by the lessee of the machinery and fixtures of the mill. Although, as between the lessor and lessee, such machinery and fixtures are chattels, yet, in connection with a leasehold interest, they are subject to a lien.<sup>83</sup>

A chattel mortgage of any articles annexed to the realty, so that they become fixtures, is subordinate to a mechanic's lien upon the realty.<sup>84</sup>

**§ 1480. Rule as to priority in states in which a lien attaches from commencement of work.**—In those states in which the lien attaches from the commencement of the work or the furnishing of the materials, the question of priority as against a mortgage relates to that time.<sup>85</sup> If a mortgage is executed after that time, the lien takes a precedence.<sup>86</sup> Materials furnished to a person in possession under

<sup>83</sup> *Nordyke & Marmon Co. v. Hawkeye Woollen Mills Co.*, 53 Iowa 521, 5 N. W. 693; *National Lumber Co. v. Bowman*, 77 Iowa 706, 42 N. W. 557.

<sup>84</sup> *Currier v. Cummings*, 40 N. J. Eq. 145, 3 Atl. 174; *National Lumber Co. v. Bowman*, 77 Iowa 706, 42 N. W. 557. But if an engine be mortgaged as a chattel for purchase-money, and afterwards it be delivered to another person for repairs, and the latter retains possession under a claim of a lien for such repairs, the mortgagee may take the engine from him by replevin, his mortgage having precedence of the lien. *Denison v. Shuler*, 47 Mich. 598, 11 N. W. 402, 41 Am. Rep. 734.

<sup>85</sup> Mechanics' liens are preferred to incumbrances which at-

tach subsequently to commencement of the work, or the furnishing of the materials in:—In Arizona: See ante, § 1188. California: See ante, § 1190. Colorado: See ante, § 1190. Connecticut: See ante, § 1192. Michigan: See ante, § 1208. Montana: See ante, § 1212; *McNeal Pipe Co. v. Howland*, 111 N. Car. 615, 16 S. E. 857, 859. Ohio: See ante, § 1220. Texas: *Keating Machine Co. v. Marshall Electric L. & P. Co.*, 74 Tex. 605, 12 S. W. 489. Virginia: See ante, § 1229. West Virginia: See ante, § 1231.

<sup>86</sup> *Chadbourn v. Williams*, 71 N. Car. 444; *Choteau v. Thompson*, 2 Ohio St. 114; *Hazard Powder Co. v. Loomis*, 2 Disney (Ohio) 544, 13 Ohio Dec. 333; *Graton & Knight Mfg. Co. v. Woodworth-Mason Co.*, 69 N. H. 177, 38 Atl. 790.

a contract of sale constitute a prior lien to a mortgage subsequently given the vendor for the price.<sup>87</sup> It may be said that the mortgagee is presumed to know that work has been commenced upon the premises to which his mortgage attaches. If he allows the work to go on without objection, the lien is given priority not only for the work done and materials furnished before the execution of the mortgage, but for the work done and materials furnished afterwards as well.<sup>88</sup>

If the mortgage is executed and recorded before work has been commenced or any materials have been furnished, although the mortgagor remains in possession, the mechanic or material man has notice of the mortgage, and furnishes the labor or materials solely on the personal credit of the mortgagor, and on his interest in the land subject to the mortgage.<sup>89</sup>

### § 1481. Meaning of phrase "commencement of the work."

—The phrase "commencement of the work" has reference, not to the commencement of the general structure, but to the commencement of the particular work, or of the furnishing of the particular materials, for which a lien is claimed. Therefore the lien in such case does not relate back to the day of the commencement of the building, but each lien relates back to and takes effect on the day the particular labor was commenced, or the material began to be furnished, for which the lien is sought to be enforced.<sup>90</sup>

When a building is constructed by several persons under different contracts, as where A digs a cellar, and B does the woodwork, and C does the plumbing, all of which is done

<sup>87</sup> *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919.

<sup>88</sup> *Mark v. Murphy*, 76 Ind. 534.

<sup>89</sup> *Chadbourn v. Williams*, 71 N. Car. 444; *Williams v. Santa Clara*

*Min. Co.*, 66 Cal. 193, 4 West Coast Rep. 616.

<sup>90</sup> *Barber v. Reynolds*, 44 Cal. 519; *Germania B. & L. Assn. v. Wagner*, 61 Cal. 349; *Soule v. Dawes*, 7 Cal. 575.

under the supervision of the owner, and under distinct contracts, C's lien would not relate back to the commencement of the cellar by A, provided that prior to commencing the work done by him, the owner had placed a mortgage on such premises and C had notice thereof.<sup>90a</sup>

**§ 1482. Labor and materials performed and furnished under one contract.**—Labor performed or materials furnished under an entire contract constitute one entire account, and all the items relate back to the first item, though the different items may have been supplied from time to time as the same were required. And though, strictly speaking, the articles are not furnished under one entire contract, the lien dates from the first item where the work is done or the materials are supplied for a particular purpose, and the dates are so near to each other as to constitute one running account.<sup>91</sup> “But where they are furnished for different purposes, as, for instance, a part of them for constructing a house and the residue at a subsequent time, for altering or repairing it, or where there are intervals of time in the account so long that it can not, with propriety, be called one account, there is not, in the absence of an entire contract, a lien for the whole from the date of the first article furnished. The items must be regarded as constituting two, or more, distinct accounts, as the case may be; as, for instance, the materials supplied for constructing the house as making one account, those subsequently furnished for repairing it, as forming another; or those supplied before the supposed interval of time, as constituting one account, and those subsequently furnished, as another. And to each of these accounts the rules heretofore stated will apply. We do not, however, mean to say, that where altera-

<sup>90a</sup> *Pacific States &c. Bldg. Co. v. Dubois*, 11 Idaho 319, 83 Pac. 513; *Home Sav. &c. Assn. v. Burton*, 20 Wash. 688, 56 Pac. 940.

<sup>91</sup> *Choteau v. Thompson*, 2 Ohio St. 114, 126.

tions and repairs are going on, at, or about, the same time, the account must be divided. Nor that there must be a division where the alteration or repairs are made immediately after the erection, so as to plainly constitute but one account.<sup>92</sup>

**§ 1483. Time of performing labor or furnishing materials.**—That a part of the labor was performed or a part of the materials furnished after the execution of the mortgage is immaterial under such a statute, if the furnishing of the labor or materials by the claimant was commenced before the execution of the mortgage.<sup>93</sup> Under such a statute the lien of a subcontractor for materials which he commenced to furnish before the execution of a mortgage has priority over the mortgage, if his claim or notice of lien is filed in due time.<sup>94</sup>

**§ 1484. Merging of mortgage having priority over mechanic's lien.**—If a mortgage which has priority of a mechanic's lien be merged so that the debt is extinguished, the lien takes priority. Perhaps the general rule would be that, where a mortgagee acquires the equity of redemption against which there exists a mechanic's lien, there would be no merger, because in such case it would be for the interest of the mortgagee to stand upon his mortgage title, and thus exclude the intervening lien.<sup>95</sup> But in some states, where a mortgage is regarded as merely a lien and not an estate, a different rule prevails. Thus in South Carolina it is held that, where a mortgagee purchases the property at a tax sale and takes a tax title, he thereby extinguishes not only the lien of his mortgage, but also the debt to secure which

<sup>92</sup> *Choteau v. Thompson*, 2 Ohio St. 114, per Thurman, J.

<sup>93</sup> *Milner v. Norris*, 13 Minn. 455.

<sup>94</sup> *Germania Building & Loan Assn. v. Wagner*, 61 Cal. 349; *Iowa Mortgage Co. v. Shanquest*, 70

*Iowa* 124, 29 N. W. 820; *Great Western Planing Mill Co. v. Bormans*, 19 Mo. App. 671.

<sup>95</sup> *Jones on Mort.* (6th ed.), §§ 848, 857, 870-873.

it was given, and that an intervening mechanic's lien then takes priority.<sup>96</sup>

If the holder of a mechanic's lien acquires the legal title to the property, the lien is not merged so as to render it subordinate to an intervening mortgage, if the intention of the lienholder was that his lien should not be merged.<sup>97</sup>

**§ 1485. Estoppel of lienor by his acts or agreement.**—A lien claimant may be estopped by his acts or agreements from asserting his lien as against a mortgage of the same property. A manufacturing company was induced by a donation of land and a loan of money to build a rolling-mill at Sandusky. The loan was made by citizens of Sandusky, who received the bonds of the company secured by mortgage of the land and mill. After the mortgage was recorded, but before any considerable part of the money was paid to the company, a firm comprising citizens of the place who were subscribers to the bonds commenced furnishing materials for the construction of the mill under an agreement that they should be paid in monthly instalments out of the moneys received from the bonds. A large part of the account was paid in this manner, but a balance was owing them upon the subsequent insolvency of the company, and for this balance the contractors attempted to assert a lien. It was held, however, that they were precluded by their acts and agreement from asserting any lien as against the mortgage.<sup>98</sup>

<sup>96</sup> *Devereux v. Taft*, 20 S. Car. 555.

<sup>97</sup> *Delaware R. Construction Co. v. Davenport & St. P. R. Co.*, 46 Iowa 406, *revd.* 100 U. S. 457, 25 L. Ed. 593; *Bowling v. Garrett*, 49 Kans. 564, 31 Pac. 135, 33 Am. St. 584.

<sup>98</sup> *West v. Klotz*, 37 Ohio St. 420, 429. "They joined other citizens of Sandusky in accepting the

proposition of the Steel Company to build the rolling-mill; they subscribed and paid for bonds issued by the company and secured by the mortgage, and thereby induced others to do the same thing; they are beneficiaries under the mortgage; they received from the Steel Company, in payment of more than two-thirds of their claim, the sum of \$57,000, which they knew had

A mortgagee agreed with the owner of a building in process of construction to advance the amount thereof in instalments as the work advanced. Before the last two advances were made, a mechanic's lien was filed. An agreement was then made, whereby the lienors subordinated their claim to the further advances to be made, and the mortgagee was to pay the claim of the lienors when the last two instalments were earned. The mortgagee advanced the full amount of these two instalments and more, but even then the building was not carried to the stage of completion which made the instalments due and payable. It was held, in a suit to foreclose, that the lien of the entire mortgage was prior to that of the mechanic's lien. "The fund out of which the lienors were to be paid, as a fund due and payable to their debtors, never in fact accrued or came into existence; and since the lienors, in making their lien subordinate, had accepted the promise of the mortgagees to pay only when the two instalments became due according to the terms of the building contract, the latter were bound to pay only when those terms were fulfilled."<sup>99</sup>

**§ 1486. Mortgage given precedence of a lien by reason of estoppel.**—A subsequent mortgage may, under some circumstances, take precedence of a lien by reason of estoppel. The assignee of a mechanic's lien, pending proceedings to foreclose it, purchased the property and gave a mortgage

been advanced to the Steel Company on the faith that this was a valid mortgage; they sold to others the larger portion of the bonds they received from the company, and it is fair to say that their purchasers relied on the mortgage as a security. Under such circumstances, there can be no justice in saying that, because they were not fully paid, as they expected to be, out of the moneys so loaned to the

Steel Company, they may, on discovering that the company and its guarantors have failed, assert a mechanic's lien for the balance of their debt, and thereby defeat the mortgage, which everybody interested in it believed to be valid, until the whole sum of \$150,000 had been advanced on the faith of it, and expended." Per Okey, C. J.

<sup>99</sup> *Lipman v. Jackson Iron Works*, 128 N. Y. 58, 27 N. E. 975.

upon it. Subsequently he prosecuted the suit to foreclose the lien to judgment, sold the property to satisfy the lien, and himself became the purchaser through an intermediate party. In a suit by the mortgagee to foreclose the mortgage, it was held that the mortgage was superior to any right or title obtained under the mechanic's lien. The mortgagor is estopped to deny that he had title to the extent he had or claimed to have at the time he gave the mortgage, and he is estopped to claim that he afterwards procured some new and independent title which the mortgage did not cover.<sup>1</sup>

**§ 1486a. A mortgage under some circumstances subordinated to subsequent liens.**—The owner of a building sold it to another, agreeing to remove it and rebuild it upon land of the purchaser. The purchaser gave a mortgage upon the land to the vendor for the price of the completed building. The mortgage was prior in time to lien claims which arose from the default of a contractor employed by the vendor to complete the building. The vendor being responsible for the completion of the building, it was held that his rights as a mortgagee must be subordinated to the claims of those from whom materials were purchased by his subcontractor for use in the building.<sup>2</sup>

**§ 1487. Vendor's lien for purchase-money superior to mechanic's lien.**—A vendor's lien for the purchase-money of the land is superior to any mechanic's lien for labor or materials used in the construction or repair of a building thereon.<sup>3</sup> A mortgage given in renewal of a vendor's lien

<sup>1</sup> Madaris v. Edwards, 32 Kans. 284, 4 Pac. 313.

<sup>2</sup> Bassett v. Menage, 52 Minn. 121, 53 N. W. 1064. To similar effect see Cummings v. Emslie, 49 Nebr. 485, 68 N. W. 621.

<sup>3</sup> Louisville Building Assn. v.

Korb, 79 Ky. 190, 2 Ky. L. (Abst.) 71; Charleston Lumber & Mfg. Co. v. Brockmyer, 18 W. Va. 586; Rees v. Ludington, 13 Wis. 276, 80 Am. Dec. 741; Jessup v. Stone, 13 Wis. 466; Neil v. Kinney, 11 Ohio St. 58; Logan v. Taylor, 20 Iowa 297;



has the same priority.<sup>4</sup> It does not matter in such case that the mortgage is given after the mechanic has expended work and materials upon the property. As regards priority, the lien of the mortgage relates back to the lien of the vendor.<sup>5</sup>

But where a vendor reserved a lien in his deed for the unpaid purchase-money, and the purchaser erected a house and gave his note for the materials used in it, and then reconveyed the premises to his vendor, who agreed to pay such note as a part of the purchase-money for the reconveyance, it was held that the material-man might enforce his lien upon the land.<sup>6</sup>

Where a mechanic builds on the land of one who holds a bond for a deed, only the equitable interest of such purchaser is subject to the mechanic's lien; but in equity the mechanic may compel a sale of the land, to pay in the first place the purchase-money due the vendor under the bond, and afterwards the lien debt due the mechanic.<sup>7</sup>

In equity, however, where a purchaser in possession before the deed is delivered makes improvements on the buildings, and the vendors, with full knowledge, allow the laborers and material-men to proceed without warning them of their claim of title, their lien is superior to any claims by the vendors for unpaid purchase-money.<sup>8</sup> And where in a con-

Wing v. Carr, 86 Ill. 347; Summers v. Stark, 76 Ill. 208; Wood v. Rawlings, 76 Ill. 206; Hickox v. Greenwood, 94 Ill. 266; West v. Reeves, 53 Nebr. 472, 73 N. W. 937; Fuller v. Pauley, 48 Nebr. 138, 66 N. W. 1115; Kuschel v. Hunter, 118 Cal. XVI, 50 Pac. 397. Contra in Texas. Bunton v. Palm (Tex.), 9 S. W. 182.

<sup>4</sup> Thorpe v. Durbon, 45 Iowa 192.

<sup>5</sup> Wing v. Carr, 86 Ill. 347.

<sup>6</sup> Adams v. Russell, 85 Ill. 284. See Janes v. Osborne, 108 Iowa

409, 79 N. W. 143, where vendor waived his priority to the amount of \$1,500.

<sup>7</sup> Gillespie v. Bradford, 7 Yerg. (Tenn.) 168, 27 Am. Dec. 494; West v. Reeves, 53 Nebr. 472, 73 N. W. 937.

<sup>8</sup> Leonard v. Cook (N. J. Eq.), 20 Atl. 855. Bird, V. C., said: "I think the following cases sustain these views: Brinkerhoff v. Brinkerhoff, 23 N. J. Eq. 477; Morris Canal & Banking Co. v. Lewis, 12 N. J. Eq. 323; Collier v. Pfenning,

tract for the sale of land, it was stipulated that the purchaser should erect a dwelling upon the premises within a stated time, and the building was erected, but the labor performed and material furnished were not fully paid for, it was held that the liens of mechanics and material-men had priority over the lien of the vendor for unpaid purchase-money.<sup>9</sup>

**§ 1488. Subsequent conveyance.**—In the provisions in regard to priority, a subsequent conveyance is regarded as a subsequent incumbrance, though the statute in terms only refers to "liens and incumbrances."<sup>10</sup>

A purchaser of a building from the owner, pending a proceeding to enforce a mechanic's lien for its erection, takes the title subject to the lien which may be established in that proceeding. If such purchaser sells the building to another, and induces him to remove it to another lot, he will hold the proceeds of the sale as a trust fund applicable to the discharge of the lien.<sup>11</sup>

**§ 1489. Sale of property subject to lien.**—Where property subject to lien has been sold in different parcels to several purchasers, the earliest grantor has an equity to have the property last sold first applied to satisfy the lien.<sup>12</sup> This is the rule applied in case of the sale in different parcels of mortgaged property.<sup>13</sup>

34 N. J. Eq. 22; Shippen v. Paul, 34 N. J. Eq. 315; Dusenbury v. Newark, 25 N. J. Eq. 295; Pickert v. Ridgefield Park R. Co., 25 N. J. Eq. 316; Liebstien v. Newark, 24 N. J. Eq. 200; Bond v. Newark, 19 N. J. Eq. 385; Schwartz v. Saunders, 46 Ill. 18; Sharpley v. South & East Coast R. Co., 2 Ch. Div. 663."

<sup>9</sup> Dickerson v. Mechling, 30 Nebr. 718, 46 N. W. 1123; Henderson v. Connelly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. 499.

<sup>10</sup> Warden v. Sabins, 36 Kans. 165, 12 Pac. 520; Fleming v. Bumgarner, 29 Ind. 424; Kellenberger v. Boyer, 37 Ind. 188; Burr v. Maultsby, 99 N. Car. 263, 6 S. E. 108, 6 Am. St. 517.

<sup>11</sup> Ellett v. Tyler, 41 Ill. 449.

<sup>12</sup> Acquackanonk Water Co. v. Manhattan Life Ins. Co., 36 N. J. Eq. 586.

<sup>13</sup> Jones on Mortgages (6th ed.), §§ 1620-1631.

§ 1490. **Precedence of prior attachment.**—An attachment of real estate is superior to a lien for labor or materials furnished after the date of the attachment.<sup>14</sup> But where the lien accrues from the time at which the labor is done or commenced, or the materials are furnished or commenced to be furnished, the lien is superior to the attachment subsequently levied upon the premises, without regard to the commencement of the suit to enforce it.<sup>15</sup> And so, if the lien attaches from the commencement of the building, the lien takes precedence of an attachment or judgment which becomes a lien subsequently to such commencement.<sup>16</sup>

The lien of a mechanic or material-man upon money going to a contractor, after notice of the lien given to the owner as required by statute, is superior to a lien acquired by a creditor of the contractor under a trustee or garnishment process.<sup>17</sup>

§ 1491. **Judgment lien acquired during the construction of building.**—A judgment lien obtained during the construction of a building is inferior to a mechanic's lien, which by statute relates back to the commencement of the building.<sup>18</sup> A judgment which became a lien on land a few days after the making of the contract under which a building was erected upon the land has priority over a mechanic's lien arising under such contract.<sup>19</sup>

<sup>14</sup> First Nat. Bank v. Redman, 57 Maine 405.

<sup>15</sup> Young v. Stoutz, 74 Ala. 574; Rothe v. Bellingrath, 71 Ala. 55; Welch v. Porter, 63 Ala. 225.

<sup>16</sup> Griel's App. (Pa.), 9 Atl. 861.

<sup>17</sup> Jones v. Church of Holy Trinity, 15 Nebr. 81, 17 N. W. 362.

<sup>18</sup> Hern v. Hopkins, 13 Serg. & R. (Pa.) 269; Pepperday's App., 152 Pa. St. 621, 25 Atl. 568; Barber v. Reynolds, 44 Cal. 519. In Pennsylvania, however, it is held that

a purchaser at an execution sale is not bound to look beyond the record. If a lien has been filed before such sale, the purchaser takes subject to the lien, but not otherwise. The date of the filing of the lien in such case is the date of the lien, and it does not relate back to the commencement of the building. Reading v. Hopson, 90 Pa. St. 494; Goepp v. Gartiser, 35 Pa. St. 130.

<sup>19</sup> McKee v. Travellers' Ins. Co., 41 Fed. 117.

§ 1492. No priority among different persons having mechanics' liens upon the same building.—Where liens attach from the commencement of the building, as distinguished from the commencement of the work,<sup>20</sup> “the circumstance of one commencing work first does not give any priority. They all stand on the same footing and are to be paid in full, or pro rata, as the funds may suffice. Such is the express provision of the statute of New Jersey. But without any statute, such construction is the most just and equitable. The building is the result of the labor of the mason, carpenter, bricklayer, plasterer, glazier, and painter. It is the joint product of the skill of the artisan and the means of the material-man. Each contributed and each should share alike without preference. Some one of the various kinds of mechanics must commence first, but the accident of commencing does not give that one any superior equity.”<sup>21</sup> And so

<sup>20</sup> In *re Hoyt*, 3 Biss. (U. S.) 436, Fed. Cas. No. 6805; *Moxley v. Shepard*, 3 Cal. 64; *Crowell v. Gilmore*, 18 Cal. 370; *Willamette Falls Co. v. Riley*, 1 Ore. 183; *Choteau v. Thompson*, 2 Ohio St. 114, 129. In the latter case Judge Thurman said: “There is no good reason why the man who, of necessity, or by accident, begins before another, should have priority. The painter and glazier may add far more to the value of the building than the mason who merely lays the foundation; yet, if priorities exist, he may get nothing whatever, while the latter is fully paid. The bricklayer and carpenter usually commence about the same time; and if priorities are allowed, the accident of one beginning a day before the other, may give him a ruinous advantage. In

any view we can take of the subject, we can come to no other conclusion than that the legislature intended the money, whether arising from rents or sales, to be distributed pro rata.” The statutes quite generally have provisions regarding priority between different claimants. In some states liens for labor are preferred to those for materials. In others it is declared that all claimants shall share equally and without priority. Subcontractors, mechanics and material-men are generally preferred to original contractors.

<sup>21</sup> Per Hopkins, J., in *In re Hoyt*, 3 Biss. (U. S.) 436, Fed. Cas. No. 6805; *Long v. Abeles*, 77 Ark. 156, 93 S. W. 67; *Miltimore v. Nofziger Bros. Lumber Co.*, 150 Cal. 790, 90 Pac. 114.

in a case in Pennsylvania, where also liens attach from the commencement of the building, the court said: "All the mechanics' liens commence at the date of the first stroke of the axe or spade used in making the house, without regard to the time of their being filed, or of the doing of the work or furnishing materials. The man who does the last of the painting or plumbing comes in *pari passu* with him who built the foundation wall. All take precedence from the commencement of the building against all other claims, and must share ratably amongst themselves."<sup>22</sup>

Even under a statute which gives a lien only "from the commencement of the work or furnishing materials," it has been held that there is no priority as between the mechanics and material-men; that, although they commenced work at different times, they were to be paid equally.<sup>23</sup>

If two mechanics of different crafts, as for instance a mason and a carpenter, enter into a joint contract for the erection of a building, though there is no partnership or community of interest in profit or loss, neither can assert a lien as against the owner until liens for materials purchased by both have been satisfied. Thus, if the carpenter has bought lumber, and with the knowledge of the mason has used it in the building, though the mason may not be liable to the lumberman for the lumber, still, as the mason knew of its purchase and use in performance of the joint contract, he ratified its purchase and use, and his right to the amount due him under the contract must be postponed until satisfaction of the lien for the lumber attaching.<sup>24</sup>

<sup>22</sup> *In re Denkel's Est.*, 1 Pearson (Pa.) 213; *Chicago Lumber Co. v. Allen*, 52 Kans. 795, 35 Pac. 781.

<sup>23</sup> *Choteau v. Thompson*, 2 Ohio St. 114, a well-considered case.

<sup>24</sup> *Pell v. Baur*, 133 N. Y. 377, 31 N. E. 224, *affg.* 16 N. Y. S. 258, 41 N. Y. St. 99. Under the lien laws of New York persons who

are collaborators have priority according to the time of filing their liens. *Hall v. Thomas*, 111 N. Y. S. 979. See also, *Western Sash, Door & Lumber Co. v. Gaul Const. Co.*, 126 N. Y. S. 1110; *Vogel & Binder Co. v. Montgomery*, 133 App. Div. (N. Y.) 836, 118 N. Y. S. 10.

Where subcontractors, material-men, and laborers obtain judgments against a railroad company in actions of the pendency of which the contractor had due notice, the latter is bound by such judgments, and to the amount thereof his lien is abated.<sup>25</sup>

A material-man's lien, attaching to real estate as the result of a contract of a decedent has been held inferior to the widow's claims for a year's support.<sup>26</sup>

<sup>25</sup> *Midland R. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506. Per Elliott, J.: "The rule in analogous cases is, that if one primarily liable is notified of the pendency of an action, and required to defend, he must do so, or he will be bound

by the judgment." *Chicago v. Robbins*, 2 Black (U. S.) 418, 17 L. Ed. 298; *McNaughton v. Elkhart*, 85 Ind. 384; *Morgan v. Muldoon*, 82 Ind. 347.

<sup>26</sup> *Gleason v. Traynham*, 111 Ga. 887, 36 N. E. 969.

## CHAPTER XXXVII.

### MECHANICS' LIENS: ASSIGNMENT OF.

Sec.	Sec.
1493. Assignability of a mechanic's lien.	1497. Assignee must show his right as such.
1494. Lien not destroyed by assignment of the lien debt.	1498. Completion of contract by assignee with owner's consent.
1495. Mechanic's lien assignable in equity.	1499. No particular words necessary to assign a debt or lien.
1496. Assignment of note for lien debt.	

§ 1493. **Assignability of a mechanic's lien.**—The authorities are somewhat conflicting as to the assignability of a mechanic's lien. The early authorities were inclined to follow the general doctrine as to the assignability of liens, and to hold that a mechanic's lien is strictly a personal privilege, which can not be enforced by an assignee of the debt for labor and materials in his own name.<sup>1</sup> This is still perhaps the prevailing rule, except where it has been changed by statute. In a few cases it was even held that an assignee could not prosecute the lien in the name of the assignor.

<sup>1</sup> *Pearsons v. Tinker*, 36 Maine 384; *Mills v. La Verne Land Co.*, 97 Cal. 254, 32 Pac. 169; *Dexter v. Sparkman*, 2 Wash. 165, 25 Pac. 1070; *Caldwell v. Lawrence*, 10 Wis. 331; *Fitzgerald v. First Presbyterian Church*, 1 Mich. (N. P.) 243; *Rollins v. Cross*, 45 N. Y. 766; *Roberts v. Fowler*, 3 E. D. Smith (N. Y.) 632, 635, 4 Abb. Pr. (N. Y.) 263; *Hallahan v. Herbert*, 57 N. Y. 409. "The lien exists only in favor of those to whom it is given

by the statute, and can be established only by a compliance with its requirements. The statute did not give it to his assignees, but to the laborer himself. The great weight of authority is in this direction. *O'Connor v. Current Riv. R. Co.*, 111 Mo. 185, 20 S. W. 16, per Gantt, P. J.; *Fleming v. Greener*, 173 Ind. 260, 87 N. E. 719; *California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 118 Pac. 103; *Pauer v. Fay*, 110 Cal. 361, 42 Pac. 902.

The assignment was held to destroy the right of lien, and to reduce the claim to a mere personal demand.<sup>2</sup>

§ 1494. **Lien not destroyed by assignment of the lien debt.**—Some later authorities hold that the lien is not destroyed by the assignment of the lien debt;<sup>3</sup> and while the lien must generally be enforced in the name of the assignor, in several states it has been declared by statute to be assignable.<sup>4</sup> In some states the assignee is expressly author-

<sup>2</sup> *Tewksbury v. Bronson*, 48 Wis. 581, 4 N. W. 749, per Lyon, J.

<sup>3</sup> See cases cited, post, § 1495. As to the policy of the rule, Mr. Justice Elliott, in *Midland R. Co. v. Wilcox*, 122 Ind. 84, 92, 23 N. E. 506, well says: "We can not regard the reasoning of some of the courts, which hold that the right of a lien is a purely personal privilege, as either valid or forcible. Statutes giving a lien always intend to give a security for a debt, and this they generally accomplish. If the debtor gets what he contracted for, it can not, in justice, make any difference to him to whom he pays what he owes, nor to whom the security created by law is assigned. It is often of great importance to a contractor to be able to raise money to prosecute the work under a contract, and, in order to do this, to assign a claim secured by a lien. The denial of the right to assign may often seriously cripple and hamper a contractor, and yet do no good to the debtor. If the one may be benefited without the slightest injury to the other, there is no conceivable reason why the law should not permit him to receive that benefit by assigning his claim and lien."

<sup>4</sup> Alabama: Any claim for which a lien is provided may be assigned and the assignee has all the rights that the assignor had. Civ. Code 1907, § 4783; *Leftwich Lumber Co. v. Florence Mutual B. & L. & Savings Assn.*, 104 Ala. 584, 18 So. 48. Arizona: The assignee of any contract or account for material furnished or labor performed may attest, file, record, and enforce the same, as if he had been the original owner or holder thereof. Rev. Stats. 1901, § 2912. Arkansas: The lien is transferable and assignable. Dig. of Stats. 1904, § 4994. Otherwise before the statute. *Dano v. Mississippi & O. R. Co.*, 27 Ark. 564. Colorado: Any party claiming a lien, may assign, in writing, his claim and lien to any other claimant or other person who shall thereupon have all the rights and remedies of the assignor, for the purpose of filing and for the enforcement of any such lien by action under this act, and the assignment shall be a sufficient consideration as to all other parties for the purpose of such action. Mill's Ann. Stats. 1912, § 4597. *Sprague Inv. Co. v. Mouat Lumber & Co.*, 14 Colo. App. 107, 60 Pac. 179. Georgia: Liens may be



assigned in writing and not otherwise, and under such assignment the assignee shall have all the rights of the assignor. Code 1911, § 3372. Illinois: All liens or claims for lien which may arise or accrue under the terms of the mechanics' lien act shall be assignable, and proceedings to enforce such liens or claims for lien may be maintained by and in the name of the assignee, who shall have as full and complete power to enforce the same as if such proceedings were taken under the provisions of the mechanics' lien act by and in the name of the lien claimant. Rev. Stats. 1913, p. 1562, § 22. Iowa: The courts having decided that such right was not assignable, the legislature enacted that "the mechanics' liens are assignable, and shall follow the assignment of the debt for which they are claimed." Code 1897, § 3099. But the court, in *Brown v. Smith*, 55 Iowa 31, 7 N. W. 401, held that the statute referred "to the lien perfected by the filing of a claim therefor, and not to the inchoate right to a lien." \* \* \* The language of the statute is that the lien is assignable, and not the mere right which follows the performance of labor, and which depends for its existence on the volition of the subcontractor." In *Haney v. Adaza Co-operative Creamery Co.*, 108 Iowa 313, 79 N. W. 79, it is said "there is no question about the validity of an assignment of a right to a lien." In *Peatman v. Centerville L. Co.*, 105 Iowa 1, 74 N. W. 689, 67 Am. St. 276, an assignment of a mechanic's lien was sustained though the verified statement had not been filed.

Kansas: All claims for liens and rights of action to recover therefor under the mechanics' lien act shall be assignable so as to vest in the assignee all rights and remedies therein given, subject to all defenses thereto that might be made if such assignment had not been made. Gen. Stats. 1909, § 6247; *Milwaukee Mechanics' Ins. Co. v. Brown*, 3 Kans. App. 225, 44 Pac. 35. Michigan: All liens or claims for liens which may arise or accrue under the terms of the mechanics' lien act shall be assignable, and proceedings to enforce such liens may be maintained by and in the name of the assignees, who shall have as full and ample power to enforce the same as if such proceedings were taken under the provisions of the act by and in the name of the lien claimants themselves. How. Stats. 1912, § 13790. *Dudley v. Toledo & C. R. Co.*, 65 Mich. 655, 32 N. W. 884. Minnesota: All liens are assignable, and may be asserted and enforced by the assignee, or by the personal representatives of any holder thereof in case of his death. Gen. Stat. 1913, § 7084; *Kinney v. Duluth Ore Co.*, 58 Minn. 455, 60 N. W. 23, 49 Am. St. 528. Missouri: Any person or persons having claims for which they are entitled to liens may assign to any other person or persons all their right, title and interest in and to such claims, and the assignee thereof may file a lien or liens therefor, and may bring suit in his own name, and include in such suit all claims assigned to him, and enforce such assigned lien or liens as fully as if such claims had been filed by

ized to bring suit to enforce the lien in his own name; while in others the assignee might do so under the general rules

the original claimant. Rev. Stat. 1909, § 8266. Nevada: Two or more creditors of the same class may assign their claims, duly verified, to any other creditor or person of the same class, and the assignee may commence and prosecute the action upon them all in his own name. All liens under this act shall be assignable as any other chose in action. Rev. Laws 1912, art. 2229. New York: A lien, filed as prescribed by the statute, may be assigned by a written instrument signed and acknowledged by the lienor, at any time before the discharge thereof. Birdseye's C. & G. Consol. Laws 1909, p. 3179, § 14. North Dakota: All claims for which liens may be or have been filed and rights of action to recover therefor hereunder may be assigned by an instrument in writing and such assignment shall vest in the assignee all the rights and remedies herein given; subject to all defenses that might have been interposed, if such assignment had not been made. Rev. Code 1905, § 6247. Oklahoma: All claims for liens and rights of action to recover therefor shall be assignable so as to vest in the assignee all rights and remedies, subject to all defenses thereto that might be made if such assignment had not been made. Comp. Laws 1909, § 6154. Oregon: A parol assignment of a debt carries with it the right to a lien. *McFeron v. Doyens*, 59 Ore. 366, 116 Pac. 1063. Pennsylvania: Any claim filed or to be filed under the provisions of

the mechanics' lien act may be assigned or transferred to a third party either absolutely or as collateral security; but no such assignment or transfer shall impair or in any way affect the rights of use-claimants or give the assignee any other rights than the assignor had. Purdon's Dig. (13th ed.), p. 2494, § 41. Tennessee: The lien does not operate in favor of any person to whom the debt is transferred without notice of the lien. Ann. Code 1896, § 3545. Utah: All mechanics' liens shall be assignable as other choses in action, and the assignee may commence and prosecute actions thereon in his own name. Comp. Laws 1907, § 1396. Virginia: An assignee of a lien claim may file a memorandum and make the oath required by statute, and shall have the same rights as his assignor. Code 1904, § 2487. Washington: Any lien or right of lien created by law and the rights of action to recover therefor, shall be assignable so as to vest in the assignee all rights and remedies of the assignor, subject to all defenses thereto that might be made if such assignment had not been made. Remington & Ballinger Ann. Codes & Stats. 1910, § 1136. Wisconsin: All claims for liens and rights of action to recover therefor shall be assignable so as to vest in the assignee all rights and remedies given by the lien laws, subject to all defenses thereto that might be made if such assignment had not been made. Stat. 1898, § 3316.

of procedure.<sup>5</sup> But generally, when the assignee is not expressly authorized by statute to enforce the lien in his own name, the suit to enforce it should be in the name of the assignor. Generally, too, it is held, even under statutes which declare mechanics' liens assignable, that the inchoate right of lien is not assignable, but only a lien which has been perfected by the filing of a claim of lien.<sup>6</sup> The lien is a personal right which can be exercised, so far as the filing of the claim goes, only by the person in whose favor it arises. If an assignee of a claim for work continues the work after the assignment, and his claim of lien does not specify what part of the work was done after the assignment, the assignee is not entitled to a lien for any part of the account.<sup>7</sup>

In Iowa<sup>8</sup> it is provided by statute that mechanics' liens shall be assignable, and shall follow the assignment of the debt; and where such lien is for personal services the same shall be exempt from execution, as now provided for such

<sup>5</sup> *Tuttle v. Howe*, 14 Minn. 145, 150, 100 Am. Dec. 205; *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219, 220; *Iaeger v. Bossieux*, 15 Grat. (Va.) 83, 76 Am. Dec. 189; *Kerr v. Moore*, 54 Miss. 286; *Oliver v. Fowler*, 22 S. Car. 534; *Mason v. Germaine*, 1 Mont. 263.

<sup>6</sup> *Davis v. Bilsland*, 18 Wall. (U. S.) 659, 21 L. Ed. 969; *Brown v. Harper*, 4 Ore. 89; *Pearsons v. Tincker*, 36 Maine 384; *St. John v. Hall*, 41 Conn. 522; *Robert v. Jacks*, 31 Ark. 597, 25 Am. Rep. 584; *Tewksbury v. Bronson*, 48 Wis. 581, 4 N. W. 749; *O'Connor v. Current Riv. R. Co.*, 111 Mo. 185, 20 S. W. 16; *Brown v. Smith*, 55 Iowa 31, 7 N. W. 401; *Griswold v. Carthage &c. R. Co.*, 18 Mo. App. 52; *Allen v. Frumet M. & S. Co.*, 73 Mo. 688; *Rollin v. Cross*, 45 N. Y. 766. In this case, Hough,

J., delivering the opinion, remarked that an account for materials might be assigned; but whether the assignee can file a lien in his own name, based upon the account assigned, has not been decided by this court. But after the lien has been filed the debt may be assigned, and the assignee may enforce it in his own name. And see *Jones v. Hurst*, 67 Mo. 568; *Goff v. Papin*, 34 Mo. 177; *Goodman v. Pence*, 21 Nebr. 459, 32 N. W. 219; *Mason v. Germaine*, 1 Mont. 263; *Jenckes v. Jenckes*, 145 Ind. 624, 44 N. E. 632. See also, to same effect *Linne-man v. Bieber*, 85 Hun (N. Y.) 477, 33 N. Y. S. 129, 66 N. Y. St. 739.

<sup>7</sup> *O'Connor v. Current Riv. R. Co.*, 111 Mo. 185, 20 S. W. 16.

<sup>8</sup> Code 1897, § 3099.

services. Before the enactment of this provision, it was held that an assignment of the debt alone would not operate to transfer the lien.<sup>9</sup> Under this statute it is the perfected lien that follows the debt, and not the mere right to a lien which the mechanic has not yet availed himself of by filing a claim therefor as required by statute.<sup>10</sup> And so an assignment by a subcontractor of an order for one instalment of his claim, before the completion of his main contract, does not carry with it the right to a lien for such portion.<sup>11</sup>

The drawing of a draft by the lienholder for the lien debt, the acceptance of it by the debtor, and the transfer of the draft to a third person, do not constitute an assignment of the lien to such third person.<sup>12</sup>

In Wisconsin<sup>12a</sup> all claims for liens, and rights of action to recover therefor, are assignable so as to vest in the assignee all rights and remedies, subject to all defenses thereto that might have been had if such assignment had not been made. Notice in writing of such assignment, together with a copy thereof, must be served upon the owner of the property affected by such claim for lien within fifteen days after such assignment is made; and all payments made by such original owner, before service of such notice of assignment, shall discharge his original debt to the amount so paid.

<sup>9</sup> *First Nat. Bank v. Day*, 52 Iowa 680, 3 N. W. 728; *Brown v. Smith*, 55 Iowa 31, 7 N. W. 401.

<sup>10</sup> *Brown v. Smith*, 55 Iowa 31, 7 N. W. 401; *Langan v. Sankey*, 55 Iowa 52, 7 N. W. 393.

<sup>11</sup> *Merchant v. Ottumwa Water-Power Co.*, 54 Iowa 451, 6 N. W. 709.

<sup>12</sup> *First Nat. Bank v. Day*, 64 Iowa 118, 19 N. W. 882; *First Nat. Bank v. Day*, 52 Iowa 680, 3 N. W. 728.

<sup>12a</sup> Stat. 1898, § 3316; *Dudley v.*

*Toledo &c. R. Co.*, 65 Mich. 655, 32 N. W. 884. It is held in this, that a parol assignment of a debt or claim will waive the right to enforce a mechanic's lien therefor. *Shearer v. Rasmussen*, 102 Wis. 585, 78 N. W. 744. The assignment of a building contract as collateral security will not deprive the contractor of his right to a lien. *Weber v. Bushnell*, 171 Ill. 587, 49 N. E. 728. See to same effect *Macomber v. Bigelow*, 126 Cal. 19, 58 Pac. 312.

§ 1495. **Mechanic's lien assignable in equity.**—A mechanic's lien is assignable in equity either before or after suit to enforce it has been commenced. The assignee becomes the equitable owner of the right, and may enforce it for his own benefit in the name of the party originally entitled to it, upon such terms and conditions for the protection of the nominal party from costs and damages as the court may think proper.<sup>13</sup> A mechanic's lien is so far a personal right that the proceeding to establish it, after it has been assigned, unless it is provided by statute that the party in interest may prosecute a suit in his own name, should be carried on in the name of the assignor.<sup>14</sup>

A provision of the Code of New York, that every action must be prosecuted in the name of the real party in interest, has been held not to apply to proceedings under a mechanic's lien law, because such proceedings are special, and do not constitute an action within the meaning of the code; and therefore, in case of the assignment of a mechanic's lien before the commencement of proceedings to enforce it, the

<sup>13</sup> *Major v. Collins*, 11 Bradw. (Ill.) 658; *Friedman v. Roderick*, 20 Bradw. (Ill.) 622; *Dixon v. Buel*, 21 Ill. 203, 204; *Cairo & Vincennes R. Co. v. Fackney*, 78 Ill. 116; *Murphy v. Adams*, 71 Maine 113, 118, 36 Am. Rep. 299; *Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205; *Iaeger v. Bossieux*, 15 Grat. (Va.) 83, 76 Am. Dec. 189; *Kerr v. Moore*, 54 Miss. 286; *Jones v. Hurst*, 67 Mo. 568; *Goff v. Pain*, 34 Mo. 177; *Skyrme v. Occidental M. & Mining Co.*, 8 Nev. 219; *Mason & Germaine*, 1 Mont. 263; *Brown v. Harper*, 4 Ore. 89; *German Bank v. Schloth*, 59 Iowa 316, 13 N. W. 314; *The Texas & St. L. R. Co. v. McCaughey*, 62 Tex. 271;

*Austin & N. W. R. Co. v. Daniels*, 62 Tex. 70; *Sinton v. The Roberts*, 46 Ind. 476; *Midland R. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506; *Brown v. School District*, 48 Kans. 709, 29 Pac. 1069; *Wiley v. Connelly*, 179 Mass. 360, 60 N. E. 784; *Clarkson v. Louterback*, 36 Fla. 600, 19 So. 887; *Beilharz v. Illingsworth* (Tex.), 132 S. W. 106.

<sup>14</sup> *Phoenix Mut. Ins. Co. v. Batchen*, 6 Bradw. (Ill.) 621; *Friedman v. Roderick*, 20 Bradw. (Ill.) 622; *Rollin v. Cross*, 45 N. Y. 766; *Fitzgerald v. First Presbyterian Church*, 1 Mich. (N. P.) 243; *Murphy v. Adams*, 71 Maine 113, 36 Am. Rep. 299.

claim is properly prosecuted in the lienor's name for the benefit of the assignee.<sup>15</sup>

§ 1496. **Assignment of note for lien debt.**—If a note has been given by the owner to the contractor for the amount of a lien debt in such a way that the note itself is no waiver of the lien, as for instance when it is delivered with a statement that the giving of the note should not be a waiver of the lien on the premises mentioned, and the contractor delivers this as collateral security without indorsement to another, the equitable assignee may enforce the lien in the name of the contractor.<sup>16</sup>

§ 1497. **Assignee must show his right as such.**—One who attempts to enforce a lien, which has arisen under a contract made with another as contractor, must show his right as assignee, or the facts by which he has become subrogated to the rights of the contractor. The lien record must upon its face show a right on the part of the claimant to impose a charge upon the property. The mere fact that the claimant or petitioner is a guarantor of the original contractor shows no prima facie right on his part to enforce the lien.<sup>17</sup>

§ 1498. **Completion of contract by assignee with owners' consent.**—An assignee of a contract who completes it with assent of the owner may enforce a lien in the name of the assignor.<sup>18</sup> If the contract had been partly performed be-

<sup>15</sup> Hallahan v. Herbert, 57 N. Y. 409, affg. 4 Daly (N. Y.) 209, 11 Abb. Pr. (N. S.) (N. Y.) 326; Roberts v. Fowler, 3 E. D. Smith (N. Y.) 632, 4 Abb. Pr. (N. Y.) 263. See also, Van Kannel Revolving Door Co. v. Astor, 119 App. Div. (N. Y.) 214, 104 N. Y. S. 653.

<sup>16</sup> Friedman v. Roderick, 20 Bradw. (Ill.) 622. In this case the

lien was enforced by bill in equity in the names of the assignor and of the assignee. Hill v. Alliance Bldg. Co., 6 S. Dak. 160, 60 N. W. 752, 55 Am. St. 819.

<sup>17</sup> Dye v. Forbes, 34 Minn. 13, 24 N. W. 309.

<sup>18</sup> McDonald v. Kelly, 14 R. I. 335; Pensacola R. Co. v. Schaffer, 76 Ala. 233; Davis v. Bilsland, 18

fore the assignment, the assignee may enforce a lien for that part of the contract performed before the assignment as well as the part performed afterwards. The lien follows the debt or contract to which it appertains. It does not matter that the assignor has taken no steps to perfect a lien before the assignment.<sup>19</sup> A mere right to a lien before any claim of lien has been filed is assignable. "We can see no reason," say the Supreme Court of Rhode Island,<sup>20</sup> why the lien should not pass in equity with the debt or contract while it remains inchoate as readily as after it is consummate. It exists in right before the filing of the claim, adding to its value, and it is no more than equitable, for the sake of both assignor and assignee, that it should pass, to be perfected by the assignee in the name of the assignor." If, at the time of the assignment, the contractor or other person entitled to the lien has not filed any claim of lien, the assignment passes no lien, but only the right to acquire a lien.<sup>21</sup>

Where the mechanic who has assigned his contract has not been released by the owner of the property, and the assignee does not enter into any new contract with the owner, but with the consent of the owner carries out the contract assigned, the claim of lien and the petition to enforce it should be in the name of the assignor, both for that part of the contract performed before the assignment and that performed afterwards.<sup>22</sup>

A lien, however, for extra work done by the assignee

Wall. (U. S.) 659, 21 L. Ed. 967; *Murphy v. Adams*, 71 Maine 113, 36 Am. Rep. 299; *Spengler v. Stiles-Tull Lumber Co.*, 94 Miss. 780, 48 So. 966, controlling *Humphreys v. McFarland*, (Miss.) 48 So. 1027.

<sup>19</sup> *McDonald v. Kelly*, 14 R. I. 335. Contra, see cases cited in ante, § 1494.

<sup>20</sup> *McDonald v. Kelly*, 14 R. I. 335.

<sup>21</sup> *English v. Sill*, 63 Hun (N. Y.) 572, 18 N. Y. S. 576, 45 N. Y. St. 462.

<sup>22</sup> *McDonald v. Kelly*, 14 R. I. 335. And see *Pearsons v. Tincker*, 36 Maine 384, 387; *Murphy v. Adams*, 71 Maine 113, 36 Am. Rep. 299.

should be prosecuted in his own name, if there was no provision for it in the contract assigned.<sup>23</sup>

A valid equitable assignment may be made of a portion of the contract price to be paid for erecting a building before it is erected, and such assignment need not be written nor accompanied by any transfer of the contract itself.<sup>24</sup> Such an assignment prevails over a notice served upon the owner by a laborer or material-man after the assignment, but before notice of it to the owner.<sup>25</sup>

**§ 1499. No particular words necessary to assign a debt or lien.**—No particular words are necessary to constitute an assignment of a debt or lien; it is sufficient if the intent of the parties to effect an assignment be clearly established.<sup>26</sup> When a mechanic's lien is regarded as in the nature of a mortgage, or a charge upon the land, it can only be assigned

<sup>23</sup> McDonald v. Kelly, 14 R. I. 335, per Durfee, J.

<sup>24</sup> Lanigan v. Bradley & Currier Co., 50 N. J. Eq. 201, 24 Atl. 505.

<sup>25</sup> Board of Education v. Duparquet, 50 N. J. Eq. 234, 24 Atl. 922. Per Pitney, V. C.: "I think notice of this assignment was unnecessary in order to vest the title to this fund in the assignee. The document worked a complete transfer by the direct force of the language used, and does not depend upon any implication or mercantile usage. In this respect it is distinguishable from a mere order for the payment of the fund, or some portion of it, directed to the depositary or debtor. It transfers the property in the fund in praesenti, and is irrevocable. It requires no assent on the part of the depositary or debtor in order to give the assignee a right of action in a court of equity in his

own name. The function of an assent or acceptance by the depositary or debtor is to give the assignee a right of action at law in his own name, founded upon a new promise, but no such assent or acceptance is required in this court. The only defense which the depositary or debtor can have against the assignee is that, before receiving notice of the assignment, he paid the amount in his hands over to the assignor or upon his order. It is just here that the function of notice comes in. It prevents the depositary or debtor from paying the fund to a person who is no longer entitled to it."

<sup>26</sup> Skyrme v. Occidental M. & M. Co., 8 Nev. 219; Nottingham v. McKendrick, 38 Ore. 495, 63 Pac. 822; Soule v. Borelli, 80 Conn. 392, 68 Atl. 979.



by a written instrument.<sup>27</sup> But other authorities regard the lien only as a remedy given to the builder or mechanic, and hold that an assignment of a note given for the lien claim passes the right to the lien for which the assignor has already filed a claim, without any special assignment of the account or claim filed.<sup>28</sup> Upon the dissolution of a partnership, and the assignment by one partner to the other of his interest in the partnership, the continuing partner may enforce in the name of the firm a lien which had accrued to the partnership.<sup>29</sup>

An assignee for the benefit of creditors may enforce a mechanic's lien existing in favor of the assignor.<sup>30</sup>

The assignment of a completed lien does not, however, transfer a legal title to the property, and the relation between the parties is not in all respects the same as that between the mortgagee and mortgagor.<sup>31</sup>

<sup>27</sup> Ritter v. Stevenson, 7 Cal. 388; St. John v. Hall, 41 Conn. 552.

<sup>28</sup> Sinton v. Steamboat Robert, 46 Ind. 476.

<sup>29</sup> Busfield v. Wheeler, 14 Allen (Mass.) 139; Brown v. School District, 48 Kans. 709, 29 Pac. 1069. As to the right of one partner

to assign a mechanic's lien after dissolution of the firm, see Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. 315.

<sup>30</sup> German Bank v. Schloth, 59 Iowa 316, 13 N. W. 314.

<sup>31</sup> Throckmorton v. Shelton, 68 Conn. 413, 36 Atl. 805.

## CHAPTER XXXVIII.

### MECHANICS' LIENS: WAIVER AND LOSS OF.

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| Sec.   | Sec.   |
| 1500. Lien waived by agreement either express or implied.                    | 1513. Contractor's abandonment of contract may deprive those under him from claiming a lien. |
| 1500a. Agreement not to file a lien a waiver of right to do so.              |  |
| 1501. Waiver of right by an implied agreement.                               | 1513a. Prevention of completion of contract by the act of the owner.                         |
| 1502. Waiver binding between contractor and owner binding on all persons.    | 1514. Under provisions allowing the owner to complete the work abandoned by the contractor.  |
| 1503. Waiver on promise of payment.  | 1515. Rule by statutes in a few states.  |
| 1504. Lien waived in favor of a mortgagee not to be enforced as against him. | 1516. Waiver of subcontractor's lien by abandonment of work.                                 |
| 1505. Release of lien not inferred from doubtful expressions.                | 1517. Building contract terminated by death of contractor.                                   |
| 1506. Estoppel of subcontractor from claiming a lien.                        | 1518. Lien not lost by destruction of building.  |
| 1507. Waiver by subcontractor of lien by directing owner to pay contractor.  | 1519. Lien waived by taking collateral security.   |
| 1507a. Waiver by surety on contractor's bond.                                | 1520. Intention to waive the lien.   |
| 1508. Lien discharged by payment of the debt.                                | 1521. Lien not waived by taking security on same property.                                   |
| 1509. Unaccepted orders on the owner.  | 1522. Lien and security must be on same property.  |
| 1510. Contract enforceable when payable otherwise than in money.             | 1523. Agreement that taking of security will not waive lien.                                 |
| 1511. Dissolution of lien by filing a bond with sureties.                    | 1524. Agreement to take a conveyance a waiver.   |
| 1512. Right of contractor to enforce lien after abandoning contract.         | 1525. Agreement for payment by a conveyance as waiver of lien.                               |
|  | 1526. Confusion of accounts in a note as a waiver of lien.                                   |

Sec.		Sec.	
1527.	Taking note of third person not a waiver.	1541.	Lienholder not subrogated to insurance money paid.
1528.	When contractor not deemed collateral security.	1542.	Not defeated by subsequent conveyance.
1529.	Agreement to pay for work out of particular money not security.	1543.	Lien defeated by conveyance by owner where it does not attach until notice is filed.
1530.	Lien waived by deposit of money as security.	1544.	Lien cut off by sale under prior mortgage.
1531.	Taking a fire insurance policy as security not a waiver of lien.	1545.	Lienholder required to look to the title upon which improvement is made.
1532.	Taking debtor's note not a waiver.	1546.	Lien not defeated by bankruptcy of owner.
1533.	Taking a promissory note not prima facie payment.	1547.	Jurisdiction of court to enforce lien not divested by bankruptcy of owner.
1534.	In some states taking a promissory note, prima facie payment.	1548.	Only interest of bankrupt taken by assignee in bankruptcy.
1535.	Notes payable after time for filing the lien.	1549.	Lien for balance after a dividend.
1536.	Taking note not due until time when lien can not be asserted as a waiver.	1550.	Lien not defeated by appointment of receiver.
1537.	Discharge of lien by notes expressly received in payment.	1550a.	Death of owner of the property.
1538.	Destruction of building cuts off lien.	1551.	Lien not to be enforced after the debt has become barred by the statute of limitations.
1539.	In some states the lien remains on the land.	1552.	Lien not divested by judgments against the owner.
1540.	Lien on land second to prior mortgage.		

**§ 1500. Lien waived by agreement either express or implied.**—A lien created by statute may be waived or released just as any other lien may be waived or released.<sup>1</sup> "It is brought into operation by the established law of the land, and, in the absence of special arrangements to the contrary, parties are presumed to have contracted for work and ma-

<sup>1</sup> *Iron Co. v. Murray*, 38 Ohio St. 323; *Brown v. Williams*, 120 Pa. St. 24, 13 Atl. 519, 6 Am. St.

689; *Geo. B. Swift Co. v. Dolle*, 39 Ind. App. 653, 80 N. E. 678.

terials with reference to this law. But no statute will be so construed as to prohibit the formation of contracts not in conflict with public policy. If, therefore, parties deem it advisable to enter into an agreement inconsistent with the existence of a lien, the statute will not be construed to operate so as to create a lien and thereby destroy the special contract."<sup>2</sup> Thus, if a mechanic or subcontractor, before or after commencing work upon a building in course of construction, agrees with the owner that he will look only to the contractor for his pay, he thereby waives any right to a lien which the law would otherwise give him.<sup>3</sup> But inasmuch as the law secures the right, the presumption is that the right exists if the claimant has brought himself within the protection of the statute by complying with all the formalities prescribed. It then rests with the defendant to show that the claimant has knowingly surrendered or waived his lien.<sup>4</sup>

**§ 1500a. Agreement not to file a lien a waiver of right to do so.**—An agreement by a contractor not to file a lien is of course a waiver of the right. Even where such an agreement by the contractor is accompanied in the same instrument by an agreement on the part of the owner that he will insure the building to secure the contractor, the agreements are separate and independent covenants, and the contractor can not file a lien upon the failure of the owner to insure.<sup>5</sup> But an agreement by a contractor to pay and

<sup>2</sup> Willison v. Douglas, 66 Md. 99, 102, 6 Atl. 530, per Yellott, J.

<sup>3</sup> Murray v. Earle, 13 S. Car. 87; Sodini v. Winter, 32 Md. 130; Long v. Caffrey, 93 Pa. St. 526; Shropshire v. Duncan, 25 Nebr. 485, 41 N. W. 403. A release of a lien in favor of two joint contractors made by one in the name of both, but in fraud of the other, is not binding upon the latter. Ca-

nal Co. v. Gordon, 6 Wall. (U. S.) 561, 18 L. ed. 894; Hughes v. Lansing, 31 Ore. 118, 55 Pac. 95, 75 Am. St. 574.

<sup>4</sup> McCabe v. McRea, 58 Maine 95, 99; Hinchman v. Lybrand, 14 Serg. & R. (Pa.) 32.

<sup>5</sup> Long v. Caffrey, 93 Pa. St. 526; Matthews v. Young, 16 Misc. (N. Y.) 525, 40 N. Y. S. 26.

discharge all claims for labor and materials, so that there shall be no lien upon the property, or his agreement that no subcontractor or material-man should file a lien, does not prevent the contractor himself from filing a lien.<sup>6</sup> An agreement by a contractor that he will not suffer or permit any mechanic's lien to be filed is a waiver of the right to file a lien in his own favor.<sup>7</sup>

A release by mechanics or material-men to the owner of all liens they have upon a building, though made during the progress of the work, operates to discharge the building from such liens as effectively as though made after its completion, and for labor done and materials furnished after as well as before its execution.<sup>8</sup> The giving of a bond by a contractor that there shall be no liens upon the property is inconsistent with his subsequently claiming of a lien.<sup>9</sup>

**§ 1501. Waiver of right by an implied agreement.**—The right may be waived by an implied agreement or understanding between the parties, such as an understanding evidenced by a long-continued usage to keep mutual accounts in relation to their respective lines of business, and at the end of every six months to adjust and settle the balance by a note payable in four months. Such an understanding, implied from their mode of dealing, in the absence of any contract, is inconsistent with the right to perfect a mechanic's lien for labor or materials furnished. The fact that the account contains items not within the scope of the statute

<sup>6</sup> *Young v. Lyman*, 9 Pa. St. 449; *Mulrey v. Barrow*, 11 Allen (Mass.) 152; *Smalley v. Gearing*, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797; *Whittier v. Wilbur*, 48 Cal. 175.

<sup>7</sup> *Scheid v. Rapp*, 121 Pa. St. 593; 15 Atl. 652; *Evans v. Grogan*, 153 Pa. St. 121, 25 Atl. 804. Such an agreement is binding upon subcontractors who have notice of it

but not binding on those who have no notice. *Stewart Contracting Co. v. Trenton & C. R. Co.*, 71 N. J. L. 568, 60 Atl. 405; *Commonwealth Title Ins. & Trust Co. v. Ellis*, 192 Pa. St. 321, 43 Atl. 1034, 73 Am. St. 816.

<sup>8</sup> *Brown v. Williams*, 120 Pa. St. 24, 13 Atl. 519, 6 Am. St. 689.

<sup>9</sup> *Pinning v. Skipper*, 71 Md. 347, 18 Atl. 659.

strongly tends to show that credit was given to the personal responsibility of the owner.<sup>10</sup>

A material-man who is a surety on the bond of a contractor to the owner, stipulating that the contractor shall furnish and pay for all materials used under his contract, is precluded by his relation to the contract for the building from enforcing a lien for such materials upon the failure of the contractor to pay for them.<sup>11</sup>

**§ 1502. Waiver binding between contractor and owner binding on all persons.**—A waiver which is binding between the contractor and the owner is binding upon all persons claiming under the contractor.<sup>12</sup> Thus, if a contractor has agreed not to incumber the property by a lien, or to permit it to be so incumbered by any subcontractor or other person, a subcontractor knowing of the existence of the contract is put upon inquiry, and is affected with notice of its contents and stipulations. In furnishing labor and materials to the original contractor, he does so in subordination to the provisions of the contract and to the rights of the owner under it.<sup>13</sup> “The connection between the owner and the subcontractor being through and by means of the contract between the owner and the principal contractor, the subcontractor is chargeable with notice of all its terms and stipulations, and is bound thereby. He can not have the benefit of the building contract without accepting its conditions. The only ground upon which the contractor can bind the building for either materials or labor is by virtue of the authority delegated to him by the owner; and where no such authority

<sup>10</sup> *Iron Company v. Murray*, 38 Ohio St. 323; *Gorman v. Sagner*, 22 Mo. 137. The right to a lien may be impliedly waived by any acts showing an intention to do so. *Harris v. Youngstown Bridge Co.*, 93 Fed. 355, 35 C. C. A. 341.

<sup>11</sup> *McHenry v. Knickerbocker*, 128 Ind. 77, 27 N. E. 430; *Aikens*

*v. Frank*, 21 Mont. 192, 53 Pac. 538, citing text.

<sup>12</sup> *Bowen v. Aubrey*, 22 Cal. 566; *Tombs v. Rochester R. Co.*, 18 Barb. (N. Y.) 583; *Buel v. Lockport*, 3 N. Y. 197. But see *Norton v. Clark*, 85 Maine 357, 27 Atl. 252, contra. See ante, § 1289a.

<sup>13</sup> *Bowen v. Aubrey*, 22 Cal. 566.

is delegated, but on the contrary is expressly withheld, and he covenants that no lien shall be filed against the building, he can not file a lien himself, nor can his subcontractors do so."<sup>14</sup>

But a covenant by the contractor for the erection of a building that, before the final payment shall become due, he will furnish releases from all persons having a right of lien, will not protect the owner from mechanics' liens for work done or materials furnished in good faith by subcontractors and material-men. This is not a covenant on the part of the contractor not to file a lien. On the contrary, there is a recognition of the right of subcontractors and material-men to file liens against the building. The provision of the contract that, before the contractor shall receive his last payment, he shall furnish releases from all persons entitled to file liens, is a recognition of the right to file them.<sup>15</sup>

<sup>14</sup> Chief Justice Paxson, in *Nice v. Walker*, 153 Pa. 123, 25 Atl. 1065, 34 Am. St. 688, who reviews the line of cases in Pennsylvania, commencing with *Schroeder v. Galland*, 134 Pa. St. 277, 19 Atl. 632, 7 L. R. A. 711, 19 Am. St. 691. See ante, § 1289a. Now by statute in Pennsylvania a contractor's stipulation against liens is not binding upon a subcontractor unless it is assented to by him. See ante, § 1222.

<sup>15</sup> *Murphy v. Morton*, 139 Pa. St. 345, 20 Atl. 1049; *Taylor v. Murphy*, 148 Pa. St. 337, 23 Atl. 1134, 33 Am. St. 825. In *Bolton v. Hey*, 148 Pa. 156, 23 Atl. 973, the building agreement, after stipulating for the time and modes of payment, stipulated that the building should be delivered to the owner free of all liens. There was a further stipulation that the provisions of the contract should

not be taken to subject the building to any liability for the payment of labor or materials furnished in or about the erection thereof. It was held that there was an implied covenant against filing liens, and that a subcontractor could not recover against the owner for materials furnished. Chief Justice Paxson, in *Nice v. Walker*, 153 Pa. St. 123, 25 Atl. 1065, 34 Am. St. 688, commenting upon this case, says: "This case stands upon the very border, and goes further in sustaining an implied covenant against filing liens than we are now prepared to go." A bond by a contractor to indemnify the owner against claims of subcontractors does not impose a duty on the owner to satisfy the claims of subcontractors. *Slagle v. DeGooyer*, 115 Iowa 401, 88 N. W. 932.

A covenant that the owner will not be responsible for any "loss or damage" that shall or may happen to the said building, or to the material or other things used and employed in erecting it, and that the contractor shall be responsible for all accidents, injuries, damages, or hurt to any person or property during the progress of the entire work, is not sufficient to prevent the contractor or subcontractor from filing a lien against the building; there must be an express covenant against liens, or a covenant resulting as a necessary implication from the language employed; and the implied covenant should so clearly appear that the mechanic or material-man can understand it without consulting a lawyer as to its legal effect.<sup>16</sup>

A stipulation that the contractor shall furnish releases from subcontractors, before the last instalment of the contract price shall be paid, does not preclude the filing of a mechanic's lien by the contractor, in advance of the furnishing or procuring of such releases.<sup>17</sup> But while a subcontractor is bound by the terms of the original contract between the owner and the contractor, he is not bound to inquire from time to time whether such contract has been changed or modified; and therefore a subsequent release by the original contractor of his right to file liens does not prevent the filing of a lien by a material-man, though the

<sup>16</sup> *Nice v. Walker*, 153 Pa. St. 123, 25 Atl. 1065, 34 Am. St. 688. Chief Justice Paxson, delivering the opinion, criticises the cases of *Dersheimer v. Maloney*, 143 Pa. St. 532, 22 Atl. 813, and *Tebay v. Kirkpatrick*, 146 Pa. St. 120, 23 Atl. 318, which was ruled upon the former case, on the ground that the language used in the contracts in these cases may be fairly interpreted to mean something quite different from a covenant against

the filing of liens; that there was no express covenant against filing liens; and that no such covenant can be reasonably implied upon the terms of the contract. *Concord Apartment House Co. v. O'Brien*, 128 Ill. App. 437.

<sup>17</sup> *Moore v. Carter*, 146 Pa. St. 492, 23 Atl. 243. A covenant to give security against mechanics' liens has a similar effect. *Carter v. Martin*, 22 Ind. App. 445, 53 N. E. 1066.



materials were furnished after the release was delivered.<sup>18</sup>

An agreement between a contractor and the owner, that no liens shall be filed either by the contractor or subcontractor, is effectual though the agreement is not in writing, if it is definite.<sup>19</sup>

**§ 1503. Waiver on promise of payment.**—Where one having a mechanic's lien was made a party defendant to an action to foreclose a mortgage upon the allegation that the lien was prior to the mortgage, and afterwards, when such defendant was about to enter his defence, the mortgagee induced him to desist by promising that he would pay the defendant's lien, and obtained a decree accordingly, upon his failure to pay the amount of the lien, the defendant could not have the decree vacated on account of fraud. He waived his lien in consideration of the plaintiff's promise to pay it, and his right then was not to have the lien established, but to sue on the promise to pay it.<sup>20</sup>

A release of a lien was obtained upon the representation that a subsequent mortgagee would pay and secure the amount of the lien from the proceeds of a larger mortgage which the mortgagee would take. The mortgagee had made the promises the owner represented he had made; but after paying a part of the lien he refused to pay or secure the remaining part of the debt. It was held that the lien creditor was entitled to the benefit of the promise of the mortgagee, and that, unless he paid or secured the whole of the lien debt, as he had promised, he would be enjoined from pleading the release of the lien to an action at law on the lien claim.<sup>21</sup>

<sup>18</sup> Willey v. Topping, 146 Pa. St. 427, 23 Atl. 335. To the same point is Cook v. Murphy, 150 Pa. St. 41, 24 Atl. 630.

<sup>19</sup> McElroy v. Braden, 152 Pa. St. 78, 25 Atl. 235.

<sup>20</sup> Lumpkin v. Snook, 63 Iowa 515, 19 N. W. 333.

<sup>21</sup> Katzenbach v. Holt, 43 N. J. Eq. 536, 12 Atl. 383; Pacific Lumber & Timber Co. v. Dailey, 60 Wash. 566, 111 Pac. 869; Reynolds v. Manhattan Trust Co., 83 Fed. 593, 27 C. C. A. 620.

§ 1504. **Lien waived in favor of a mortgagee not to be enforced as against him.**—If a mechanic releases his lien in order to enable the owner to obtain a loan by a mortgage, he can not afterwards claim a lien as against the mortgagee.<sup>22</sup> But a release made for this purpose alone, and so limited in the instrument of release, will be confined to the purpose intended by the parties, and a stranger to the release can take no benefit from it. Even if no one is named therein to whom the release is given, and no consideration is named, the court may look to extrinsic facts to determine both the consideration and the person in whose favor the release is intended.<sup>23</sup>

A mechanic who has a right of lien may also waive it by his conduct with reference to a mortgage or conveyance which the owner is negotiating with the approval of the mechanic. If by his conduct he substantially says the lien is waived, and he will look to the proceeds of the sale or mortgage for the satisfaction of his claim, he in fact waives his lien as against the purchaser or mortgagee.<sup>24</sup> And so if a mechanic who has performed labor and furnished materials in building a house is present at a mortgagee's sale of the premises, and states that there is no incumbrance

<sup>22</sup> *Phillips v. Gilbert*, 2 McAr. (D. C.) 415, revd. 101 U. S. 721, 25 L. Ed. 833. An see *Scott v. Orbison*, 21 Ark. 202; *Alexander v. Slavens*, 7 B. Mon. (K. Y.) 351; Where lien claimant by fraud induces mortgagee to make advances, he can not claim lien against mortgagee, *Commercial Loan &c. Assn. v. Trevette*, 160 Ill. 390, 43 N. E. 769, revg. 58 Ill. App. 656.

<sup>23</sup> *Paulsen v. Manske*, 126 Ill. 72, 18 N. E. 275, 9 Am. St. 532, affg. 24 Ill. App. 95; *Goldman v. Brinton*, 90 Md. 259, 44 Atl. 1029. A contractor releases his lien by sell-

ing the improvements to a purchaser of the property, even though the transfer is set aside for fraud. *Barnett v. Stevens*, 16 Ind. App. 420, 43 N. E. 661, 45 N. E. 485.

<sup>24</sup> *McGraw v. Bayard*, 96 Ill. 146; *Scott v. Orbison*, 21 Ark. 202. Thus a contract by grantor after conveyance with one who has knowledge of the conveyance does not render the property in the hands of the grantee subject to a mechanic's lien. *Des Moines Sav. Bank v. Goode*, 106 Iowa 568, 76 N. W. 825.

upon the premises, and advises a person present to buy it, and this person relying upon such representation does buy it, the mechanic can not claim a lien as against such purchaser, and may be enjoined from selling the property upon an order obtained upon default and without the knowledge of the purchaser.<sup>25</sup>

**§ 1505. Release of lien not inferred from doubtful expressions.**—Where a clause in a contract for building several houses provided that the contractor should release from mechanics' liens all the houses as soon as they were respectively completed and ready for occupancy, it was held that there was no intention to relinquish all claim of lien upon the houses absolutely, but only to release each house as soon as it should be finished, retaining a lien upon the others until they also should be finished. It was not a provision that no lien should exist, but only a provision for a future release of the lien on each house when it should be finished and ready for sale.<sup>26</sup>

And so where a contractor, writing to the owner to inform him that he could not fulfil the contract, stated that, in order that the owner might make other arrangements to proceed with the building, he released him from further liability upon the contract from that date, it was held that this was not a relinquishment of all claim and lien for what was then due him, but only a waiver of his right to complete the contract, and to receive, as the contract provided, one of the houses in part payment.<sup>27</sup>

An agreement that the contractor shall furnish a release from all liens and rights of liens refers to liens of subcon-

<sup>25</sup> Hinchley v. Greany, 118 Mass. 595.

<sup>26</sup> McLaughlin v. Reinhart, 54 Md. 71; Aste v. Wilson, 14 Colo. App. 323, 59 Pac. 846, citing text.

Concord Apartment House Co. v. O'Brien, 128 Ill. App. 437, affd. 228 Ill. 476, 81 N. E. 1076.

<sup>27</sup> McLaughlin v. Reinhart, 54 Md. 71.

tractors, and is not a waiver by the contractor of his own lien.<sup>27a</sup>

**§ 1506. Estoppel of subcontractor from claiming a lien.**—A subcontractor may be estopped from claiming a lien by fraudulently inducing the owner to employ a certain contractor through false representations as to his responsibility. But a subcontractor is not estopped from asserting his lien as against the owner by the fact that the latter was induced to employ a certain contractor to build a house by verbal statements that if such contractor was employed he, the subcontractor, would be responsible that the contractor would so perform his contract that no liens would be filed, unless it is alleged and proved that the subcontractor made the representation with the intention of inducing the employment of the contractor, with the ulterior purpose of availing in some way of the misrepresentation. The subcontractor incurred no legal responsibility by such representation, inasmuch as his statement was not in writing.<sup>28</sup>

One seeking a mechanic's lien must act in good faith towards all persons interested in the property. An act which would make it inequitable to enforce his lien may operate as estoppel in equity.<sup>28a</sup>

**§ 1507. Waiver by subcontractor of lien by directing owner to pay contractor.**—A subcontractor waives his lien by directing the owner to pay the contractor money withheld for his protection, to the extent of such payment; for, as between the subcontractor and the owner, the effect is the same as if

<sup>27a</sup> *Concord Apartment House Co. v. O'Brien*, 228 Ill. 476, 81 N. E. 1076.

<sup>28</sup> *Abham v. Boyd*, 7 Daly (N. Y.) 30.

<sup>28a</sup> *Heidenbluth v. Rudolph*, 152 Ill. 316, 38 N. E. 930; *Eakins v. Frank*, 21 Mont. 192, 53 Pac. 538;

*Bristol-Goodson Electric Light & Power Co. v. Bristol Gas, Electric Light & Power Co.*, 99 Tenn. 371, 42 S. W. 19. See also, *Barnett v. Stevens*, 16 Ind. App. 420, 43 N. E. 661; *Green Bay Lumber Co. v. Thomas*, 106 Iowa 154, 76 N. W. 651.

the owner had paid the money directly to the subcontractor.<sup>29</sup> A subcontractor or mechanic, by agreeing with the owner before commencing work upon a building that he would look only to the contractor for his pay, thereby waives any right which the law might otherwise give him to a lien upon such building.<sup>30</sup>

**§ 1507a. Waiver by surety on contractor's bond.**—A surety on a contractor's bond conditioned that the building shall be turned over to the owner free from all liens claims can not himself maintain a bill in equity to enforce a lien against the building. A surety should be held to do precisely what he agreed to do, and having agreed that the building should be turned over to the builder free from liens, he is estopped from enforcing any.<sup>31</sup>

**§ 1508. Lien discharged by payment of the debt.**—A lien is of course discharged by payment of the lien debt, whether the debt be one between the owner and principal contractor, or one between the principal contractor and a subcontractor. If the debt be once paid by an application of funds for that purpose, the application can not afterwards be changed to suit the convenience or interests of the creditor. Thus, where a contractor is indebted to a material-man on two accounts for materials furnished for two different buildings on premises of different owners, and he makes a payment which the creditor at first applies on one account, but afterwards changes it to the other, and it does not appear that the first application was made by mistake, the lien under the

<sup>29</sup> *Rand v. Grubbs*, 26 Mo. App. 591. See, further, as to estoppel of subcontractor by being present when the owner accepts an order of the contractor in favor of a third person, *Havighorst v. Lindberg*, 67 Ill. 463; *Frohlich v. Ashton*, 159 Mich. 265, 123 N. W. 1130;

*Capital Lumber & Mfg. Co. v. Crutcher*, 140 Ky. 394, 131 S. W. 176.

<sup>30</sup> *Murray v. Earle*, 13 S. Car. 87.

<sup>31</sup> *Moyes v. Kimball*, 92 Maine 231, 42 Atl. 400.

first account is thereby released to the extent of the payment so applied, and it is not waived by the subsequent change in the application.<sup>32</sup> But the recovery of judgment for the amount due under the contract does not bar the claimant from filing his lien claim so long as the judgment remains unsatisfied.<sup>33</sup>

**§ 1509. Unaccepted orders on the owner.**—A contractor entitled to a lien is not estopped to enforce it by the fact that he has given orders on the owner of the property for the amount due him, provided the owner has not accepted such orders and they have been reassigned to the claimant before the filing of his lien.<sup>34</sup>

**§ 1510. Contract enforceable when payable otherwise than in money.**—A contract payable otherwise than in money, as for instance by a conveyance of a lot of land, may be enforced when the owner has upon demand refused or neglected to fulfil the contract, and so has rendered himself liable to pay in money. In such case the court must determine the amount that is to be paid in money, and then it may proceed in the same manner as though such amount had been required to be paid by the contract.<sup>35</sup>

**§ 1511. Dissolution of lien by filing a bond with sureties.**—The effect of an undertaking filed in a lien suit in pursuance of a statute, to pay any judgment that may be rendered upon the lien claim, is to release the property from the

<sup>32</sup> Chicago Lumber Co. v. Woods, 53 Iowa 552, 5 N. W. 715; Blanton v. Brandenburg, 143 Ky. 651, 137 S. W. 212; Williams v. Willingham-Tift Lumber Co., 5 Ga. App. 533, 63 S. E. 584.

<sup>33</sup> Marean v. Stanley, 5 Colo. App. 335, 38 Pac. 395.

<sup>34</sup> Palmer v. Uncas M. Co., 70

Cal. 614, 11 Pac. 666; Beach v. Wakefield, 107 Iowa 567, 76 N. W. 688; Bradford v. Neill & Mahunke Const. Co., 76 Ill. App. 488.

<sup>35</sup> Dowdney v. McCullom, 59 N. Y. 367, 48 How. Pr. (N. Y.) 342; Pierce v. Marple, 148 Pa. St. 69, 23 Atl. 1008, 33 Am. St. 808.

lien, and to oblige the complainant to have recourse to the parties who entered into the undertaking; but a decree can not be entered against them in the equitable suit to enforce the lien, unless it be expressly so stipulated in the instrument, or unless the parties have entered into a recognizance.<sup>36</sup> Where a lien has been discharged by the filing of a bond, the lienor's right of recourse against the sureties depends upon his obtaining a judgment in an action wherein he establishes a right to a foreclosure, enforceable by a sale of the premises but for the filing of the bond.<sup>37</sup> The lienor must establish a lien valid at the time of filing of the bond; and this requires a subcontractor to show that there was a sum due from the owner to the contractor sufficient, after the payment of prior liens, to satisfy the claim in suit.<sup>38</sup>

Where a building contractor makes an assignment for the benefit of his creditors, and his assignee discharges a lien filed by a subcontractor by depositing the amount of it with the county clerk, and completes the work and receives payment therefor, the subcontractor, upon the foreclosure of his lien, is entitled to the money deposited, with costs to be paid out of the assigned estate.<sup>39</sup>

If a contractor for the construction of a building gives a bond to the owner for the performance of his contract con-

<sup>36</sup>Phillips v. Gilbert, 101 U. S. 721, 25 L. Ed. 833. It has been held, however, that the acceptance of a bond with a power of attorney to confess judgment is not a waiver of the lien. Thompson's case, 2 Browne (Pa.), 297. See, also, Crean v. McFee, 2 Miles (Pa.) 214; Germania Building Co. v. Wagner, 61 Cal. 349. But this seems doubtful law. If the bond were given with sureties, the lien would be discharged under the rule that it is waived by taking collateral security.

<sup>37</sup>Copley v. Hay, 16 Daly (N.

Y.) 446, 12 N. Y. S. 277, 34 N. Y. St. 771; Kerrigan v. Fielding, 47 App. Div. (N. Y.) 246, 62 N. Y. S. 115. See also, Kerrigan v. Fielding, 49 App. Div. (N. Y.) 635, 63 N. Y. S. 1110; In re Greines, 60 Misc. (N. Y.) 542, 112 N. Y. S. 640.

<sup>38</sup>Lauer v. Dunn, 52 Hun (N. Y.) 191, 115 N. Y. 405, 408, 23 N. Y. St. 374, aff'd. 115 N. Y. 405, 22 N. E. 270; Scherrer v. Music Hall Co., 18 N. Y. S. 459, 45 N. Y. St. 638, per Daly, C. J.

<sup>39</sup>McMurray v. Hutcheson, 10 Daly (N. Y.) 64.

ditioned also to save the owner harmless "from any and all mechanic's liens in any manner arising from or growing out of said contract," the bond will cover only liens for work done and material furnished for the contractor by laborers, subcontractors, or material-men, and will not embrace liens which the law might give to the contractor.<sup>40</sup> The failure of the contractor to pay a claim for which a lien is filed is a breach of the condition of the bond, rendering the contractor and his sundries liable.<sup>41</sup>

**§ 1512. Right of contractor to enforce lien after abandonment of contract.**—A contractor who, without default on the part of the employer, abandons the undertaking, can enforce no lien for what he has done.<sup>42</sup> Neither can a subcontractor, who has furnished materials to such contractor, maintain a lien therefor,<sup>43</sup> at least not for an amount which shall cause any loss to the owner upon the completion of the contract by other persons.<sup>44</sup> The point is illustrated in a case where a builder entered into a contract for the erection of a building for a stipulated price. By the terms of the contract the owner agreed to pay the builder eighty per cent. of the labor

<sup>40</sup> *Bassett v. Swarts*, 17 R. I. 215, 21 Atl. 352.

<sup>41</sup> *Kiewit v. Carter*, 25 Nebr. 460, 41 N. W. 286.

<sup>42</sup> *Wallis v. Smith*, 21 Ch. Div. 243; *Malbon v. Birney*, 11 Wis. 107; *Stagner v. Woodward* (Ky.), 1 S. W. 583; *Mahon v. Guilfoyle*, 18 N. Y. S. 93, 44 N. Y. St. 879; *Kinney v. Sherman*, 28 Ill. 520; *Dennistoun v. McAllister*, 4 E. D. Smith (N. Y.) 729; *McNeal v. Clement*, 2 Thomp. & C. (N. Y.) 363. In Missouri it is held that in such case the contractor may have a lien for the actual value of the work and materials, not exceeding the contract price, less

such damages as have resulted to the owner from the breach of the contract. *Kelly v. Rowane*, 33 Mo. App. 440; *Yeats v. Ballantine*, 56 Mo. 530; *Eyerman v. Mt. Sinai Cem. Assn.*, 61 Mo. 489; *Davis v. Brown*, 67 Mo. 313.

<sup>43</sup> *Malbon v. Birney*, 11 Wis. 107; *Hollister v. Mott*, 132 N. Y. 18, 29 N. E. 1103; *Larkin v. McMullin*, 120 N. Y. 206, 24 N. E. 447.

<sup>44</sup> *Fullerton Lumber Co. v. Osborn*, 72 Iowa 472, 34 N. W. 215; *Blythe v. Poultney*, 31 Cal. 233; *Wiggins v. Bridge*, 70 Cal. 437; *Weisman v. Buffalo*, 10 N. Y. S. 569.



and materials every Saturday, and the balance upon the completion of the building, making no reservation for protection against liens of subcontractors. A lumber dealer filed a lien for lumber used in the construction of the building, and notice was duly served upon the owner. A few days afterwards, the builder, who had in the meantime received a large amount of money on the contract, abandoned the work, and it was completed by another, though at a cost less than the amount stipulated in the original contract. In a suit to enforce the lumberman's lien, it was held that the owner was not bound to know who furnished the materials, nor whether there were any unpaid claims for materials; and that the lien could be enforced for an amount equal only to the difference between the cost of the building when completed and the contract price.<sup>45</sup>

Where a contractor has neglected to put in the lateral sewers and the water connection to a house as agreed, there is an abandonment of the contract on his part, and if the

<sup>45</sup> Fullerton Lumber Co. v. Osborn, 72 Iowa 472, 34 N. W. 215. The court, Seevers, J., said: "The defendant was bound to pay in accordance with the contract; if he had failed to do so, he would have become liable for all the damages sustained thereby by the contractors, who could possibly have abandoned the job for this reason earlier than they did. It is exceedingly doubtful if the defendant could have excused himself from paying in accordance with the contract by claiming the lumber was not paid for. \* \* \* Having, therefore, merely knowledge that the contractors had procured lumber from some person unknown, the defendant was not bound to inquire and protect himself against the lien of such person, when the

contract did not authorize him to do so." For a similar case and similar decision, see Wiggins v. Bridge, 70 Cal. 437, 11 Pac. 754. In a case where the owner in his contract reserved the right to discharge mechanics' liens if they should be claimed, this was regarded as a controlling circumstance, for then the owner was not bound to pay in accordance with the contract; and moreover he has anticipated that there might be liens, and he should be held to inquire as to the existence of claims that might become liens. Gilchrist v. Anderson, 59 Iowa 274, 13 N. W. 290; Winter v. Hudson, 54 Iowa 336, 6 N. W. 541; Hunnicutt & Co. v. Van Hoose, 111 Ga. 518, 36 S. E. 669.

owner, after notice, completes the work, the premises are not subject to the liens of material-men.<sup>46</sup>

**§ 1513. Contractors abandonment of contract may deprive those under him from claiming a lien.**—A contractor's abandonment of his contract, under such circumstances that nothing is due him, deprives those claiming under him of all right of lien.<sup>47</sup> At most, the owner will only be liable for so much as the work and materials may be shown to be reasonably worth according to the original contract price, first deducting so much as has been rightfully paid under the contract, and any damages the owner has sustained in consequence of the contractor's default in his contract.<sup>48</sup>

But the rights of a subcontractor can not be impaired or abridged by subsequent acts or agreements of the parties to the original contract, without his consent, express or implied. If by the terms of that contract a certain part of the sum to become due to the contractor for erecting a building is to be reserved until after the completion of the building, and the owner pays over to the contractor the whole or a part of that sum before the completion of the building, whereupon the contractor abandons the undertaking, the subcontractor is not deprived of his lien.<sup>49</sup> A subcontractor is not deprived of his lien when the contractor stops work in consequence of the owner's refusal to pay an instalment due

<sup>46</sup> *Larkin v. McMullin*, 120 N. Y. 206, 24 N. E. 447; *Hollister v. Mott*, 132 N. Y. 18, 29 N. E. 1103.

<sup>47</sup> *Linn v. O'Hara*, 2 E. D. Smith (N. Y.) 560, 1 Abb. Pr. (N. Y.) 360; *Malbon v. Birney*, 11 Wis. 107; *Dudley v. Jones*, 77 Tex. 69, 14 S. W. 335; *Hollister v. Mott*, 132 N. Y. 18, 29 N. E. 1103; *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017. See ante, § 1299.

<sup>48</sup> *Mehrle v. Dunne*, 75 Ill. 239; *Fullerton Lumber Co. v. Osborn*,

72 Iowa 472, 34 N. W. 215. But the balance due on the contract must be distributed pro rata among all the lien claimants. A lien can not be defeated by showing that all the sums due from the owner have been expended in satisfying other liens. *Long v. Abeles*, 77 Ark. 156, 93 S. W. 67.

<sup>49</sup> *Shaver v. Murdock*, 36 Cal. 293, 298; *Henley v. Wadsworth*, 38 Cal. 356.

the contractor, and the owner thereupon proceeds to finish the building at the expense of the contractor. The extent of the owner's liability in that case is the contract price, less the payments made and the expense of completing the building according to the contract.<sup>50</sup>

Where by the terms of a building contract the owner, upon the default of the contractor to supply sufficient materials or workmen, was authorized, after three days' notice, to provide them and to deduct the expense from the amount of the contract, and a default occurred, and the owner, after such notice, supplied labor and materials to complete the work, the cost of which, with the amounts paid to the contractor, amounted to less than the contract price, it was held that one who had supplied materials to the contractor could maintain a lien to the extent of the difference between the amount the owner had paid and the contract price.<sup>51</sup> The defendant, by electing to go on under this clause of the contract, waived the right to insist upon a forfeiture for the failure of the contractor to perform the contract. The owner was not precluded thereafter from claiming damages against the contractor for defective performance, or for failure on his part to complete the building at the time specified; and these damages he could recoup against any sum due the contractor for work done under the contract. But he could not avail himself of the right given by the contract to complete

<sup>50</sup> *Graf v. Cunningham*, 109 N. Y. 369, 16 N. E. 551. See *Wheeler v. Scofield*, 67 N. Y. 311; *Wright v. Reusens*, 60 Hun (N. Y.) 585, 15 N. Y. S. 590, 39 N. Y. St. 804, *affd.* 31 N. E. 215, 133 N. Y. 298. Where an owner upon the contractor's default undertakes, under the terms of a building contract, the completion of the building shortly before an instalment is due the contractor, the material-men are entitled to liens to the amount of such in-

stalment, less the sum necessary to pay for defective work to that time, and to complete it to the stage when such instalment would become due, though nothing would be due the contractor on the completion of the building. *Foshay v. Robinson*, 137 N. Y. 134, 32 N. E. 1041.

<sup>51</sup> *Murphy v. Buckman*, 66 N. Y. 297, 300; *Gillen v. Hubbard*, 2 Hill (N. Y.) 303, 304.

the work, thereby substituting himself in place of the contractor, and at the same time claim that the contract was at an end, and refuse to account to the contractor for work done under it, on the ground that the contract was forfeited. The election to do the work at the contractor's expense, under the clause referred to, assumed that the contract was then in force.<sup>52</sup>

**§ 1513a. Prevention of completion of contract by the act of the owner.**—A contractor who is prevented by the owner from completing a building has a lien for the contract price less the cost of finishing the building,<sup>53</sup> or according to other decisions he may have his lien for the reasonable value of the work done, regardless of the contract price.<sup>54</sup> That the owner of premises, who has contracted for work thereon, fails to pay for the work as agreed, justifies the contractor in abandoning the work, and he may enforce a mechanic's lien for a quantum meruit for the work done.<sup>55</sup> But a lien can not be sustained for a portion of the work called for by an entire contract, where there is no averment that the mechanic had completed the contract, or that its completion had been prevented by the owner.<sup>56</sup>

A carpenter who, having nearly finished a building contract, is reproached for being a swindler, knocked down by the owner, and ordered never to come into the building again, may enforce his lien for the work already done with-

<sup>52</sup> *Murphy v. Buckman*, 66 N. Y. 297, 300, per Andrews, J.

<sup>53</sup> *Howes v. Reliance Wire Works Co.*, 46 Minn. 44, 48 N. W. 448; *Charnley v. Honig*, 74 Wis. 163, 42 N. W. 220; *Landyskowski v. Martyn*, 93 Mich. 575, 53 N. W. 781.

<sup>54</sup> *Kelly v. Rowane*, 33 Mo. App. 440; *Ahern v. Boyce*, 19 Mo. App. 552; *McCullough v. Baker*, 47 Mo. 401; *Pardue v. Missouri Pac. R.*

*Co.*, 52 Nebr. 201, 71 N. W. 1022, 66 Am. St. 489. In the last case it was held there was no lien for the damages caused by the breach of contract by the owner.

<sup>55</sup> *Hunter v. Walter*, 128 N. Y. 668, 29 N. E. 145, affg. 58 Hun (N. Y.) 607, 12 N. Y. S. 60, 35 Am. St. 363.

<sup>56</sup> *Bohem v. Seabury*, 141 Pa. St. 594, 21 Atl. 674.

out completing the same, though notified so to do by the owner. Such treatment may be regarded as a sufficient justification for an abandonment of the contract.<sup>57</sup>

§ 1514. Under provisions allowing the owner to complete the work abandoned by the contractor.—Under contract provisions for enabling the owner to proceed with the work, such for instance as a provision that if a contractor shall neglect to supply sufficient materials, the owner may provide them after three days' notice in writing to the contractor, and deduct the expense from the contract price, the owner, in setting up the failure of the contractor to supply sufficient materials, should aver such failure and notice in writing, as provided by the contract<sup>58</sup> If he also relies upon the fact that the cost of completing the work, together with the payments already made, amounts to more than the contract price, he should aver that the payments made were due when made, and that the sums paid to complete the building were paid to complete it according to the terms of the contract, and that the aggregate payments exceed the amount that was to be paid by the contractor.<sup>59</sup>

If the owner, under a provision of the contract permitting him to do so, completes the building according to the contract for less than the contract price, the lien attaches to the extent of the difference between the cost of completing the building and the amount unpaid on the contract when the lien was filed.<sup>60</sup>

Where neither party had fully performed his part of the contract, and the contractor was ordered to stop work, and was notified that the work would be completed at his expense, and he accordingly stopped work with the under-

<sup>57</sup> *Sproessig v. Keutel*, 17 N. Y. S. 839, 43 N. Y. St. 794.

<sup>59</sup> *Quale v. Moon*, 48 Cal. 478.

<sup>58</sup> *Quale v. Moon*, 48 Cal. 478; *Wells v. Board of Education*, 78 Mich. 260, 44 N. W. 267.

<sup>60</sup> *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017, *Follett, J.*, dissenting. See ante, § 1299.

standing that he should be paid the contract price of his work, less certain deductions, it was held that there was in substance an agreement that a certain sum was due as compensation for claimant's labor, and he was entitled to a lien therefor.<sup>61</sup>

§ 1515. **Rule by statutes in a few states.**—By statute in a few states<sup>62</sup> it is provided that, if the progress or completion of the work be suspended by the default or decease of the owner, without the consent of the head or subcontractor or material-man, he or they or any of them may proceed with the work, in accordance, however, with the terms of the original plan or contract, and on completion thereof have either or all the remedies provided by statute. Under this provision a material-man may proceed with the work in accordance with such plan, and may, on the completion of the same, perfect a lien for the work and for the materials furnished. Although his contract was merely for the supply of material, he may by force of the statute proceed with the work and complete the building, and furnish the materials for such completion. In such case the lien has priority of a levy of a judgment upon the property by a creditor of a devisee of the decedent, though the levy be made before the work is done.<sup>63</sup>

Under a provision that in case the contractor is prevented from completing his contract by failure of the owner to perform his part of the contract, he shall have a "reasonable compensation for as much thereof as he has performed, in proportion to the price stipulated for the whole," the value of the work performed may be determined by deducting

<sup>61</sup> McCue v. Whitwell, 156 Mass. 205, 30 N. E. 1134. Followed in Bergfors v. Caron, 190 Mass. 168, 76 N. E. 655.

<sup>62</sup> Nebraska: Ann. Stats. 1911,

§ 7104. Ohio: Gen. Code 1910, § 8337.

<sup>63</sup> Holbrook v. Ives, 44 Ohio St. 516, 9 N. E. 228.

from the contract price the necessary cost of completing the work.<sup>64</sup>

**§ 1516. Waiver of subcontractor's lien by abandonment of work.**—A subcontractor waives his lien by abandoning his contract with his employer, and accepting the personal responsibility of the owner of the premises, and making a new contract with him. He may acquire a lien under the new contract for labor and materials afterwards furnished, but he loses his lien for labor and materials previously furnished.<sup>65</sup>

**§ 1517. Building contract terminated by death of contractor.**—A building contract is terminated by the death of the contractor, and a subcontractor or material-man can have no lien thereafter for work done or materials furnished under that contract, but only by virtue of some new contract with the owner. To obtain a lien for what he has already done under the contract, he must file his claim or account of lien within the limited time after the contract was terminated by the contractor's death.<sup>66</sup>

**§ 1518. Lien not lost by destruction of building.**—Destruction of the building by fire does not deprive a workman of his lien, if by contract the risk of fire is to be with the owner. In such case the workman is prevented without fault on his part from completing his contract.<sup>67</sup>

**§ 1519. Lien waived by taking collateral security.**—Generally it may be said that a lien is waived by taking collateral security for the debt which by operation of the sta-

<sup>64</sup> *Jewell v. Peron*, 94 Mich. 83, 53 N. W. 951. "This is certainly as favorable a construction of the statute above quoted as the complainant can successfully contend for, as this credits the contractor with all the profits which he would

have made upon the entire contract." *Per Montgomery, J.*

<sup>65</sup> *Whitney v. Joslin*, 108 Mass. 103; *Abbott v. Nash*, 35 Minn. 451, 29 N. W. 65.

<sup>66</sup> *Gauss v. Hussmann*, 22 Mo. App. 115.

<sup>67</sup> *Sontag v. Brennan*, 75 Ill. 279.

tute might be secured by the lien.<sup>68</sup> This is upon the ground that the taking of other full security is inconsistent with the idea of there being a mechanic's lien upon the land for the same debt; or, in other words, the taking of such other security shows an intention to waive the security afforded by the statutory lien. It is immaterial what such security be, if only it be a distinct security. It may be a mortgage of the same or other property;<sup>69</sup> or a pledge;<sup>70</sup> or the obligation of a third person;<sup>71</sup> or a chattel mortgage;<sup>72</sup> a guaranty or an indorsed note.<sup>73</sup>

<sup>68</sup> *Phelps v. The Camilla*, Taney (U. S.) 400, Fed. Cas. No. 11073; *The St. Jago de Cuba*, 9 Wheat. (U. S.) 409, 416, 6 L. Ed. 122; *Grant v. Strong*, 18 Wall. (U. S.) 623, 21 L. Ed. 859; *McMurray v. Brown*, 91 U. S. 257, 23 L. Ed. 321; *Willison v. Douglass*, 66 Md. 99, 6 Atl. 530; *Croskey v. Corey*, 48 Ill. 442; *Little v. Vredenburg*, 16 Bradw. (Ill.) 189; *Brady v. Anderson*, 24 Ill. 110; *Kinzey v. Thomas*, 28 Ill. 502; *Kankakee Coal Co. v. Crane Mfg. Co.*, 138 Ill. 207, 27 N. E. 935; *Clark v. Moore*, 64 Ill. 273; *Cosgrove v. Farwell*, 114 Ill. App. 491; *Geo. S. Lyon & Sons Lumber & Mfg. Co. v. Equitable Loan & Inv. Assn.*, 174 Ill. 31, 50 N. E. 1006, affg. 72 Ill. App. 489; *Muir v. Cross*, 10 B. Mon. 277. *Contra*, *Hall v. Pettigrove*, 10 Hun (N. Y.) 609; *Hinchman v. Lybrand*, 14 Serg. & R. (Pa.) 32; *Montandon v. Deas*, 14 Ala. 33, 48 Am. Dec. 84; *Ford v. Wilson*, 85 Ga. 109, 11 S. E. 559. By statute in several states the taking of security is a waiver of the lien:—Georgia: See *Royal v. McPhail*, 97 Ga. 457, 25 S. E. 512. New Mexico: Comp. Laws 1897, § 2235. North Dakota: The taking of col-

lateral or other security for an indebtedness, for which a lien might be claimed under the mechanics' lien act, shall in no way impair the right to such lien, unless such security shall be by express agreement given and received in lieu of such lien. Rev. Codes 1905, § 6251. South Dakota: Rev. Code (Civ. Proc.) 1903, § 695.

<sup>69</sup> *Willison v. Douglas*, 66 Md. 99, 6 Atl. 530; *Trullinger v. Kofoed*, 7 Ore. 228, 33 Am. Rep. 708; *Barrows v. Baughman*, 9 Mich. 213; *Gardner v. Hall*, 29 Ill. 277; *Weaver v. Demuth*, 40 N. J. L. 238; *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150, 47 N. W. 364.

<sup>70</sup> *Gorman v. Sagner*, 22 Mo. 137.

<sup>71</sup> *Little v. Vredenburg*, 16 Bradw. (Ill.) 189; *Kinzey v. Thomas*, 28 Ill. 502; *Cowl v. Varnum*, 37 Ill. 181; *German Luth. Church v. Heise*, 44 Md. 453, 479; *Dutton v. New Eng. Mut. F. Ins. Co.*, 29 N. H. 153.

<sup>72</sup> *Kinzey v. Thomas*, 28 Ill. 502.

<sup>73</sup> *Kankakee Coal Co. v. Crane Mfg. Co.*, 138 Ill. 207, 27 N. E. 935; *Lyon Lumber Co. v. Equitable L. & I. Co.*, 174 Ill. 31, 50 N. E. 1006, affg. 72 Ill. App. 489.



In Iowa it is provided by statute<sup>74</sup> that no person shall be entitled to the lien who before completion of the work shall take any collateral security, though the taking of such security after the completion of the contract does not affect the lien unless it is expressly taken in lieu of the lien. The creditor takes collateral security within the meaning of the statute who takes a separate obligation, or takes a transfer of property or of other contracts to guarantee the performance of the contract.<sup>75</sup> The object of the statute doubtless is to prevent any one from obtaining a lien who takes security for the amount due or to become due at any time before he completes his contract, be it for work or materials.<sup>76</sup> The taking of collateral security, after the completion of the work or the furnishing of the materials for which a lien is claimed, is no waiver of the lien although the building still remains incomplete.<sup>77</sup>

**§ 1520. Intention to waive the lien.**—There are authorities, however, which hold that the taking of security does not of itself show an intention to waive a mechanic's lien; that the question of waiver as between the parties is largely one of intention;<sup>78</sup> and that there is no waiver unless the security is inconsistent with the lien.<sup>79</sup>

<sup>74</sup> Code 1897, § 3088.

<sup>75</sup> *Mervin v. Sherman*, 9 Iowa 331.

<sup>76</sup> *Bissell v. Lewis*, 56 Iowa 231, 239, 9 N. W. 177, per Seevers, J.

<sup>77</sup> *Bissell v. Lewis*, 56 Iowa 231, 9 N. W. 177.

<sup>78</sup> *Howe v. Kindred*, 42 Minn. 433, 44 N. W. 311; *McCall v. Eastwick*, 2 Miles (Pa.) 45; *Parberry v. Johnson*, 51 Miss. 291; *Grant v. Strong*, 18 Wall. (U. S.) 623, 21 L. Ed. 859; *Bashor v. Nordyke & Co.*, 25 Kans. 222. See *Chicago Building & Mfg. Co. v. Talbotton Creamery & Mfg. Co.*, 106 Ga. 84,

31 S. E. 809; *Baker v. Abrams*, 42 Nebr. 880, 61 N. W. 91.

<sup>79</sup> *Peck v. Bridwell*, 10 Mo. App. 524; *Perkins v. Coleman*, 51 Miss. 298; *Maryland Brick Co. v. Spilman*, 76 Md. 337, 25 Atl. 297; *Willison v. Douglas*, 66 Md. 99, 6 Atl. 530, 17 L. R. A. 599, 35 Am. St. 431; *Pinning v. Skipper*, 71 Md. 347, 18 Atl. 659; *Ford v. Wilson*, 85 Ga. 109, 11 S. E. 559; *Hinchman v. Lybrand*, 14 Serg. & R. (Pa.) 32; *Montandon v. Deas*, 14 Ala. 33; *Hoagland v. Lusk*, 33 Nebr. 376, 50 N. W. 162; *McKeen v. Haseltine*, 46 Minn. 426, 49 N. W. 195; *Smith v. Butts*, 72 Miss. 269, 16 So. 242.

In accordance also with this view, the taking of security in the form of promissory notes of third persons has been held not to discharge the lien unless the notes are expressly received in payment; and the burden is upon the debtor to show by direct and positive proof that the creditor agreed so to receive them. The receipting of the original account as paid in full by such a note raises no presumption that the original debt has been paid.<sup>80</sup>

A subcontractor does not lose his right of lien by taking the personal agreement of the owner to pay his claim.<sup>81</sup> Moreover, the mechanic does not waive his lien by accepting the promise of a subsequent purchaser, made in consideration of the mechanic's forbearance to sue, to pay for work and materials.<sup>82</sup>

The situation of a mortgagee who took his mortgage subject to a lien, or subject to a right to perfect a claim which had already attached to the property, is not changed by the lienor's taking security, and he should not be allowed to claim a waiver for that reason when no waiver was intended.<sup>83</sup>

Under the Iowa statute making it a waiver to take security before the work is done, but denying this effect, if security is taken after the work is done, a statement by the contractor that he may require security by indorsement of a note, is not a waiver, where the indorsement is not secured till after the work is done.<sup>84</sup>

<sup>80</sup> *Allis v. Meadow Spring Distilling Co.*, 67 Wis. 16, 29 N. W. 543.

<sup>81</sup> *Embree v. Fowler*, 3 Mo. App. 598.

<sup>82</sup> *Mervin v. Sherman*, 9 Iowa 331.

<sup>83</sup> *Howe v. Kindred*, 42 Minn. 433, 44 N. W. 311. "The reason usually given in the adjudicated cases for holding that a mechanic or material-man has lost his lien

by taking security, either upon the property to which the lien attaches or upon other property, is that subsequent lienholders and purchasers have a right to rely upon the record, and should be protected against secret liens." Per *Collins, J.*; *Trullinger v. Kofoed*, 7 Ore. 228, 33 Am. Rep. 708.

<sup>84</sup> *Atlantic Trust Co. v. Carbondale Coal Co.*, 99 Iowa 234, 68 N. W. 697.

§ 1521. **Lien not waived by taking security on same property.**—By taking security under the same contract upon the same property, it is declared in several cases, a mechanic does not waive his right to a mechanic's lien, unless it appear affirmatively that it was his intention to look to such security and not to his lien.<sup>85</sup> Thus the acceptance of a mortgage for the same debt upon the same property covered by a mechanic's lien is not regarded as the taking of collateral security, and does not divest a mechanic's lien, unless the lienholder evinces the intention to rely upon the new security rather than upon the lien.<sup>86</sup>

§ 1522. **Lien and security must be on same property.**—But to bring a case within this rule it must appear that the lien and the collateral security cover the same property. Certain iron merchants sold to a railroad company material for use in the construction of its road, and at the same time took notes of the company secured by its bonds and a mortgage on "all the franchises, fuel, rolling-stock, cars, engines, machinery, and appurtenances appertaining or belonging to" a single division of its line of road, which together embraced four divisions, as well as coal stations, land stations, engine-houses and other buildings. Subsequently the merchants claimed a lien under the statute of Iowa which gives a lien upon "the building, erection, or other improvement, including any work of internal improvement." The lien was claimed upon the entire line of road, including the four divisions. It was held that inasmuch as a large proportion of the property covered by the mortgage would not be subject to a mechanic's lien for iron and other materials

<sup>85</sup> *Hale v. Burlington Cedar Rapids & N. R. Co.*, 13 Fed. 203, 2 McCrary (U. S.) 558; *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507; *Taliaferro v. Stevenson*, 58 N. J. L. 165, 33 Atl. 383.

<sup>86</sup> *Gilcrest v. Gottschalk*, 39 Iowa

311; *Roberts v. Wilcoxson*, 36 Ark. 355; *Elwood State Bank v. Mock*, 40 Ind. App. 685; *Farmers & Mechanics Nat. Bank v. Taylor*, 91 Tex. 78, 40 S. W. 876; *Chapman v. Brewer*, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. 779.

used in the construction of the track, and inasmuch as the mortgage covered only one of the four divisions upon which the lien was claimed, the security was not upon the identical property upon which the lien was sought to be enforced.<sup>87</sup>

**§ 1523. Agreement that taking security will not waive lien.**—An express stipulation that the taking of collateral security shall not operate as a waiver of the lien is effectual. But even if such a stipulation be in writing, parol evidence is admissible to show that, at the time the assignment was executed, it was distinctly understood that no proceedings should be had upon the lien until the maturity of the mortgage, and that such agreement was the consideration of the assignment.<sup>88</sup>

**§ 1524. Agreement to take a conveyance a waiver.**—An agreement to receive a conveyance or mortgage of real estate as part payment is a waiver of the lien only so far as the payment goes. It is not a waiver of lien as to the residue not paid, any more than the acceptance of money as part payment would be.<sup>89</sup> An agreement to take a mortgage upon the same property in part payment for the materials furnished for a house is a waiver of a right of lien for such part, if the mortgage is duly tendered;<sup>90</sup> but it is no waiver of a lien for the balance of the lien claim.<sup>91</sup> If the owner, however, upon the completion of the building or of the contract, neglects to fulfill his part of the agreement by tendering the mortgage, or is unable to execute a good and valid mortgage of the property, the lien is not generally

<sup>87</sup> *Hale v. Burlington, Cedar Rapids & N. R. Co.*, 13 Fed. 203, 2 McCrary (U. S.) 558.

<sup>88</sup> *Barclay v. Wainwright*, 86 Pa. St. 191; *Miller v. Henderson*, 10 Serg. & R. (Pa.) 290; *Pierce v. Marple*, 148 Pa. St. 69, 23 Atl. 1008; *Butler-Ryan Co. v. Silvey*, 70 Minn. 507, 73 N. W. 406, 510.

<sup>89</sup> *Bayard v. McGraw*, 1 Bradw. (Ill.) 134.

<sup>90</sup> *Willison v. Douglas*, 66 Md. 99, 6 Atl. 530.

<sup>91</sup> *McLaughlin v. Reinhart*, 54 Md. 71; *Barrows v. Baughman*, 9 Mich. 213; *Hinchman v. Lybrand*, 14 Serg. & R. (Pa.) 32.

lost by the mere agreement to take the mortgage;<sup>92</sup> though it has been said that, in case of an absolute agreement on the part of the mechanic to take a mortgage, his remedy, upon the failure of the owner to execute the mortgage, is either by a suit for damages, or by a bill for specific performance.<sup>93</sup>

An agreement by one entitled to a mechanic's lien to take in payment second mortgages upon some of the houses, for the building of which a lien accrues, is a waiver of the lien.<sup>94</sup> Where the parties by their contract provide for a different security upon the same land, the security designed by the statute is waived.<sup>95</sup>

But a mechanic's lien in favor of contractors for the erection of a building is not released or merged by their acquiring the undivided half interest of one of the owners, where they took title solely to enable them to get a loan and complete the building and not to discharge the owner from liability.<sup>96</sup>

The lien is waived by taking security in the form of a conditional sale, although the instrument be not recorded so as to be valid as to creditors or purchasers.<sup>97</sup>

**§ 1525. Agreement for payment by a conveyance as waiver of lien.**—Whether an agreement for payment by a conveyance or mortgage amounts to a waiver of a lien depends upon the terms of the agreement, as well as upon the subsequent breach of it. A lien is waived by an agreement to take a conveyance of a house in payment for the work, in pursuance of which a deed is executed and placed in

<sup>92</sup> *McMurray v. Brown*, 91 U. S. 257, 22 L. Ed. 321; *Gardner v. Hall*, 29 Ill. 277. See post, § 1525.

<sup>93</sup> *Weaver v. Demuth*, 40 N. J. L. 238.

<sup>94</sup> *Weaver v. Demuth*, 40 N. J. L. 238.

<sup>95</sup> *Barrows v. Baughman*, 9 Mich. 213.

<sup>96</sup> *Blatchford v. Blanchard*, 160 Ill. 115, 43 N. E. 794, affg. 57 Ill. App. 518.

<sup>97</sup> *Taylor v. Burlington, C. R. & N. R. Co.*, 4 Dill. (U. S.) 570, Fed. Cas. No. 13783.

escrow, to be delivered when the work should be done; and no lien attaches even if the contractor, by another agreement, surrenders that security, and takes the owner's promissory note for the work done.<sup>98</sup>

But if the agreement for security be not fulfilled, the promise itself does not impair the right to a lien. Thus, where a contractor agreed to furnish building material and build a house in consideration of a certain sum to be paid by the owner, a large part of which should be paid by the conveyance to the contractor of a certain lot of land, and the owner, after the contractor had completed his part of the contract, refused to convey the lot, or to pay the stipulated price, it was held that the contractor was entitled to his statutory lien.<sup>99</sup>

**§ 1526. Confusion of accounts in a note as a waiver of lien.**—If a note be accepted which includes not only a debt for which the creditor had a mechanic's lien, but also other accounts not connected with the lien debt, the confusion of the accounts works a waiver of the lien. The claimant is bound to preserve the unity of his claim against the par-

<sup>98</sup> *Grant v. Strong*, 18 Wall. (U. S.) 623, 21 L. Ed. 859.

<sup>99</sup> *McMurray v. Brown*, 91 U. S. 257, 21 L. Ed. 859. Per Clifford, J.: "Contracts of a special character, such as to give a mortgage to the laborer or mechanic, if duly executed under circumstances showing that the claim to a lien was not intended by the parties, may defeat such a claim; but a mere promise to give such a security, if subsequently broken, will not impair such a right if the requisite notice is given before any right of a third party, as by attachment or conveyance, has become vested in the premises. \* \* \* Liens of the kind, except where

the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis, that, if the stipulated labor is performed or the promised materials are furnished, the laborer or material-man is entitled to the lien which the law affords, provided he gives the required notice within the specified time." See, also, *Barrows v. Baughman*, 9 Mich. 213; *Central Trust Co. v. Richmond N. I. & B. R. Co.*, 68 Fed. 90.

ticular property against which he seeks to enforce a lien. If he confuses this claim with other claims so as to necessitate a process of separation by the courts, it will be held that he has waived his lien. When the identity of the claim is lost, the specific remedy by lien is lost.<sup>1</sup>

**§ 1527. Taking note of third person not a waiver.—**

Where a promissory note has been given to a subcontractor by a third person as collateral security for the payment of a portion of the work upon a house, in order to induce him to go on with the work, the subcontractor may enforce the note simultaneously with proceedings to enforce a mechanic's lien filed by him against the premises, and separate judgments may be recovered in each, though there can be but one satisfaction.<sup>2</sup>

**§ 1528. When contract not deemed collateral security.—**

The contract of two persons for the erection of a building on the land of one of them is not deemed collateral security taken on such contract, as where a husband, acting as agent for his wife in contracting for materials for building upon her land, also binds himself to pay for the same.<sup>3</sup>

Where a firm orders lumber for use upon land belonging to one member of the firm, and afterwards gives the firm note for the price of it, the lien is not discharged. But if an individual member of the firm orders the lumber for use on his own land, and the firm gives their note for the price,

<sup>1</sup> *Schulenburg v. Robison*, 5 Mo. App. 561.

<sup>2</sup> *Gambling v. Haight*, 59 N. Y. 354. Assigning contract to subcontractor as security does not defeat original contractor's lien. *Weber v. Bushnell*, 171 Ill. 587, 49 N. E. 728, 69 Ill. App. 26.

<sup>3</sup> *Bissell v. Lewis*, 56 Iowa 231, 236, 9 N. W. 177. "The transaction

amounted to this. Two persons contract for the erection of a building on the land of one of them, and because only one owns an interest in the land, it can not be said collateral security was taken on such contract and the mechanic thereby deprived of his lien." Per Seevers, J. See, also, *Jodd v. Duncan*, 9 Mo. App. 417.

this is a separate and distinct security which would discharge the lien.<sup>4</sup>

§ 1529. **Agreement to pay for work out of particular money not security.**—An agreement to pay for work out of money to be received from a particular source is not collateral security, but only a designation of the source whence payment is to be expected, unless there is an assignment of the money.<sup>5</sup>

§ 1530. **Lien waived by deposit of money as security.**—But a deposit of a sum of money to secure the performance of a contract with a material-man, and out of which the latter is to be paid on default, is such collateral security as will deprive him of his right to a lien.<sup>6</sup>

§ 1531. **Taking a fire insurance policy as security not a waiver of lien.**—The taking of a fire insurance policy upon property upon which a lien is claimed does not operate as a release or waiver of the lien, in the absence of evidence that it was received with such intention. The policy is not really security. It does not become a security unless the property be destroyed by fire. The policy is taken to secure the claim in the event the lien should become unavailing by the destruction of the property by fire. It is not intended to operate as a release of the lien, and does not so operate.<sup>7</sup>

§ 1532. **Taking debtor's note not a waiver.**—But the taking of the debtor's own note or other evidence of indebtedness, which does not extend the credit beyond the time within which a lien may be asserted, does not amount to a

<sup>4</sup> *Croskey v. Corey*, 48 Ill. 442.

<sup>5</sup> *Meyer v. Delaware R. Const. Co.*, 100 U. S. 457, 25 L. Ed. 593, rev'g. *Delaware R. Const. Co. v. Davenport & St. P. R. Co.*, 46 Iowa 406, 412.

<sup>6</sup> *Shickle &c. Iron Co. v. Council Bluffs Water Works Co.*, 33 Fed. 13; *Harrison &c. Iron Co. v. Council Bluffs Water Works Co.*, 25 Fed. 170.

<sup>7</sup> *Clark v. Moore*, 64 Ill. 273.



waiver of the right of lien, in the absence of an express agreement to that effect.<sup>8</sup> If such note is negotiated by

<sup>8</sup> *Carter v. The Byzantium*, 1 Cliff. (U. S.) 1, Fed. Cas. No. 2473; *Sutton v. The Albatross*, 2 Wall. Jr. (U. S.) 327, Fed. Cas. No. 13645; *Van Stone v. Stillwell Mfg. Co.*, 142 U. S. 128, 35 L. Ed. 961, 12 Sup. Ct. 181. Alabama: *Lane v. Jones*, 79 Ala. 156; *Leftwich Lumber Co. v. Florence Mutual B. L. & Savings Assn.*, 104 Ala. 584, 18 So. 48. Arkansas: *Eddy v. Loyd*, 90 Ark. 340, 119 S. W. 264. District of Columbia: *Smith v. Johnson*, 2 MacAr. (D. C.) 481. Florida: *Stringfellow v. Coons*, 57 Fla. 158, 49 So. 1019. Georgia: *Belmont Farms v. Dobbs Hdw. Co.*, 124 Ga. 827, 53 S. E. 312. Illinois: *Van Court v. Bushnell*, 21 Ill. 624; *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Meeks v. Sims*, 84 Ill. 422; *Brady v. Anderson*, 24 Ill. 110, 113; *Chisholm v. Randolph*, 21 Ill. App. 312; *Bayard v. McGraw*, 1 Bradw. (Ill.) 134. Indiana: *Rhodes v. Webb-Jameson Co.*, 19 Ind. App. 195, 49 N. E. 283. Iowa: *Bonsall v. Taylor*, 5 Iowa 546; *Scott v. Ward*, 4 G. Greene (Iowa) 112; *Logan v. Attix*, 7 Iowa 77; *Gilcrest v. Gottschalk*, 39 Iowa 311, 313. Kentucky: *Graham v. Holl*, 4 B. Mon. (Ky.) 61; *Lavolette v. Redding*, 4 B. Mon. (Ky.) 81; *Finch v. Redding*, 4 B. Mon. (Ky.) 87; *Gere v. Cushing*, 5 Bush (Ky.) 304; *Mivelaz v. Genovely*, 121 Ky. 235, 28 Ky. L. 203, 89 S. W. 109; *Mivelaz v. Johnson*, 30 Ky. L. 389, 98 S. W. 1020. Maine: *Bryant v. Grady*, 98 Maine 389, 57 Atl. 92. Maryland: *Sodini v. Winter*, 32 Md. 130, 133; *Blake v. Pitcher*, 46 Md. 453; *Pin-*

*ning v. Skipper*, 71 Md. 347, 18 Atl. 659. Michigan: *Smalley v. Ashland Brownstone Co.*, 114 Mich. 104, 72 N. W. 29. Minnesota: *Milwain v. Sanford*, 3 Minn. 147; *McKeen v. Haseltine*, 46 Minn. 426, 49 N. W. 195; *Butler-Ryan Co. v. Silvey*, 70 Minn. 507, 73 N. W. 406. Mississippi: *Ehlers v. Elder*, 51 Miss. 495. Missouri: *McMurray v. Taylor*, 30 Mo. 263, 77 Am. Dec. 611; *Steamboat Charlotte v. Hammond*, 9 Mo. 59; *Morrison v. Steamboat Laura*, 40 Mo. 260, 261; *Jones v. Hurst*, 67 Mo. 568; *Van Stone v. Stillwell Mfg. Co.*, 142 U. S. 128, 35 L. Ed. 961, 12 Sup. Ct. 181. Nebraska: *Hoagland v. Lusk*, 33 Nebr. 376, 50 N. W. 162, 29 Am. St. 485; *Livesey v. Hamilton*, 47 Nebr. 644, 66 N. W. 644; *Barnacle v. Henderson*, 42 Nebr. 169, 60 N. W. 382; *Hursh v. Carman*, 51 Nebr. 784, 71 N. W. 714. Nevada: *Skryme v. Occidental M. & M. Co.*, 8 Nev. 219. New Jersey: *Edwards v. Derrickson*, 28 N. J. L. 39. New York: *Miller v. Moore*, 1 E. D. Smith (N. Y.) 739; *Althause v. Warren*, 2 E. D. Smith (N. Y.) 657; *Teaz v. Chrystie*, 2 E. D. Smith (N. Y.) 621, 2 Abb. Pr. 109; *Linneman v. Bieber*, 85 Hun (N. Y.) 477, 33 N. Y. S. 129, 66 N. Y. St. 739. Ohio: *Standard Oil Co. v. Sowden*, 55 Ohio St. 332, 45 N. E. 320. Pennsylvania: *Johns v. Bolton*, 12 Pa. St. 339; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507, 64 Am. Dec. 675; *Fisher v. Rush*, 71 Pa. St. 40, 8 Phila. (Pa.) 44; *Herron v. Graham*, 3 Wkly. N. Cas. (Pa.) 176; *Jones v. Shawhan*, 4 Watts &

the contractor, the lien is lost,<sup>9</sup> unless he regains possession of it in time to enforce the lien.<sup>10</sup> The claimant must produce the note at the trial, or satisfactorily account for its absence, or else the lien can not be enforced.<sup>11</sup> An extension or renewal of the note, not extending the time of pay-

S. (Pa.) 257; *Kinsley v. Buchanan*, 5 Watts (Pa.) 118. Texas: *Jones v. White*, 72 Tex. 316, 12 S. W. 179; *Gillespie v. Remington*, 66 Tex. 108, 18 S. W. 338. Utah: *Doane v. Clinton*, 2 Utah 417. West Virginia: *Cushwa v. Improvement L. & B. Assn.*, 45 W. Va. 490, 32 S. E. 259. Wisconsin: So provided by statute. Stat. 1898, § 3317; *Schmidt v. Gilson*, 14 Wis. 514; *White v. Dumpke*, 45 Wis. 454; *Pond Machine Tool Co. v. Robinson*, 38 Minn. 272, 37 N. W. 99. In Delaware: Rev. Code 1893, p. 820, and Maryland, Pub. Gen. Laws 1904, ch. 63, § 3, no person having such lien shall be considered as waiving the same by granting a credit, or receiving notes or other securities, unless the same be received as payment, or the lien be expressly waived, but the sole effect thereof shall be to prevent the institution of any proceedings to enforce said lien until the expiration of the time agreed upon. Massachusetts: *Davidson v. Stewart*, 200 Mass. 393, 86 N. E. 779. In Kansas, Gen. Stats. 1908, § 6243, a copy of the note may be recorded with an affidavit, as evidence of the lien. In Nebraska a copy of the note is to be filed in the office of the register of deeds, together with a sworn statement that the sum for which the note is

given, or any part thereof, is due for labor and material used, and itemizing the labor and materials. Ann. Stats. 1911, § 7102. In New Hampshire: Pub. Stats. & Sess. Laws 1901, p. 453, § 18, it is provided that no lien shall be defeated by taking a note, unless it was taken in discharge of the amount due and of the lien. North Dakota: *Erickson v. Russ*, 21 N. Dak. 208, 129 N. W. 1025.

<sup>9</sup> *Scott v. Ward*, 4 G. Greene (Iowa) 112. Contra, *Standard Oil Co. v. Sowden*, 55 Ohio St. 332, 45 N. E. 320.

<sup>10</sup> *Carter v. The Byzantium*, 1 Cliff (U. S.) 1. Fed. Cas. No. 2473; *Teaz v. Chrystie*, 2 Abb. Pr. (N. Y.) 109, 44 N. Y. S. 533; *German Bank v. Schloth*, 59 Iowa 316, 13 N. W. 314; *Palmer v. Uncas M. Co.*, 70 Cal. 614, 11 Pac. 666; *Morrison v. Steamboat Laura*, 40 Mo. 260; *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219; *Cox v. Colles*, 17 Bradw. (Ill.) 503; *Brady v. Anderson*, 24 Ill. 110; *Clement v. Newton*, 78 Ill. 427; *Bayard v. McGraw*, 1 Bradw. (Ill.) 134.

<sup>11</sup> *Kankakee Coal Co. v. Crane Bros. Mfg. Co.*, 128 Ill. 627, 21 N. E. 500; *Clement v. Newton*, 78 Ill. 427; *Morton v. Austin*, 12 Cush. (Mass.) 389; *Graham v. Holt*, 4 B. Mon. (Ky.) 61; *Sweet v. James*, 2 R. I. 270.

ment beyond the time when a lien may be enforced, does not destroy the lien.<sup>12</sup>

Taking acceptances of bills of exchange or drafts from the owner upon which nothing is paid does not defeat the lien of a subcontractor.<sup>13</sup>

**§ 1533. Taking a promissory note not prima facie payment.**—In most of the states the taking of a promissory note is not prima facie payment, and a lien is not affected by the taking of a note for the lien debt, unless it be shown that the note was taken in payment. The note is regarded merely as evidence of the debt.<sup>14</sup> In cases of liens upon personal property where possession is essential to retaining a lien, the giving of time by taking a note is often inconsistent with the retention of possession, and therefore is a waiver of the lien. But this reason does not apply in case of mechanic's liens. It is only when credit is extended beyond the time allowed for filing the lien that the giving of time by note makes the extension inconsistent with a claim of lien.

**§ 1534. In some states taking a promissory note prima facie payment.**—In a few states the taking of negotiable promissory notes for a lien claim is a waiver of the lien, unless it is agreed or shown that they were not taken in payment.<sup>15</sup> Whether a promissory note received on account of a claim for which it is sought to enforce a mechan-

<sup>12</sup> *Chisholm v. Williams*, 128 Ill. 115, 21 N. E. 215; *Paddock v. Stout*, 121 Ill. 57, 13 N. E. 182.

<sup>13</sup> *Bradford v. Neill & Co. Construction Co.*, 76 Ill. App. 488.

<sup>14</sup> *Hopkins v. Forrester*, 39 Conn. 351; *Pope v. Graham*, 44 Tex. 196; *Brooks v. Mastin*, 69 Mo. 58; *Doebbling v. Loos*, 45 Mo. 150; *Van Stone v. Stillwell Mfg. Co.*, 142 U. S. 128, 35 L. Ed. 961, 12 Sup. Ct.

181; *Bryant v. Grady*, 98 Maine 389, 57 Atl. 92; *Hersh v. Carman*, 51 Nebr. 784, 71 N. W. 713; *Donovan v. Frazier*, 15 App. Div. (N. Y.) 521, 44 N. Y. S. 533.

<sup>15</sup> *Schneider v. Kolthoff*, 59 Ind. 568; *Hill v. Sloan*, 59 Ind. 181; *Teal v. Spangler*, 72 Ind. 380. But see *Sinton v. Steamboat Roberts*, 46 Ind. 476.

ie's lien is in itself payment, is a question of fact.<sup>16</sup> If it be shown that a note by a contractor was taken on account, but not as payment, his negotiation of the note does not destroy his lien where, before filing his claim, he had redeemed the note, and afterwards surrendered it in court.<sup>17</sup>

A contractor made an agreement with his employer to accept his three promissory notes in payment for building a house, under the supposition that he owned the land upon which the building was to be erected. Before the contract was completed the contractor ascertained that the land belonged to another, who induced the contractor by fraudulent statements as to the employer's financial ability, to complete the contract. The owner had agreed to convey the land to the employer, and knew the terms of his contract for the building of the house. All the notes were tendered to the contractor, and two of them were accepted by him. It was held that he could not rescind the contract and pursue his remedy by enforcing a lien against the land on the ground of an implied contract on the part of the owner coexistent with the contract with the employer.<sup>18</sup>

But upon the rescinding of the contract, laborers employed by the contractor may have a lien for their own labor, if proceedings be duly taken.<sup>19</sup>

**§ 1535. Notes payable after time for filing the lien.—**Taking a note or acceptance for labor done or materials furnished extends the time of payment of the claim until the maturity of the note or acceptance taken, and suspends the creditor's remedy until the maturity of the note or bill.

<sup>16</sup> *Casey v. Weaver*, 141 Mass. 280, 6 N. E. 372; *Quimby v. Durgin*, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514.

<sup>17</sup> *Davis v. Parsons*, 157 Mass. 584, 32 N. E. 1117. See *Moore v. Jacobs*, 190 Mass. 424, 76 N. E. 1041.

<sup>18</sup> *Ellenwood v. Burgess*, 144 Mass. 534, 11 N. E. 755. And see *Clark v. Kingsley*, 8 Allen (Mass.) 543.

<sup>19</sup> *Clark v. Kingsley*, 8 Allen (Mass.) 543.

He can not, until such maturity of the note or bill, file his petition for a mechanic's lien.<sup>20</sup> If the paper matures before the expiration of the time within which the mechanic must file his notice of lien and commence suit for its enforcement, there is no waiver of the lien.<sup>21</sup> If, on the other hand, the note is payable after the time when the right to file a claim of lien or a petition to enforce the lien would expire, this is ground for the inference that the parties intended to substitute the note for the lien claim, and is regarded as a waiver of the lien.<sup>22</sup> The enforcement of a lien is wholly inconsistent with the acts of the parties in giving and receiving the notes; for to retain the lien the creditor is required to file his claim or certificate within a limited period after the completion of the work, and to commence suit within a certain other limited period; and if the creditor, notwithstanding he had taken notes for the demand, should file his claim and bring suit to enforce the lien before the maturity of the notes, and were allowed to prevail in such suit, the owner might be obliged to pay the lien debt again if the notes were outstanding in the hands of third persons.<sup>23</sup> At any rate, the extension of credit prevents an enforcement of the debt till the maturity of the notes taken. The necessary conclusion is, that the creditor elected to take the notes in payment rather than to retain his claim and right of lien. It therefore does not aid the petitioner

<sup>20</sup> Green v. Fox, 7 Allen (Mass.) 85; Cox v. Keiser, 15 Bradw. (Ill.) 432; Ehlers v. Elder, 51 Miss. 495; Graham v. Holt, 4 B. Mon. (Ky.) 61, 64; Flenniken v. Liscoe, 64 Minn. 269, 66 N. W. 799.

<sup>21</sup> Bodley v. Denmead, 1 W. Va. 249; Miller v. Moore, 1 E. D. Smith (N. Y.) 739; Ashdown v. Woods, 31 Mo. 465; Cushwa v. Improvement Loan & Building Assn., 45 W. Va. 490, 32 S. E. 259. See

also, Hines v. Chicago Bldg. Mfg. Co., 115 Ala. 637, 22 So. 160.

<sup>22</sup> Green v. Fox, 7 Allen (Mass.) 85; Peyroux v. Howard, 7 Pet. (U. S.) 324, 8 L. Ed. 700; The Highlander, 4 Blatch. (U. S.) 55, Fed. Cas. No. 6475; Blakeley v. Moshier, 94 Mich. 299, 54 N. W. 54; Loyd v. Guthrie, 131 Ala. 65, 31 So. 506.

<sup>23</sup> Green v. Fox, 7 Allen (Mass.) 85, per Bigelow, C. J.

that he has never negotiated the notes, or that he has, after negotiating them, taken them up, and offers to surrender them in court before taking judgment.<sup>24</sup>

**§ 1536. Taking note not due until time when lien can not be asserted as a waiver.**—An agreement to give credit by taking the owner's promissory note, or independent security of a third person, falling due at a day beyond the period within which the lien must be asserted, is a waiver of the lien, if the owner has given, or stands ready to give, such note or security.<sup>25</sup> But if the owner has refused to comply with the agreement by giving such note or security, there is no waiver. If the owner refuses to comply with the agreement, the builder or material-man ought not to be bound by it, but should be remitted to his rights independently of the contract.<sup>26</sup> On the failure of the owner to deliver the note or security according to the contract, the contractor is entitled to immediate payment and to the statutory lien to secure it, because the credit is conditional upon the giving of the note or security. If the agreement be that the owner shall secure the payment of the final instalment under a contract for labor, and payment is thus to be postponed beyond the time within which the lien must be asserted, but the mortgage is not given in accordance with the agreement, the lien remains, if it be perfected and asserted within the proper time.<sup>27</sup>

<sup>24</sup> *Green v. Fox*, 7 Allen (Mass.) 85.

<sup>25</sup> *Quinby v. Wilmington*, 5 *Houst. (Del.)* 26; *Crooks v. Finney*, 39 *Ohio St.* 57; *Miller v. Moore*, 1 *E. D. Smith (N. Y.)* 739; *Althause v. Warren*, 2 *E. D. Smith (N. Y.)* 657; *Lutz v. Ey*, 3 *E. D. Smith (N. Y.)* 621, 632; *Dey v. Anderson*, 39 *N. J. L.* 199. Perhaps days of grace would not be counted where these would extend the time of payment beyond the time

limited. *Stout v. Sower*, 22 *Ill. App.* 65.

<sup>26</sup> *Van Stone v. Stillwell Mfg. Co.*, 142 *U. S.* 128, 35 *L. Ed.* 961, 12 *Sup. Ct.* 181; *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, 109 *U. S.* 702, 721, 27 *L. Ed.* 1081, 3 *Sup. Ct.* 594; *The Highlander*, 4 *Blatch. (U. S.)* 55, *Fed. Cas. No.* 6475; *Gardner v. Hall*, 29 *Ill.* 277; *Clark v. Moore*, 64 *Ill.* 273, 279.

<sup>27</sup> *Gardner v. Hall*, 29 *Ill.* 277.

But if the failure to give the note according to the contract be shown to have arisen through the default of the contractor to complete the work contracted for, he can have no lien.<sup>28</sup>

**§ 1537. Discharge of lien by notes expressly received in payment.**—If notes are expressly received in payment, the lien is discharged.<sup>29</sup> Whether a receipt given upon taking a note as being in payment of the account, or as in full for the account, has the effect of discharging the lien, seems to have been doubted in some cases.<sup>30</sup> The receipt would not have that effect if it were shown that the parties did not understand that it would discharge the lien. The receipt may be explained by showing negatively that there was no agreement or intention to discharge the lien, and by showing affirmatively that the transaction was entered into for a different purpose.<sup>31</sup>

A lien once unconditionally waived can not afterwards be revived as against intervening purchasers.<sup>32</sup>

**§ 1538. Destruction of building cuts off lien.**—The destruction of a building before the filing of notice or claim of lien cuts off the lien, where the lien attaches only from the time of filing the claim, as is the case in New York. The reason given for this rule is that the object of the law is to encourage improvements; and to hold that the lien remains on the land after the improvements have been destroyed or removed would discourage the improvement of

<sup>28</sup> *Simon v. Blocks*, 16 Bradw. (Ill.) 450.

<sup>29</sup> *McCoy v. Quick*, 30 Wis. 521; *Crooks v. Finney*, 39 Ohio St. 57. Lien is only waived when note is taken in absolute payment. *Meek v. Parker*, 63 Ark. 367, 38 S. W. 900, 58 Am. St. 119; *Ward v. Thorn-dyke*, 65 Wash. 11, 117 Pac. 593.

<sup>30</sup> *Rose v. Persse &c. Paper*

*Works*, 29 Conn. 256; *Chapin v. Persse &c. Paper Works*, 30 Conn. 461, 79 Am. Dec. 263.

<sup>31</sup> *Sutton v. The Albatross*, 2 Wall. Jr. (U. S.) 327, Fed. Cas. No. 13645.

<sup>32</sup> *Blakeley v. Moshier*, 94 Mich. 299, 54 N. W. 54; *Au Sable Boom Co. v. Sanborn*, 36 Mich. 358.

of the land, and would thus operate to defeat the principal object of the law.<sup>33</sup>

In Pennsylvania the lien against the land is regarded as merely incident to that against the building; and if there is no building to which a lien can attach, there can be no lien on the land.<sup>34</sup> It is immaterial whether the building be destroyed by storm or by fire. A lien against a former building does not survive upon the land and attach to another building erected on the same.<sup>35</sup>

**§ 1539. In some states the lien remains on the land.--** But in other states it is held that the lien remains upon the land after the building has been destroyed or removed.<sup>36</sup> It is regarded as the principal object of the law to provide security for a class of persons whose claims gradually accumulate from day to day, and who can not conveniently protect themselves in any other way. It is immaterial that the statement or claim of lien has not been filed prior to the destruction of the building, if the lien has attached either from the commencement of the building, or from the time the labor was performed or the materials furnished.<sup>37</sup>

The destruction by fire of a building upon which there are liens for labor and materials does not affect the liens upon the land. The lienors are not insurers of the property

<sup>33</sup> Schukraft v. Ruck, 6 Daly (N. Y.) 1; Wood v. Wilmington Conference Academy, 1 Marv. (Del.) 416, 2 Hard. (Del.) 146, 41 Atl. 89.

<sup>34</sup> Wigton's App., 28 Pa. St. 161; Odd Fellows' Hall v. Masser, 24 Pa. St. 507, 64 Am. Dec. 675. Pennsylvania doctrine followed in Humboldt Lumber Mill Co. v. Crisp, 146 Cal. 686, 81 Pac. 30, 106 Am. St. 75; Wood v. Wilmington Conference Academy, 1 Marv. (Del.) 416, 2 Hard. (Del.) 146, 41 Atl. 89.

<sup>35</sup> Presbyterian Church v. Stett-

ler, 26 Pa. St. 246; Wigton's App., 28 Pa. St. 161.

<sup>36</sup> Clark v. Parker, 58 Iowa 509, 12 N. W. 553; Sontag v. Brennan, 75 Ill. 279; Steigleman v. McBride, 17 Ill. 300; Gaty v. Casey, 15 Ill. 189; Schwartz v. Saunders, 46 Ill. 18; McLaughlin v. Green, 48 Miss. 175; Smith v. Newbaur, 144 Ind. 95, 42 N. E. 40, 33 L. R. A. 685; Bratton v. Ralph, 14 Ind. App. 153, 42 N. E. 644.

<sup>37</sup> Freeman v. Carson, 27 Minn. 516, 8 N. W. 764.



unless they expressly make themselves such.<sup>38</sup> The lien attaches to the brick, iron and other material not destroyed by the fire, and to money received from a sale of the remains of the building, and of fixtures, such as permanent machinery.<sup>39</sup>

**§ 1540. Lien on land second to prior mortgage.**—Under statutes which give a lien priority, as to improvements, over a prior mortgage, if the improvements are destroyed by fire, the lien of the mechanic has nothing on which to attach except the equity of redemption; and if this be sold upon a foreclosure of the mortgage, the lien is cut off entirely.<sup>40</sup>

**§ 1541. Lienholder not subrogated to insurance money paid.**—The lienholder is not, however, subrogated to the insurance money payable under a policy obtained by and in the name of the owner of the property.<sup>41</sup> If the mortgagor assigns the insurance policy to the mortgagee, though the assignment be made after the loss has occurred, the mortgagee is entitled to the insurance to the exclusion of the lienholder.<sup>42</sup>

The lienholder has, however, an insurable interest.<sup>43</sup> It is not an interest in real estate, but a right to a remedy against it.<sup>44</sup> It does not matter that the property is covered by a prior mortgage, so that the lien only attaches to an equity of redemption. The insurable interest in such case is not limited to the amount such equity of redemption

<sup>38</sup> *Stuart v. Broome*, 59 Tex. 466; *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182.

<sup>39</sup> *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *McLaughlin v. Green*, 48 Miss. 175.

<sup>40</sup> *Condict v. Flower*, 106 Ill. 105.

<sup>41</sup> *Jones on Mortgages* (6th ed.),

§ 401; *Rackley v. Scott*, 61 N. H. 140; *Cameron v. Fay*, 55 Tex. 58.

<sup>42</sup> *Galyon v. Ketchen*, 85 Tenn. 55, 1 S. W. 508.

<sup>43</sup> *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa 287; *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285.

<sup>44</sup> *Andrews v. Burdick*, 62 Iowa 714, 16 N. W. 275.

would bring at public sale, but by the value of the property and the amount of the claim.<sup>45</sup>

§ 1542. **Not defeated by a subsequent conveyance.**—A lien under a contract with the owner of a building, having once attached, is not defeated by a conveyance of the premises on which the lien is claimed after the claimant had begun to perform the contract. The lien attached as of the time the contract was entered into, or the building or work commenced, whichever the statute makes the commencement of the lien.<sup>46</sup> The claimant, in his petition, may safely describe such purchaser as the owner. He may describe the grantor as the owner, and may show that the conveyance was fraudulent and void as to himself and other creditors; but in such case he assumes the burden of proving that the conveyance was fraudulent and void.<sup>47</sup> If houses are erected for one who was the owner of the land in fee at the time the contract was made and the work begun, but he afterwards

<sup>45</sup> Insurance Co. v. Stinson, 103 U. S. 25, 26 L. Ed. 473. In Nebraska it is provided by statute that any lienholder who may deem himself in danger of loss or damage by fire may notify in writing the owner or agent of property subject to such lien, to insure the same in a reasonable amount against such loss or damage; and if he shall fail or refuse to do so for the space of ten days, then the person or persons having such lien or liens may insure such property in an amount not to exceed two-thirds of the total amount of their liens, and may recover such proportion of the premium paid therefor as the court shall deem just and proper as part of the costs of enforcing such lien.

Ann. Stats. 1911, § 7112. A mechanic's lien is not an incumbrance within the meaning of a condition in a policy of insurance making it void if the property shall in any way be incumbered without the consent of the insurer. The condition applies only to incumbrances created with the assent of the assured. Green v. Homestead F. Ins. Co., 82 N. Y. 517, affg. 17 Hun (N. Y.) 467.

<sup>46</sup> Gale v. Blaikie, 126 Mass. 274; Carew v. Stubbs, 155 Mass. 549, 30 N. E. 219; Miller v. Barroll, 14 Md. 173; Blauvelt v. Woodworth, 31 N. Y. 285; Allen v. Sales, 56 Mo. 28; Hotaling v. Cronise, 2 Cal. 60; Weller v. McNabb, 4 Sneed (Tenn.) 422.

<sup>47</sup> Amidon v. Benjamin, 126 Mass. 276.

changes his interest to a leasehold estate, a mechanic may maintain his lien against the larger interest which the owner had in the beginning.<sup>48</sup> On the other hand, if the person who has contracted for the erection of a building has only a contract for the purchase of the land, he can not, by a surrender or transfer of his interest in the land, divest the mechanic's lien. Nor does a judgment cancelling the contract, in an action to which the lienor is not a party, affect his interest.<sup>49</sup>

If the owner of land, upon which there is a partly completed building subject to a lien for lumber under a contract for the entire building, conveys it to one who assumes the payment of such contract, and the purchaser induces the lumberman to go on with the contract and furnish the lumber for completing the building, the lumberman may enforce his lien for the lumber. The purchaser assumed the indebtedness, on which the right to a lien was based, without being accepted by the lumberman as a debtor in place of the original owner, and can not be heard to say that by means of this transaction the statutory right and remedy of lien has been lost.<sup>50</sup>

**§ 1543. Lien defeated by conveyance by owner where it does not attach until notice is filed.**—Where, as in New York, the lien does not attach until notice of the lien is filed as provided, a conveyance by the owner in good faith, prior to the filing of the notice, defeats the mechanic's right to a lien; and a mortgage to a bona fide creditor, made before the filing of the notice, has priority.<sup>51</sup> If a conveyance by

<sup>48</sup> Goldheim v. Clark, 68 Md. 498, 13 Atl. 363.

<sup>49</sup> King v. Smith, 42 Minn. 286, 44 N. W. 65.

<sup>50</sup> St. Paul Labor Exchange Co. v. Eden, 48 Minn. 5, 50 N. W. 921; Howe v. Kindred, 42 Minn. 433, 44 N. W. 311.

<sup>51</sup> Munger v. Curtis, 42 Hun (N.

Y.) 465, 4 N. Y. St. 847; Payne v. Wilson, 11 Hun (N. Y.) 302, 305, affd. 74 N. Y. 348, 355; Tiley v. Thousand Island Hotel Co., 9 Hun (N. Y.) 424; Smullen v. Hall, 13 Daly (N. Y.) 392; Quimby v. Sloan, 2 Abb. Pr. (N. Y.) 93, 2 E. D. Smith (N. Y.) 594; Sinclair v. Fitch, 3 E. D. Smith (N. Y.) 677;

the owner absolute in form be shown to have been intended only as a mortgage, the conveyance does not prevent the lien from attaching upon the equitable interest the owner had at the date of filing the notice.<sup>52</sup> And so if the title is transferred by operation of law before the notice or claim of lien is filed, by the death of the contracting owner and the devise of the land to trustees, no lien can be established as against them.<sup>53</sup>

A conveyance procured in fraud of a mechanic's lien will not have the effect of precluding the foreclosure of the lien, although notice of the lien be filed subsequent to the purchase.<sup>54</sup>

§ 1544. **Lien cut off by sale under prior mortgage.**—A mechanic's lien is cut off by a sale under a prior mortgage, unless the claimant gives notice of his claim pending the foreclosure proceedings. Where, in a suit to foreclose a railroad mortgage, a third party intervened and sought to enforce a claim for materials used in the construction of the road against the earnings of the road in the hands of a receiver, but did not claim a mechanic's lien, it was held that the purchaser at the foreclosure sale was not bound to look beyond the record and anticipate a future claim of lien

Cox v. Broderick, 4 E. D. Smith (N. Y.) 721; Noyes v. Burton, 29 Barb. (N. Y.) 631, 17 How. Pr. (N. Y.) 449; Ernst v. Reed, 49 Barb. (N. Y.) 367; Brown v. Zeiss, 9 Daly (N. Y.) 240, 242; Meehan v. Williams, 36 How. Pr. (N. Y.) 73, 2 Daly (N. Y.) 367; Bailey v. Johnson, 1 Daly (N. Y.) 61; Cross v. Daly, 5 Daly (N. Y.) 540; Altieri v. Lyon, 13 N. Y. S. 617, 37 N. Y. St. 881, 59 N. Y. Super. Ct. 110; Robbins v. Arendt, 148 N. Y. 673, 43 N. E. 165, modifying 4 Misc.

(N. Y.) 196, 23 N. Y. S. 1019, 53 N. Y. St. 483. There can be no mechanic's lien against the lien of a vendor for the purchase-money where he has conveyed the whole title. Smullen v. Hall, 13 Daly (N. Y.) 392.

<sup>52</sup> McAuley v. Mildrum, 1 Daly (N. Y.) 396.

<sup>53</sup> Meyers v. Bennett, 7 Daly (N. Y.) 471.

<sup>54</sup> Meehan v. Williams, 36 How. Pr. (N. Y.) 73, 2 Daly (N. Y.) 367; Schafer v. Reilly, 50 N. Y. 61.

in case the earnings of the road in the receiver's hands should not satisfy the claim made against them.<sup>55</sup>

**§ 1545. Lienholder required to look to the title upon which improvement is made.**—A mechanic or material-man who relies upon a lien should look to the state of the title of the land upon which the labor or materials are to be applied. A person holding an agreement for a perpetual lease contracted for materials to be used in the construction of a house on the lot with one having knowledge of the the terms of this agreement, which was not recorded. Afterwards, while the house was building, a lease was executed in accordance with the agreement, except that a higher rent was reserved. At the time of executing the lease the owner sold and the conveyed the reversion to a purchaser who had knowledge of the lease, but not of the prior agreement. Upon a bill filed by the material-man to enforce a lien, he claimed a prior lien not only upon the leasehold estate as actually created, but upon the reversionary interest over and above the rent reserved in the agreement for the lease. On demurrer it was held that the purchaser was only bound to look to the record; and that, although he knew that a house was in course of construction upon the property, he was not bound to make inquiry; and that his equity was superior to that of the material-man.<sup>56</sup>

<sup>55</sup> Hale v. Burlington, Cedar Rapids & N. R. Co., 13 Fed. 203, 2 McCrary (U. S.) 558.

<sup>56</sup> Gable v. Preachers' Fund Society, 59 Md. 455, 460. "If he finds the party with whom he deals is not the owner, but is the architect, builder or agent of the owner, the law prescribes a mode by which, upon notice to the owner, he can make the land liable. If he finds that such party is lessee or tenant for life or

years he can only claim a lien to the extent of such estate. The complainants, therefore, before parting with their materials should have looked into the title, and, finding it the subject of an agreement to lease at a prescribed rent, they should have acquired the agreement, or the lease it calls for, to be recorded, so that no one could be led into a dealing with the title without record notice of its condition." Per

**§ 1546. Lien not defeated by bankruptcy of owner—**

A mechanic's lien is not dissolved by the bankruptcy of the owner of the building, although the statement of the lien is not filed till after the commencement of the proceedings in bankruptcy.<sup>57</sup> The petition for the enforcement of the lien may be entered in the state court, and upon the application of the assignee may be ordered to stand continued to await the result of the bankruptcy proceedings in the United States court. The latter court may authorize the assignee to redeem the property, or may order the entire property to be sold and the amount of the lien paid from the proceeds. If the bankruptcy court should abstain from determining the amount of the lien, the state court might proceed to do so.

But proceedings to enforce a mechanic's lien will not be continued to await bankruptcy proceedings against a debtor who had conveyed all his interest in the land before his bankruptcy.<sup>58</sup>

The lien depends for its existence upon a strict compliance with the statutory provisions for enforcing the lien. Suit must be brought within the time limited by statute. In what way the lien shall be ascertained after the defendant is adjudged a bankrupt depends in the first instance upon the assignee. Unless the assignee proceeds in the United States courts, the creditor is entitled to pursue his remedy in the state court. If the assignee, upon being served with an order of notice, neglects to appear and show cause why

Miller, J. (By art. 63, § 9, of Code 1904, the lien applies only to the extent of the interest of the lessee or tenant. See also, *Laird-Norton Co. v. Herker*, 6 S. Dak. 509, 62 N. W. 104, holding that a material-man's lien which is prior to a mortgage is not defeated by a foreclosure of the mortgage un-

der a power of sale stipulated in the mortgage.

<sup>57</sup> *Clifton v. Foster*, 103 Mass. 233, 4 Am. Rep. 539; *In re Coulter*, 2 Sawyer (U. S.) 42, Fed. Cas. No. 3276; *In re Cook*, 3 Biss. (U. S.) 116, Fed. Cas. No. 3151; *Laughlin v. Reed*, 89 Maine 226, 36 Atl. 131.

<sup>58</sup> *Glendon Co. v. Townsend*, 120 Mass. 346.

judgment should not be rendered, the creditor is entitled to have judgment in the state court.<sup>59</sup>

**§ 1547. Jurisdiction of court to enforce lien not divested by bankruptcy of owner.**—The jurisdiction of a state court to enforce mechanics' liens is not divested by subsequent proceedings in bankruptcy.<sup>60</sup> If the suit is not continued, it may proceed to judgment. If the bankruptcy court orders the property to be sold subject to pending mechanics' liens, the state court after such sale has jurisdiction to enter judgment and enforce the lien.<sup>61</sup>

If the security of the lien be appraised and the debt is proved for the balance, the lienholder may afterwards proceed to enforce his lien. His rights are not affected by the fact that the lien was appraised at a nominal value.<sup>62</sup> If the lien debt be proved in full against the bankrupt's estate without valuing the security and deducting its amount, although the lien may thereby be relinquished as to the assignee, it is not relinquished as against one who had purchased the property before the lien was filed, and who is not interested in the distribution of the bankrupt estate.<sup>63</sup>

**§ 1548. Only interest of bankrupt taken by assignee in bankruptcy.**—The assignee in bankruptcy or insolvency takes only the interest that the debtor had in his property, and all liens and rights of lien remain unaffected.<sup>64</sup>

A lien is not defeated by the debtor's assignment for the benefit of creditors. The assignee has no greater interest in the property assigned than the assignor had, though the assignee is entitled to the possession for the purpose of con-

<sup>59</sup> Marston v. Stickney, 55 Maine 383.

<sup>60</sup> Seibel v. Simeon, 62 Mo. 255.

<sup>61</sup> Douglass v. St. Louis Zinc Co., 56 Mo. 388; Seibel v. Simeon, 62 Mo. 255.

<sup>62</sup> Streeper v. McKee, 86 Pa. St. 188.

<sup>63</sup> Bassett v. Baird, 85 Pa. St. 384.

<sup>64</sup> Howe v. Patterson, 78 Maine 227; Douglas v. St. Louis Zinc Co., 56 Mo. 388; Barnes v. Fisher, 9 Mo. App. 574.

verting the property into money.<sup>65</sup> In New York, where the lien attaches only from the time it is filed, an assignee for the benefit of creditors takes free from the lien unless it had been previously perfected.<sup>66</sup> But a subcontractor's right of lien is not cut off by a general assignment for the benefit of creditors made by the contractor, though made before the filing of the lien.<sup>67</sup> But the assignee has the right to contest the validity of the lien upon every ground available to the owner of the premises.

§ 1549. **Lien for balance after a dividend.**—Where the proceeding to enforce a lien is in the nature of a proceeding in chancery, and not strictly a proceeding in rem, the pendency of proceedings under an insolvent law, wherein the lienholder has proved his claim and received a dividend from the assignee, does not affect his right to enforce his lien for a balance of his claim.<sup>68</sup>

§ 1550. **Lien not defeated by appointment of receiver.**—Although a receiver of the debtor's property has been appointed, a lien may be recorded and fixed upon the property. The recording of the claim of lien after the appointment of a receiver does not newly incumber the property, but simply fixes and secures upon it a lien already existing.<sup>69</sup> But in a state where the lien does not attach as of the date labor is performed or material is furnished, but only from the date

<sup>65</sup> *Hart v. Globe Iron Works*, 37 Ohio St. 75; *Crump v. Gill*, 9 Phila. (Pa.) 117.

<sup>66</sup> *Noyes v. Burton*, 29 Barb. (N. Y.) 631, 17 How. Pr. (N. Y.) 449; *Quimby v. Sloan*, 2 Abb. Pr. (N. Y.) 93, 2 E. D. Smith (N. Y.) 594.

<sup>67</sup> *Smith v. Baily*, 8 Daly (N. Y.) 128; *Oates v. Haley*, 1 Daly (N. Y.) 338; *Mandeville v. Reed*, 13 Abb. Pr. (N. Y.) 173.

<sup>68</sup> *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182.

<sup>69</sup> *Richardson v. Hickman*, 32 Ark. 406; *Fagan v. Boyle*, *Ice Mach. Co.*, 65 Tex. 324; *Barstow v. McLachlan*, 99 Ill. 641; *Deady v. Fink*, 5 N. Y. S. 3, 24 N. Y. St. 734; *Totten & Co. Iron Co. v. Muncie Nail Co.*, 148 Ind. 372, 47 N. E. 703.



of filing the notice if a receiver is appointed before the notice of lien is filed the right to a lien is cut off.<sup>70</sup>

But where a railroad passes into the hands of a receiver under proceedings to enforce a mortgage, and claims for labor and materials are presented in that suit, they will be considered, not as liens, but as claims for the equitable discretion of the court.<sup>71</sup>

A state court has no jurisdiction to enforce a mechanic's lien where the property has been forfeited to the United States under the revenue laws, or has been seized by the marshal under forfeiture proceedings. In such case the lien claimant should apply to the court in possession of the property for leave to participate in the proceeds of the sale under the forfeiture proceedings. The lien upon the property would be divested by such sale, but might attach to the fund in court realized from the sale.<sup>72</sup>

**§ 1550a. Death of owner of the property.**—The death of the owner of the property does not defeat the statutory right of a mechanic to a lien. If the owner dies within the ninety days limited for filing the lien, the heirs at law should be made parties defendant to the lien action and the administrator can properly be cited to defend if the land is necessary to pay debts of the deceased.<sup>73</sup>

**§ 1551. Lien not to be enforced after the debt has become barred by the statute of limitations.**—The fact that a statute provides that the lien may be foreclosed in the same manner as if the premises affected were held by mortgage does not give the lienholder all the rights of a mortgagee in this respect; for a lien gives no present title or right of possession as a mortgage does.<sup>74</sup>

There is a presumption of law that after the lapse of

<sup>70</sup> *Smith v. Pierce*, 45 App. Div. (N. Y.) 628, 60 N. Y. S. 1011.

<sup>71</sup> *Turner v. Indianapolis R. Co.*, 8 Biss. (U. S.) 315, Fed. Cas. No. 14258.

<sup>72</sup> *Heidritter v. Elizabeth Oil Cloth Co.*, 6 Fed. 138.

<sup>73</sup> *Russell v. Howell*, 74 N. H. 551, 69 Atl. 886.

<sup>74</sup> *Hills v. Halliwell*, 50 Conn.

more than twenty years a lien of indefinite duration, like that of a contractor for the construction of a railroad, has been paid.<sup>75</sup>

**§ 1552. Lien not divested by judgments against the owner.**—This lien is not merged or destroyed by obtaining judgment against the party personally liable. This is in analogy with the rule that a judgment upon the debt in the case of a mortgage or pledge does not affect the security. The lien, like a mortgage or pledge, is a security for the debt. The remedies upon the debt and upon the security are distinct and concurrent.<sup>76</sup> On the other hand, the pendency of a proceeding to enforce a mechanic's lien does not bar a suit at law for the debt,<sup>77</sup> unless, perhaps, in states where a personal judgment can be rendered in the proceeding upon the lien.

Where the assignee of a claim for labor has had lien claims for the same debt assigned to him, it has been held he can sue at law and recover a personal judgment for the debt. But such suit could not be maintained if the lien was outstanding in another person.<sup>78</sup>

270, per Pardee, J.: "By recording the statement of his claim the plaintiff acquired no present title to the land, no right to possession, and of course no right to an action for the recovery of possession; no right, in short, for the enforcement of which he could have any standing-place in a court either of law or equity after the expiration of six years, and although the complaint is by statutory permission addressed to the equitable side of the court, it remains in fact and effect a proceeding for the collection of a debt after the creditor has allowed time to suspend his remedy."

<sup>75</sup> Hayes' Appeal, 113 Pa. St. 380, 4 Cent. 457, 6 Atl. 144.

<sup>76</sup> Germania Building & Loan Assn. v. Wagner, 61 Cal. 349; West v. Fleming, 18 Ill. 248, 68 Am. Dec. 539; Crean v. McFee, 2 Miles (Pa.) 214; Thompson's Case, 2 Browne (Pa.) 297; Sorg v. Crandall, 129 Ill. App. 255; Lowden v. Sorg, 233 Ill. 79, 84 N. E. 181; United States Blowpipe Co. v. Spencer, 40 W. Va. 698, 21 S. E. 769; Marean v. Stanley, 5 Colo. App. 335, 38 Pac. 395.

<sup>77</sup> Delahay v. Clement, 3 Scam. (Ill.) 201. Or an action for breach of contract to convey land. American Nat. Bank v. Barnard, 15 Colo. App. 110, 61 Pac. 200.

<sup>78</sup> Cady v. Fair Plain Literary Assn., 135 Mich. 295.

## CHAPTER XXXIX.

### MECHANICS' LIENS: PROCEEDINGS TO ENFORCE.

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| <p>1583. Prior mortgagee necessary party where lienholder has prior lien on building alone.</p> <p>1584. Other lienors.</p> <p>1585. New parties to be summoned any time prior to final decree.</p> <p>1586. Where the owner dies, his executor or administrator to be substituted as party.</p> <p>1587. Petition or complaint to substantially conform to the statute.</p> <p>1588. What the complaint must show.</p> <p>1589. Averments in the complaint continued.</p> <p>1590. Complaint to aver that the materials were used in the structure.</p> <p>1591. Complaint to show that defendant was owner or had some interest.</p> <p>1592. Not required to prove the precise title of owner.</p> <p>1593. Necessary allegations of subcontractor.</p> <p>1594. To aver an indebtedness by owner to original contractor.</p> <p>1595. Not necessary to allege in the complaint that the indebtedness arose under a particular contract.</p> <p>1596. Allegations as to date of execution of contract.</p> <p>1597. One contract.</p> <p>1598. Abandonment of contract through no fault of contractor.</p> <p>1599. Damages allowed to defendant by way of set-off.</p> <p>1600. Description of the land.</p> | <p>1601. Effect of variance in description in notice and in the complaint.</p> <p>1602. Variance as to parties between claim filed and the complaint, not ground for dismissal.</p> <p>1603. Case proved to be substantially as alleged.</p> <p>1604. Variance as to amount of the lien claim.</p> <p>1604a. Owner to appear and answer complaint to enforce lien.</p> <p>1605. Amendment of complaint.</p> <p>1606. Evidence admissible.</p> <p>1607. Question for the court to determine whether a lien exists.</p> <p>1608. Judgment to direct a sale of owner's interest.</p> <p>1609. Interest allowed from date of finding.</p> <p>1610. Decree for sale of separate buildings on separate lots.</p> <p>1611. Judgment where money has been paid into court.</p> <p>1612. Sale on credit.</p> <p>1613. Judgment for a deficiency.</p> <p>1614. A personal judgment to be rendered only for a deficiency after a sale.</p> <p>1614a. Receivers.</p> <p>1615. Judgment against contractor in suit by subcontractor.</p> <p>1616. Costs.</p> <p>1616a. Attorneys' fees.</p> <p>1617. Reversal of decree of sale.</p> <p>1617a. Appeal.</p> <p>1617b. Distribution of proceeds of sale.</p> <p>1617c. Effect of agreement to postpone execution.</p> |
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§ 1553. Proceedings to enforce liens dependent on the practice in different states.—The proceedings to enforce me-

chanics' liens depend largely upon the general systems of practice used in the different states; and these are so diverse that it would be impossible to formulate any complete system of practice and procedure which would be wholly applicable in more than a very few states. Every lawyer, however, is presumed to be familiar with the system in use in his own state, and not to be very much interested in other systems adopted in other states. It is, therefore, quite impracticable to attempt to set out all the steps to be taken in a suit or petition to enforce a mechanic's lien. The statute of the state where the suit is brought must be followed; and this is adapted or is to be adapted to the system of procedure which prevails in such state. There are, however, some rules of construction, and some rules relating to parties, to pleadings and practice, which are of general application, and the purpose of the present chapter is to state these rules, so far as they have been adjudged by the courts.

Of course a statute referring in very general terms to the things which give rise to liens—such as work done or materials furnished in the erection, alteration, or repair of buildings or other structures—must be interpreted by the courts, in order to determine whether it applies to particular work or materials. It is a question of law, in every case arising under such a statute, whether the particular thing for which a lien is sought is within the scope of the statute. Rules of construction must be applied. The purpose of the statute must be considered; and the statute should be given the meaning which its words taken in their usual meaning imply. The scope of the statute should neither be extended nor restricted by construction.

**§ 1554. Rules of practice.**—The rule of construction applicable to questions arising under these liens may be strict at one stage of the proceedings and liberal at another. Mechanics' liens are in derogation of the common law, depending for their existence wholly upon statutes; and therefore

upon the question whether a lien attaches at all, a strict construction is proper.<sup>1</sup> The court is not authorized, in de-

<sup>1</sup> *Trask v. Searle*, 121 Mass. 229; *Butler v. Gain*, 128 Ill. 23, 21 N. E. 350; *Belanger v. Hersey*, 90 Ill. 70; *Kay v. Smith*, 10 Heisk. (Tenn.) 41; *Rothgerber v. Dupuy*, 64 Ill. 452; *Canisius v. Merrill*, 65 Ill. 67; *Stephens v. Holmes*, 64 Ill. 336; *Cook v. Heald*, 21 Ill. 425, 429; *Huntington v. Barton*, 64 Ill. 502, 504; *Brady v. Anderson*, 24 Ill. 110; *Reindollar v. Flickinger*, 59 Md. 469; *Wehr v. Shryock*, 55 Md. 334, 336; *Mushlitt v. Silverman*, 50 N. Y. 360; *Minor v. Marshall*, 6 N. Mex. 194, 27 Pac. 481; *Kirby v. McGarry*, 16 Wis. 68; *McGugin v. Ohio River R. Co.*, 33 W. Va. 63, 10 S. E. 36; *Gordon v. Deal*, 23 Ore. 153, 31 Pac. 287; *Tilford v. Wallace*, 3 Watts (Pa.) 141; *Pool v. Wedemeyer*, 56 Tex. 287, 295. Per Stayton, J.: "There is no subject within the range of judicial action in which construction has been so diverse and varied as that applicable to laws regulating the liens of mechanics and material-men, and some of the courts of the different states seem to have felt that they were authorized in some instances, to engraft upon the plain terms of the statute, by construction, principles operating harshly or beneficially to the respective parties, as a supposed public policy might seem to indicate as proper. \* \* \* With the policy of a law the courts should have but little concern; to shape that pertains to another department of the government. The simple question in the construction and application

of a statute is, what was the legislative intention in its enactment, as the same is to be found in the language in which the statute is written, considered with reference to the every-day wants and business of the people for whose government the same was enacted? That being ascertained and applied, the duty of the court is performed, whether the policy thereby subserved is good or bad." In a later case in Texas, a different rule of construction seems to have been adopted. The court finds ground for a liberal construction of the mechanic's lien statute, in the provision of the Constitution (art. 16, § 37) in favor of such a lien, which provides that the common-law rule, that statutes in derogation thereof shall be strictly construed, shall have no application to the Revised Statutes, but that its provisions shall be liberally construed. *Rev. Civ. Stats.* 1911, p. 1719; § 3; *Schultze v. Alamo & Co. Brew. Co.*, 2 Tex. 236, 21 S. W. 160. In South Dakota, also, the rule of strict construction has been abrogated by statute. *Rev. Code (Civ.)* 1903, § 2472; *Pinkerton v. LeBeau*, 3 S. Dak. 440, 54 N. W. 97. The rule of construction stated in the text has been departed from in some decisions, in which the courts say in substance that the mechanic's lien statutes have become an integral part of our law; that their justice and beneficence are apparent; that it was

termining whether the statute attaches, to extend it beyond its express terms. Thus, the court is not authorized, in determining whether the labor done is within the statute, to apply it to labor not within its terms, but only analogous to that to which the statute applies.<sup>2</sup> "The court is not authorized to extend the law beyond the causes specifically provided for. It can not say that the statute by implication includes labor not within its terms. It can not say that the labor performed is analogous to the labor for which a lien is given by statute; nor can it say, that if the subject is brought to the attention of the legislature, it would probably give a lien for such labor. The court can only construe the law as enacted by the legislature; and when, by force of law, the performance of certain labor creates an interest in the real estate of another, the court can not say that the performance of other labor than that which the statute has expressly named shall thus create an interest in, or divest the owner of an estate in land."<sup>3</sup>

Decisions of another state construing a statute contrary to its plain import will not be followed in construing a similar statute subsequently enacted, especially where such statute in still other states has been construed according to its terms.<sup>4</sup>

**§ 1555. Lien not extended to cases falling only within the spirit of the law.**—The lien will not even be extended to cases falling within the reason of the statute, but not in

not intended by the legislatures that laborers' lien statements should be strangled by technicalities, but that the statutes, being remedial in their nature, are to receive a broad and liberal construction. *Maynard v. Ivey*, 21 Nev. 241, 29 Pac. 1090.

<sup>2</sup> *Barnard v. McKenzie*, 4 Colo. 251; *Ayres v. Revere*, 25 N. J. L. 474; *Scudder v. Harden*, 31 N. J. Eq. 503.

<sup>3</sup> Per Lord, J., in *Trask v. Searle*, 121 Mass. 229.

<sup>4</sup> *Spokane Mfg. & Lumber Co. v. McChesney*, 1 Wash. 609, 21 Pac. 198.

terms provided for.<sup>5</sup> The remedy to enforce the lien is purely statutory, and nothing can be adjudicated under the proceeding except the existence and amount of the lien. If no lien exists, the petition must be dismissed.<sup>6</sup> In a case decided in Delaware soon after the enactment of a mechanic's lien law in that state, the court said:<sup>7</sup> "Both our inclination and conviction of duty, therefor, is, not to extend the operation of the act by construction any further than the terms of it clearly require, and to leave it to the legislature to remedy whatever defect or deficiencies which may be found to attend it when put into practical operation and effect." The courts can not create liens. They can only declare and enforce them when they exist either in law or equity.<sup>8</sup>

<sup>5</sup> *McCartney v. Buck*, 8 Houst. (Del.) 34, 11 Cent. 249, 12 Atl. 717; *Capelle v. Baker*, 3 Houst. (Del.) 344; *Brady v. Anderson*, 24 Ill. 110.

<sup>6</sup> *McCarthy v. Neu*, 93 Ill. 455; *Wagar v. Briscoe*, 38 Mich. 587. Per Graves, J.: "In perfect agreement with the views generally maintained in the tribunals of our sister states, this court has repeatedly declared in substance that these acts are innovations upon the common law over the rights of property by permitting the institution of private charges on property without or against the owner's assent and without any judicial or other official sanction, and by authorizing an enforcement of such charges by unusual and summary methods, and that the provisions of these enactments can not be extended in their operation and effect beyond the plain and fair sense of the terms; and that parties asserting liens or

titles resting upon them must bring themselves and their titles plainly and distinctly within these terms, and affirmatively make out that a lien was originally effected regularly, and thereafter kept up, and that every essential statutory step, either in the creation, continuance or enforcement of the lien, has been duly taken." To same effect see *Stoltze v. Hurd*, 20 N. Dak. 412, 128 N. W. 115.

<sup>7</sup> *Capelle v. Baker*, 3 Houst. (Del.) 344.

<sup>8</sup> *Lyster's App.*, 54 Mich. 325, 20 N. W. 83. See, also, *Gordon v. Deal*, 23 Ore. 153, 31 Pac. 287, where Bean, J., says: "Whatever the statute makes necessary to the existence of the lien, must be complied with, in order to obtain the benefit of its provisions. The courts can not by construction dispense with any of the requirements of the statute, and one who claims the benefit of its provis-



§ 1556. **Liberal construction after the lien has attached.**—But after the lien has once attached, a liberal construction should be put upon the statute for the purpose of fulfilling its objects. The statute is highly remedial in its nature, and should receive a practical and reasonable construction to effect its objects.<sup>9</sup>

It is incumbent upon the claimant, however, to show that his claim in every essential particular comes within the terms of the statute.<sup>10</sup> Thus he must show that his claim was filed or recorded within the time limited,<sup>11</sup> and that he has brought suit to enforce the lien within the time limited.<sup>12</sup> If the priority of the lien is disputed, the claimant must bring his claim within those provisions of the statute which determine priority, by fixing with certainty the time of commencement and completion of the work.<sup>13</sup>

§ 1557. **Lien law has no extra-territorial effect.**—A lien law has no extra-territorial effect, but as a general rule a

ions must show a clear compliance with its terms." Citing *Pilz v. Killingsworth*, 20 Ore. 432, 26 Pac. 205.

<sup>9</sup> *Kay v. Smith*, 10 Heisk. (Tenn.) 41; *Luter v. Cobb*, 1 Coldw. (Tenn.) 525; *Central Trust Co. v. Sheffield & B. R. Co.*, 42 Fed. 106, 109, 9 L. R. A. 67; *White Lake Lumber Co. v. Russell*, 22 Nebr. 126, 34 N. W. 104, 3 Am. St. 262; *De Witt v. Smith*, 63 Mo. 263; *Gibson v. Nagel*, 15 Mo. App. 597; *Hunter v. Truckee Lodge*, 14 Nev. 24; *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219; *Malter v. Falcon M. Co.*, 18 Nev. 209, 2 Pac. 50; *Black v. Appolonia*, 1 Mont. 342; *Cannon v. Williams*, 14 Colo. 21, 23 Pac. 456, per *Helm, C. J.*; *Greeley v. Harris*,

12 Colo. 226, 20 Pac. 764; *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332; *Buckley v. Taylor*, 51 Ark. 302, 11 S. W. 281.

<sup>10</sup> *Davis v. Alvord*, 94 U. S. 545, 24 L. Ed. 283; *Mushlitt v. Silverman*, 50 N. Y. 360; *Reese v. Corlew*, 60 Tex. 70; *Lee v. O'Brien*, 54 Tex. 635; *Lee v. Phelps*, 54 Tex. 367; *Pool v. Sanford*, 52 Tex. 621; *Ferguson v. Ashbell*, 53 Tex. 245.

<sup>11</sup> *Kay v. Smith*, 10 Heisk. (Tenn.) 41; *Luter v. Cobb*, 1 Coldw. (Tenn.) 525; *Lee v. Phelps*, 54 Tex. 367; *Lee v. O'Brien*, 54 Tex. 635.

<sup>12</sup> *Dunn v. McKee*, 5 Sneed (Tenn.) 657.

<sup>13</sup> *Davis v. Alvord*, 94 U. S. 545, 24 L. Ed. 283.

lien for material is consummated by the use of the material in the erection or repair of a building, and it is therefore immaterial where the contract for it is made, whether in the state where the building is situate, or in another state.<sup>14</sup> The rule is the same even where the actual use of the materials in the structure is not essential to the creation of a lien, but a lien arises from the furnishing of the material with the intention that it shall be used in a particular structure, whether they are actually so used or not.<sup>15</sup> "In the one case, the use of the goods in the state, and in the other, the purpose to use them in the state, perfects the lien, but in both, the lien, its subject and the remedy upon it, the law's effect are precisely the same. The title to the material furnished passes as absolutely when delivered within as without the state. In neither case does any property of the furnisher enter the structure. The contract of the parties may reserve a lien on the material or the improvement, but the statutory lien springs from and requires no such germ. The facts upon which the latter lien grows, are in themselves, sterile. Their producing quality is supplied by the law; their product, the lien, is on land in the state."<sup>16</sup>

**§ 1558. Effect of repeal of statute under which mechanic's lien has accrued.**—After a lien has once become fixed and secured, it becomes a vested right, and it is not within the power of a legislature to destroy the right by a repeal of the statute under which it accrued.<sup>17</sup> The right

<sup>14</sup> *Gaty v. Casey*, 15 Ill. 189; *Birmingham Iron Foundry v. Glen Cove Co.*, 78 N. Y. 30. If, for instance, materials be contracted for in New York between parties residing in that state, to be delivered in Connecticut and there attached to the realty, no lien therefor can be enforced in New York. *Birmingham Iron Foundry v. Glen Cove Co.*, 78 N. Y. 30.

<sup>15</sup> *Fagan v. Boyle Ice Mach. Co.*, 65 Texas 324.

<sup>16</sup> *Fagan v. Boyle Ice Mach. Co.*, 65 Tex. 324, per Robertson, J.

<sup>17</sup> *Wabash & Erie Canal Co. v. Beers*, 2 Black (U. S.) 448; *In re Hope Mining Co.*, 1 Sawy. (U. S.) 710, Fed. Cas. No. 6681; *Steamship Co. v. Joliffe*, 2 Wall. (U. S.) 450, 458, 17 L. ed. 805; *Hallahan v. Herbert*, 4 Daly (N. Y.) 209, 11

to the lien before the filing of the notice or claim of lien, even from the time the material is furnished or the labor performed, is a part of the obligation of the contract, and is a right which the law and the constitution protect in the same way that they protect the title to corporeal property.<sup>18</sup>

In a few cases a lien has been regarded as only a part of the remedy for enforcing a debt, rather than as a vested right, and on this ground it has been held that a repeal of the statute would defeat the lien.<sup>19</sup> The statutory lien is declared to be no part of the contract between the parties, but only a means of enforcing it,—a remedy which is not of the essence of the contract, and not a vested right, but wholly within the power of the legislature which created the remedy.<sup>20</sup>

Where the mode of enforcing a lien has been changed by statute after a right of lien has accrued, it should be enforced in accordance with the previous statute.<sup>21</sup> When, however, a prior statute is repealed, saving any right of lien then existing under it, though the new act does not expressly say that such right shall be enforced under the new law.

Abb. Pr. (N. S.) (N. Y.) 326, affd. 57 N. Y. 409; *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 219, 220; *Capron v. Strout*, 11 Nev. 304; *Weaver v. Sells*, 10 Kans. 609; *Buser v. Shepard*, 107 Ind. 417, 8 N. E. 280; *Willamette Falls T. & M. Co. v. Riley*, 1 Ore. 183; *Steamer Gazelle v. Lake*, 1 Ore. 119; *Streubel v. Milwaukee & M. R. Co.*, 12 Wis. 67, 74; *Christman v. Charleville*, 36 Mo. 610; *Handel v. Elliott*, 60 Tex. 145. See, however, *Bailey v. Mason*, 4 Minn. 546; *Dunwell v. Bidwell*, 8 Minn. 34.

<sup>18</sup> *Wade*, *Retrospective Law*, § 173; *Goodbub v. Hornung*, 127 Ind. 181, 26 N. E. 770. See, however, *Hanes v. Wadey*, 73 Mich.

178, 41 N. W. 222, 2 L. R. A. 498.

<sup>19</sup> See ante, §§ 107, 108; *Watson v. New York Central R. Co.*, 47 N. Y. 157; *Donaldson v. O'Connor*, 1 E. D. Smith (N. Y.) 695; *Templeton v. Horne*, 82 Ill. 491; *Woodbury v. Grimes*, 1 Colo. 100.

<sup>20</sup> *Hanes v. Wadey*, 73 Mich. 178, 41 N. W. 222, 2 L. R. A. 498; *Bourgette v. Williams*, 73 Mich. 208, 41 N. W. 229; *Mundy v. Monroe*, 1 Mich. 68.

<sup>21</sup> *Brodt v. Rohkar*, 48 Iowa 36; *Conrad v. Starr*, 50 Iowa 470. See *Willamette Falls T. & M. Co. v. Riley*, 1 Ore. 183; *Welde v. Henderson*, 53 Hun (N. Y.) 633, 6 N. Y. S. 176, 25 N. Y. St. 511; *Tell v. Woodruff*, 45 Minn. 10, 47 N. W. 262.

yet, if it is plain that such was the legislative intent, the lien will be enforced under the new law.<sup>22</sup>

If, after the making of a contract for the construction of a building, but before the furnishing of any material by subcontractors, a provision that a subcontractor desiring to avail himself of the mechanic's lien law shall give notice to the owner, before or at the time of furnishing material, is repealed, the repeal merely affects the remedy, and it is immaterial whether such notice was given or not.<sup>23</sup>

Where all the material or labor for a building had been furnished or performed before the new law took effect, the provisions of the old law relating to lien statements should be applied, although such statements are not filed until after the new law has taken effect; but where part of the material or labor was furnished or performed before, and part after, the repeal of the old law and the taking effect of the new law, the provisions of the new law should be applied.<sup>24</sup>

**§ 1559. Whether proceedings are legal or equitable dependant upon the statute.**—Whether the proceedings to enforce a mechanic's lien are legal or equitable depends, of course, upon the terms of the statutes providing the remedy. The statutes of several states assimilate the proceedings to enforce such a lien to the equitable action to foreclose a mortgage, and under such statutes the proceeding is essentially a suit in equity.<sup>25</sup> Thus, under a former lien law in

<sup>22</sup> *Hammond v. Shephard*, 50 Hun (N. Y.) 318, 3 N. Y. S. 349, 19 N. Y. St. 848.

<sup>23</sup> *St. Croix Lumber Co. v. Mitchell*, 6 Dak. 215, 50 N. W. 624.

<sup>24</sup> *Bardwell v. Mann*, 46 Minn. 285, 48 N. W. 1120.

<sup>25</sup> Alabama: Analogous to a bill in chancery; but the chancery court did not have jurisdiction to enforce the mechanic's lien, "in the absence of some special

ground of equitable interposition, such as would render inadequate the remedy prescribed in a court of law." *Walker v. Daimwood*, 80 Ala. 245; *Chandler v. Hanna*, 73 Ala. 390. But after these decisions jurisdiction was conferred by statute. See ante, § 1187. Arkansas: The statutory remedy does not oust the jurisdiction in chancery. *Kizer Lumber Co. v. Mosely*, 56 Ark. 544, 20 S. W. 409;

Wisconsin, the action to enforce the lien was regarded as an action at law.<sup>26</sup> But under the present statute the proceeding is regarded as an equitable one. The present statute, as the court remarked,<sup>27</sup> denominates the action as one

Murray v. Rapley, 30 Ark. 568. California: An equitable proceeding. Curnow v. Blue Gravel & H. Co., 68 Cal. 262, 9 Pac. 149. Colorado: Of an equitable nature. San Juan & St. Louis M. & S. Co. v. Finch, 6 Colo. 214; Clear Creek & C. M. Co. v. Root, 1 Colo. 374; Selfridge v. Leonard-Heffner Co., 51 Colo. 314, 117 Pac. 158. District of Columbia: Bill in equity. See ante, § 1195. Florida Summary proceeding provided by statute does not oust general equitable jurisdiction conferred by Rev. Stat. 1892, §§ 1510, 1744. Futch v. Adams, 47 Fla. 257, 36 So. 575. Illinois: Substantially a chancery proceeding. McGraw v. Bayard, 96 Ill. 146. An original contractor must enforce his lien by bill in equity but the subcontractor shall bring his action at law jointly against the contractor and owner. O'Brien v. Gooding, 194 Ill. 466, 62 N. E. 898, construing Mechanic's Lien Act of 1895. Indiana: Suit is of equity cognizance only. Albrecht v. C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157; Ainsworth v. Atkinson, 14 Ind. 538; Snell v. Mohan, 38 Ind. 494; Richards v. Reed, 39 Ind. 330; Doyle v. State, 61 Ind. 324; Brown v. Goble, 97 Ind. 86; Reichert v. Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835. Iowa: An equitable proceeding. Code 1897, § 3429. See ante, § 1201. Kentucky: An equitable proceed-

ing. See ante, § 1203. Maryland: Bill in equity. See ante, § 1206. Montana: An equitable proceeding. Davis v. Alvord, 94 U. S. 545, 24 L. ed. 283; Mochon v. Sullivan, 1 Mont. 470. Nebraska: Petition in chancery in addition to method provided by statute. See ante, § 1213. New York: Equitable proceeding. Henderson v. Sturgis, 1 Daly (U. S.) 336; Miller v. Moore, 1 E. D. Smith (N. Y.) 739. North Dakota and South Dakota: Question discussed in McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39, per Francis, J. Virginia: Bailey Const. Co. v. Purcell, 88 Va. 300, 13 S. E. 456. Washington: Harrington v. Miller, 4 Wash. 808, 31 Pac. 325; Washington Iron Works v. Jensen, 3 Wash. 584, 28 Pac. 1019; Fox v. Nachtsheim, 3 Wash. 684, 29 Pac. 140. Wisconsin: An equitable suit. Spruhen v. Stout, 52 Wis. 517, 9 N. W. 277; Willer v. Bergenthal, 50 Wis. 474, 7 N. W. 352. But the verdict of a jury is conclusive, not advisory merely. The judge need not view the premises with the jury. Moritz v. Larsen, 70 Wis. 569, 36 N. W. 331; Bentley v. Davidson, 74 Wis. 420, 43 N. W. 139. The proceedings in several other states, especially those which have adopted the code practice, are also of an equitable nature.

<sup>26</sup> Marsh v. Fraser, 27 Wis. 596.

<sup>27</sup> Willer v. Bergenthal, 50 Wis.

to foreclose a lien, and the procedure to judgment is very similar to that in an action to foreclose a mortgage. Formerly, the creditor who first filed his lien obtained a priority over other lien creditors; now, he does not. Formerly, also, a personal judgment went against the debtor in the first instance, and the lien was enforced by a sale on execution. Now, no personal judgment goes except for a deficiency to be ascertained by a sale, and no execution issues on the lien judgment. The conclusion, therefore, is, that the latter statute as regards the remedy has the essential characteristics of a suit in equity.

The fact that a personal judgment for the debt is rendered in a suit to foreclose a mechanic's lien, with directions that, if the same be not satisfied out of other property of the debtor, the property upon which the lien is adjudged to exist shall be sold, and the proceeds shall be applied to its payment, does not change the character of the suit from one of equitable cognizance and convert it into an action at law.<sup>28</sup> A similar mode of proceeding is in some states adopted in equitable suits for the foreclosure of mortgages.<sup>29</sup>

The court, in an equitable proceeding, has authority to submit questions of fact to the jury for trial, but the verdict of the jury is only advisory.<sup>30</sup> The court may submit an issue as to the amount due to a jury for determination, regardless of a provision that the court may proceed to hear and determine liens and claims, or may refer the same to a referee to ascertain and report on such liens and claims, and the sums due thereon.<sup>31</sup> The mere fact that the defendant in such suit interposes a counterclaim for damages is not

474, 7 N. W. 352, per Lyon, J. See, also, *Spruhen v. Stout*, 52 Wis. 517, 9 N. W. 277.

<sup>28</sup> *Davis v. Alvord*, 94 U. S. 545, 24 L. Ed. 283.

<sup>29</sup> *Rollins v. Forbes*, 10 Cal. 299.

<sup>30</sup> *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *Bentley v. Davidson*, 74 Wis. 420, 43 N. W. 139.

<sup>31</sup> *Bradbury v. Butler*, 1 Colo. 430, 29 Pac. 463.

sufficient to divest the court of its jurisdiction, and to entitle the defendant to demand a trial by jury.<sup>32</sup>

A proceeding to enforce a mechanic's lien is essentially a proceeding in rem and the subject-matter is local. Hence the proceeding is properly brought in the county in which the real estate lies upon which the lien is asserted.<sup>32a</sup>

**§ 1560.** In code states the foreclosure of a lien an equitable suit.—In the code states the suit for the foreclosure of a mechanic's lien is an equitable suit, and is subject to the rules generally applicable to suits of that nature.<sup>32b</sup> As in other equitable actions the court may, of its own motion, order a jury to be empanelled to try any issue of fact. A statute giving either party a right to demand a jury does not change this rule.<sup>33</sup> The verdict in such case is advisory merely.

In Virginia, <sup>34</sup> the remedy by motion is a summary proceeding in equity. The act seems to contemplate substantially a proceeding in equity, assimilated, however, in some of its features, to a proceeding at law. The motion may be heard without formal pleadings. The testimony is given viva voce before the court, and objections to rulings may be taken by bills of exceptions. All this is anomalous in a court of equity, but results necessarily from the proceeding auth-

<sup>32</sup> Instalment Bldg. & L. Co. v. Wentworth, 1 Wash. St. 467, 25 Pac. 298.

<sup>32a</sup> Prather Engineering Co. v. Detroit &c. R. Co., 152 Mich. 582, 116 N. W. 376.

<sup>32b</sup> Huse v. Washburn, 59 Wis. 414, 18 N. W. 341; Willer v. Bergenthal, 50 Wis. 474, 7 N. W. 352; George v. Everhart, 57 Wis. 397, 15 N. W. 387; Weston v. Olsen, 55 Wis. 613, 13 N. W. 700; San Juan & St. Louis M. & S. Co. v. Finch, 6 Colo. 214; Decker v. Myles, 4 Colo. 558; Clear

Cr. & C. M. Co. v. Root, 1 Colo. 374. This is not unconstitutional on the ground that it deprives the parties of the right to trial by jury. In equity parties never had an absolute right to a trial by jury, and the legislature has the power to grant jurisdiction to courts of equity to enforce this new right created by it. Hathorne v. Panama Park Co., 44 Fla. 194, 32 So. 812.

<sup>33</sup> Huse v. Washburn, 59 Wis. 414, 18 N. W. 341.

<sup>34</sup> Code 1904, § 2484.

orized. The court might, perhaps, in the exercise of a sound discretion, direct an issue under circumstances which would warrant such direction in an equity suit; and there also might be a reference to a commissioner to state an account.<sup>35</sup>

**§ 1561. Court of equity can not take jurisdiction to enforce a lien without the aid of a statute.**—A court of equity can not assume jurisdiction to enforce a mechanic's lien without the aid of a statute, in the absence of a special cause for equitable interposition. This lien is a statutory right, and the remedy for its enforcement is provided by statute, and can be pursued only before the tribunals and in the mode the statute provides.<sup>36</sup> An averment in a bill in equity to enforce a mechanic's lien that the statements of the account are difficult, and can not well be shown in a court of law, does not show the necessity of the intervention of a court of equity to adjust the accounts, or the inadequacy of the remedy at law, and does not aid the equity of the bill.<sup>37</sup>

On the other hand it has been declared that liens established by statute may be enforced by bill in chancery if the statute has provided no other remedy.<sup>37a</sup>

**§ 1562. Filing complaint to enforce lien generally the commencement of a suit.**—The filing of the petition or com-

<sup>35</sup> *Pairo v. Bethell*, 75 Va. 825.

<sup>36</sup> In New Jersey it is said that, from beginning to end, the proceeding is a common-law procedure. From the filing of the lien claim to the final act for its enforcement, by conveyance from the sheriff to the purchaser, the entire proceeding is, in all respects modelled after a suit at law. The lien extends to real estates and interests only, and does not embrace equitable inter-

ests or estates. *Dalrymple v. Ramsey*, 45 N. J. Eq. 494, 18 Atl. 105; *Metz v. Critcher*, 83 S. Car. 396, 65 S. E. 394.

<sup>37</sup> *Chandler v. Hanna*, 73 Ala. 390.

<sup>37a</sup> *National Bank v. Petterson*, 200 Ill. 215, 65 N. E. 687; *West Chicago &c. Com. v. Western Granite Co.*, 200 Ill. 527, 66 N. E. 37; *Atlantic Dynamite Co. v. Baltimore &c. R. Co.*, 101 Ill. App. 13.



plaint to enforce a lien is generally the commencement of the suit.<sup>38</sup> But in some states an action to enforce a mechanic's lien is commenced when the defendant is served with the proper summons, or the petition or complaint is placed in the hands of the sheriff for immediate service.<sup>39</sup> The suit is not begun by the service of a summons which names an appearance day already past. The service of an amended summons, after the expiration of the time within which the action is required to be commenced, does not give jurisdiction of the suit; and the appearance of the defendant, and his plea that the action was not commenced within the time required by law, are not a waiver of his right to insist upon the forfeiture of the lien.<sup>40</sup>

Under a statute providing that suit on the lien of a railroad contractor shall be brought within twelve months from its record, the suit is not commenced by the mere filing of a declaration with the clerk of court, unless this be followed by proper service upon the defendant. Without service there is no suit.<sup>41</sup>

Service upon a foreign railroad company in a suit to enforce a mechanic's lien may be made by service upon its station agents in the state, if there be no general officer in charge of such railroad in the state, and no officer has been designated by the corporation upon whom legal process may be served.<sup>42</sup>

It is not necessary to file *a lis pendens* to protect the

<sup>38</sup> *Gosline v. Thompson*, 61 Mo. 471; *Work v. Hall*, 79 Ill. 196; *Dunphy v. Riddle*, 86 Ill. 22; *Burlingim v. Cooper*, 36 Nebr. 73, 53 N. W. 1025; *Cassery v. Waite*, 124 Mich. 157, 82 N. W. 841, 83 Am. St. 320.

<sup>39</sup> *Green v. Jackson Water Co.*, 10 Cal. 374; *Flandreau v. White*, 18 Cal. 639; *Jones & Magee Lumber Co. v. Boggs*, 63 Iowa 589, 19 N. W. 678; *Steinmetz v. St. Paul*

*Trust Co.*, 50 Minn. 445, 52 N. W. 915; *Malmgren v. Phinney*, 50 Minn. 457, 52 N. W. 915, 18 L. R. A. 753.

<sup>40</sup> *Jones & Magee Lumber Co. v. Boggs*, 63 Iowa 589, 19 N. W. 678.

<sup>41</sup> *Cherry v. North & South R. Co.*, 65 Ga. 633.

<sup>42</sup> *Morgan v. Chicago & Alton R. Co.*, 76 Mo. 161.

rights of the lien claimant against a purchaser. Filing the lien claim is all the notice required under a *lis pendens* statute.<sup>42a</sup>

§ 1563. **Suit brought on notice by publication.**—Where notice of suit to foreclose a lien is given by publication, if the defendant's name as published differs substantially from his true name, the notice is insufficient to give the court jurisdiction. A notice which gives only the initial letter or letters of his christian name may possibly be regarded as sufficient; but a notice which gives only those initial letters where there are two or more, and transposes those, gives the court no jurisdiction to render a decree against the defendant.<sup>43</sup> An error in the publication of the defendant's name may be cured by the statement of other particulars which clearly identify the defendant. If the defendant be a married woman, and she be described as the wife of a person correctly named, and this fact be alleged in the petition, the notice may, perhaps, be regarded as sufficient.<sup>44</sup>

§ 1563a. **Rule for computing time.**—The day of filing is not counted in computing the time within which suit must be brought. Thus, if the lien was filed June 25, 1885, and suit may be brought within one year afterwards, the time limited embraces the whole of June 25, 1886.<sup>45</sup> But under a statute requiring an attachment to be filed within ninety days after the last material is furnished, where the last day fell on Sunday, an attachment filed the following day was not in time. In computing the lapse of time, Sunday was counted.<sup>45a</sup>

<sup>42a</sup> *Empire Land & Canal Co. v. Engley*, 18 Colo. 388, 33 Pac. 153.

<sup>43</sup> *Fanning v. Krapfl*, 61 Iowa 417, 14 N. W. 727.

<sup>44</sup> *Fanning v. Krapfl*, 61 Iowa 417, 14 N. W. 727, per Adams, J. And see *Buchanan v. Roy*, 2 Ohio St. 251.

<sup>45</sup> *Hammond v. Shephard*, 50 Hun (N. Y.) 318, 3 N. Y. S. 349, 19 N. Y. St. 848, *Marvin v. Marvin*, 75 N. Y. 240.

<sup>45a</sup> *Oakland Mfg. Co. v. Lemieux*, 98 Maine 488, 57 Atl. 795.

§ 1564. **Lapsed lien not revived by suit.**—A lien which has lapsed, by failure to commence a suit to enforce it within the time prescribed, can not be revived. It becomes wholly void by lapse of time.<sup>46</sup> Though the failure arise from a defect in the notice of the action, another notice can not be given after the expiration of the time for bringing the action.<sup>47</sup>

§ 1565. **Action to foreclose lien premature if brought before the debt is payable.**—Thus, if payment is to be made "upon the completion of the building," the action can not be commenced until the building is completed.<sup>48</sup> If an installment of the sum to be paid is payable twelve months from the date of the contract, suit can not be brought within that time;<sup>49</sup> and if this time is not within the time prescribed for bringing the suit, there can be no suit at all upon the lien. A suit prematurely brought should be dismissed.<sup>50</sup>

§ 1566. **Notice to commence suit.**—Under a statute which provides that the owner may give notice to the claimant to commence suit to enforce the lien within thirty days from the service of such notice, and that the lien shall be discharged upon affidavit that the notice was given and suit was not commenced within that time, the claimant can not

<sup>46</sup> *Weyer v. Beach*, 79 N. Y. 409; *Bowes v. N. Y. Christian Home*, 64 How. Pr. (N. Y.) 509; *Noyes v. Burton*, 29 Barb. (N. Y.) 631, 17 How. Pr. (N. Y.) 449; *Poerschke v. Kedenburg*, 6 Abb. (N. S.) (N. Y.) 172; *Green &c. Lumber Co. v. Bain*, 77 Ill. App. 17; *Union Nat. Sav. Assn. v. Helberg*, 152 Ind. 139, 51 N. E. 916. The lien is lost by failure to bring suit within the time prescribed by statute. *Mc-*

*Intosh v. Schroeder*, 154 Ill. 520, 39 N. E. 478, affg. 55 Ill. App. 149.

<sup>47</sup> *Jones & Magee Lumber Co. v. Boggs*, 63 Iowa 589, 19 N. W. 678.

<sup>48</sup> *Harmon v. Ashmead*, 60 Cal. 439. See, also, *Seaton v. Hixon*, 35 Kans. 663, 12 Pac. 22.

<sup>49</sup> *Hardin v. Marble*, 13 Bush (Ky.) 58; *Graham v. Holt*, 4 B. Mon. (Ky.) 61.

<sup>50</sup> *Hardin v. Marble*, 13 Bush (Ky.) 58.

escape the obligations arising from the notice by filing a new claim for the same debt.<sup>51</sup>

**§ 1567. Parties plaintiff.**—The plaintiff is of course the person to whom the lien debt is due, and in whose favor the right of lien attached. In a few states the assignee of the lien debt may by virtue of statutory provisions enforce the lien in his own name, but ordinarily the suit must be in the name of the original assignor. One who has contracted and furnished material in his own name as “agent” may file his claim of lien and maintain a petition to foreclose the lien in the same name. The fact that he will hold the proceeds of the lien debt, or even the real estate itself, in trust for another, does not defeat his right of action.<sup>53</sup>

The plaintiff may include in one suit causes of action which have arisen under several contracts between the same parties, provided the claims were filed within the statutory time after the date of the last item under each contract.<sup>54</sup>

**§ 1568. Partners to give joint notices and bring joint proceedings to enforce a lien.**—Two or more persons who have together performed labor or furnished materials for their common account in erecting a house, though not general partners, should bring a joint petition to enforce their lien;<sup>55</sup> and upon the death of one of them, the petition may be prosecuted by the survivor.<sup>56</sup> Upon the death of one partner before the completion of a contract for the delivery of materials, the surviving partner may complete the delivery of the materials, and the limitation on the lien claim

<sup>51</sup> *Wheeler v. Almond*, 46 N. J. L. 161; *Whole Creek Iron Works v. New York &c. L. &c. Co.*, 73 Misc. (N. Y.) 242, 130 N. Y. S. 930.

<sup>53</sup> *Hooker v. McGlone*, 42 Conn. 95.

<sup>54</sup> *Kearney v. Wurdeman*, 33 Mo. App. 447.

<sup>55</sup> *Pell v. Baur*, 133 N. Y. 377, 31 N. E. 224, affg. 16 N. Y. S. 258, 47 N. Y. St. 99.

<sup>56</sup> *Rockwood v. Walcott*, 3 Allen (Mass.) 458; *Miller v. Hoffman*, 26 Mo. App. 199; *Hammer-smith v. Hilton*, 8 Mo. App. 564.

runs from the date of the last delivery under the contract, and not from the date of the copartner's death.<sup>57</sup> But if there was no special contract for the materials, the surviving partner can not continue to furnish materials on the firm account, and take a lien for the whole; and he can not add the items for material thus furnished by him on running account to an account of materials furnished by the partnership, so as to make the two accounts one, and thus save the lien.<sup>58</sup>

Under a contract made in the name of one partner for the benefit of both, the petition to enforce the lien should be brought in the name of both partners.<sup>59</sup> But if an individual contracts to furnish materials, and before the completion of the contract forms a partnership, and some materials are afterwards furnished by the firm, a joint petition can not be maintained to enforce the lien. Neither can a decree be entered in favor of one petitioner for a certain sum, and another decree in another sum in favor of both petitioners.<sup>60</sup> The firm name should be used in enforcing a lien, where one partner after the lien has attached assigns his interest to the other member.<sup>61</sup>

Where a contract is made by a mechanic in his individual name, and he afterwards takes a partner, and later retires from the firm, the remaining partner can not enforce the lien as the legal successor of the firm. He is a stranger to the contract.<sup>62</sup>

**§ 1569. Consolidating claims or actions.**—There is generally some provision of statute that any number of persons claiming liens upon the same property may join in the same action, or that the court may consolidate several

<sup>57</sup> *Miller v. Hoffman*, 26 Mo. App. 199; *Davis v. Church*, 1 Watts & S. (Pa.) 240.

<sup>58</sup> *Miller v. Hoffman*, 26 Mo. App. 199.

<sup>59</sup> *Lombard v. Johnson*, 76 Ill. 599.

<sup>60</sup> *Roberts v. Gates*, 64 Ill. 374.

<sup>61</sup> *Jones v. Hurst*, 67 Mo. 568.

<sup>62</sup> *Bohem v. Seabury*, 141 Pa. St. 594, 21 Atl. 674.

separate actions.<sup>63</sup> These provisions are in different terms, but they have for their object the combining of all the liens upon the same property in one proceeding, whereby expense is saved, and the court can more conveniently distribute the fund collected among the claimants.

A statutory provision authorizing and inviting all persons having similar liens upon the same property to become parties to the first suit brought for the enforcement of a lien, is a privilege and not a command. Each creditor may commence a separate suit. If such a creditor who is served with notice of the first suit does not appear, and the suit is prosecuted to judgment, it is no bar to a proceeding by such other creditor to enforce his lien upon the same property.<sup>64</sup>

When several claims are joined in one complaint, the different causes of action are stated sufficiently by making distinct statements of the facts concerning each lien, though the claims are not numbered, or otherwise formally designated.<sup>65</sup>

<sup>63</sup> As in Wisconsin: Stats. 1898, § 3324; *Allis v. Meadow Spring Distilling Co.*, 67 Wis. 16, 29 N. W. 543, 30 N. W. 300. In Pennsylvania: Any person having an interest in the property described in the claim, whether existing at the time of the claimant's contract or acquired subsequently thereto, may by agreement of the parties or by leave of the court, intervene as a party defendant and make defence thereto, with the same effect as if he had been originally named as a defendant in the claim filed. And the claimant may, by writing, filed at his costs, strike off the name of any defendant therein and may substitute as a defendant, and issue a scire facias against, any person who may have acquired an inter-

est as owner after the time of said contract, or who is the personal representative of an owner or contractor who has died, either before or after filing the claim, but such substitution shall always be without prejudice to any intervening rights. 2 Purdon's Dig. (13th ed.), p. 2494, § 40.

<sup>64</sup> *Sexton v. Weaver*, 141 Mass. 273, 6 N. E. 367.

<sup>65</sup> *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200. The fact that the court makes separate findings in each case is not in itself sufficient cause for reversal. *Marble Lime Co. v. Lordsburg Hotel Co.*, 96 Cal. 332, 31 Pac. 164; *Willamette Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629 distinguished.

Each claim should be tried on its merits, and one of several consolidated causes should not be prejudiced by the introduction of evidence proper in another, and such testimony should not be held applicable to any cause except the one in which it is introduced, without the consent of all parties concerned.<sup>66</sup>

If two plaintiffs, being both defeated, move separately, upon different grounds, for new trials, take separate appeals, and file separate bills of exceptions, the reviewing court must decide each case on its own record, and can not consider the evidence in the record of the other.<sup>67</sup>

After such consolidation the several causes of action should be treated as a single action, and the decision be embodied in a single set of findings and judgment, rather than a separate finding and judgment on each claim.<sup>68</sup>

**§ 1570. Parties defendant in suits to enforce liens.**—As regards the defendant to proceedings to enforce mechanic's liens, much depends upon the nature of the proceeding. If the proceeding is one at law, or in the nature of a proceeding at law, it is not necessary or proper even to make subsequent purchasers and incumbrancers parties. They are represented by the owner who made the contract and subjected the property to the lien. They are in privity with the owner, and are estopped by a judgment which is conclusive upon him.<sup>69</sup> But if the action is an equitable one, all other parties in interest, such as incumbrancers and other persons

<sup>66</sup> *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325.

<sup>67</sup> *Harmon v. San Francisco & S. R. Co.*, 86 Cal. 617, 25 Pac. 124, revg. 23 Pac. 1024.

<sup>68</sup> *Willamette Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629.

<sup>69</sup> *State v. Eads*, 15 Iowa 114, 83 Am. Dec. 399. In Maine in 1879, Acts 1879, ch. 136, §§ 1, 2, a

statute was enacted authorizing the owner of the property affected to become a party to the suit, and authorizing the court to make him a party to the suit. Judgment is now rendered against the defendant and the property or either. *Byard v. Parker*, 65 Maine 576; *Colley v. Doughty*, 62 Maine 501.

having liens, should be made parties, or the foreclosure will not affect their rights.<sup>70</sup> The holder of a junior mechanic's lien may maintain an equitable action to redeem from such prior lien. The fact that the junior lien was not filed until after the action of foreclosure was commenced does not impair the right, if the lien be afterwards filed within the time allowed.<sup>71</sup>

**§ 1571. Necessary parties defendant where suit is an equitable proceeding.**—If the proceeding is an equitable one, all parties in interest whose rights can be affected by the proceeding should be made parties defendant to a suit to foreclose a lien, not only all persons claiming title in the land, but also the contractors and other lien claimants.<sup>72</sup> If a part owner, or the owner of an interest in the property affected by the lien, is not made a party, his interest can not be sold, or, if the sale in terms covers his interest, it is ineffectual.<sup>73</sup> But the sale in such case may be effectual to transfer the interest of other owners who are made parties to the proceedings. Thus, in a proceeding to enforce a lien upon community property of a husband and wife in Texas, if the heirs of the wife, who has died pending the proceed-

<sup>70</sup> *Evans v. Tripp*, 35 Iowa 371; *Falconer v. Cochran*, 68 Minn. 405, 71 N. W. 386; *Maneely v. New York*, 119 App. Div. (N. Y.) 376, 105 N. Y. S. 976.

<sup>71</sup> *Jones v. Hartsock*, 42 Iowa 147.

<sup>72</sup> *San Juan & St. M. S. Co. v. Finch*, 6 Colo. 214; *Snodgrass v. Holland*, 6 Colo. 596; *Thomas v. Ownby*, 1 Tex. App. Civ. Cas., § 1212; *Lomax v. Dore*, 45 Ill. 379; *Williams v. Chapman*, 17 Ill. 423, 65 Am. Dec. 669; *Kelley v. Chapman*, 13 Ill. 530, 56 Am. Dec. 474; *Dunphy v. Riddle*, 86 Ill. 22; *Jones v. Hartsock*, 42 Iowa 147;

*Roman v. Thorn*, 83 Ala. 443, 3 So. 759; *Trammell v. Hudmon*, 78 Ala. 222; *Johnson v. Bennett*, 6 Colo. App. 362, 40 Pac. 847.

<sup>73</sup> *Franklin Sav. Bank v. Taylor*, 131 Ill. 376, 23 N. E. 397. The proceeding on petition for mechanic's lien is not one in rem, so as to bind others than parties and privies in the particular proceeding. *Dunphy v. Riddle*, 86 Ill. 22; *Kelley v. Chapman*, 13 Ill. 530, 56 Am. Dec. 474; *Raymond v. Ewing*, 26 Ill. 329; *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594; *Warner v. Yates*, 118 Tenn. 548, 102 S. W. 92.



ing, are not made parties, her estate is not bound, but the husband's interest may be sold to satisfy the lien.<sup>74</sup>

The rights and interests of those who are not made parties to the proceeding are not affected by any judgment therein.<sup>75</sup>

In a proceeding to enforce a lien against a railroad, it is not essential that all the companies interested in it should be made parties; but no company having an interest in it will be affected or bound unless it is made a party.<sup>76</sup>

**§ 1572. The owner a necessary party.**—His interest in the land can only be reached and applied to the satisfaction of the lien debt by making him a party to the proceeding.<sup>77</sup> As a party to the original contract, a former owner may properly be made a party, though he has sold the land to another subject to the lien, but he is not a necessary party.<sup>78</sup> If the original owner has died after such sale, his administrator and not his heir is the proper party defendant. Where such deceased owner had conveyed the land and taken a mortgage for the purchase-money, and his administrator was made a party to the suit, it was held that the administrator was estopped, after judgment and sale to satisfy the mechanic's lien, from selling the property under a fore-

<sup>74</sup> Pool v. Wedemeyer, 56 Tex. 287.

<sup>75</sup> McCoy v. Quick, 30 Wis. 521; Lampson v. Bowen, 41 Wis. 484; Willer v. Bergenthal, 50 Wis. 474, 7 N. W. 352; White v. Chaffin, 32 Ark. 59.

<sup>76</sup> Morgan v. Chicago & Alton R. Co., 76 Mo. 161.

<sup>77</sup> Keller v. Tracy, 11 Iowa 530; Burbank v. Wright, 44 Minn. 544, 47 N. W. 162; Green v. Sanford, 34 Nebr. 363, 51 N. W. 967; Ayres v. Revere, 25 N. J. L. 474; McIntosh v. Thurston, 25 N. J. Eq. 242;

White v. Chaffin, 32 Ark. 59; Hughes v. Torgerson, 96 Ala. 346, 11 So. 209, 16 L. R. A. 600, 38 Am. St. 105; Roman v. Thorn, 83 Ala. 443, 3 So. 759; German Nat. Bank v. Elwood, 16 Colo. 244, 27 Pac. 705; Lang v. Adams, 71 Kans. 309, 80 Pac. 593; Missoula Mercantile Co. v. O'Donnell, 24 Mont. 65, 60 Pac. 594. See Benson v. Shines, 107 Ga. 406, 33 S. E. 439.

<sup>78</sup> Harrington v. Miller, 4 Wash. 808, 31 Pac. 325, per Anders, C. J. See post, § 1578.

closure of such mortgage, he having failed to assert the rights of a mortgagee in the action to enforce the mechanic's lien.<sup>79</sup> But a mere agent of the owner or of the employer, through whom the owner or employer made purchases, is not a proper party.<sup>80</sup> If such agent be the sole defendant, the suit can not be maintained. The suit must be against the principal, not against the agent.<sup>81</sup>

But by the word owner in the statute is meant the person for whom as owner of the land, the building is constructed. Hence the holder of a note secured by deed of trust on real estate is not the owner and is not an indispensable party.<sup>82</sup>

In a suit to enforce a lien against the interest of a lessee, the lessor is not a necessary party.<sup>83</sup>

**§ 1573. Husband and wife.**—Where the suit is against the husband to enforce a lien against his estate by the curtesy, the wife has no such interest as to entitle her to become a party to the suit, either on her own application or that of other parties, nor can her interest in the property be affected by such suit.<sup>84</sup>

In a suit to enforce a lien against a homestead, the wife of the owner is a proper party.<sup>85</sup>

In an action to enforce a lien against the real estate of a married woman, her husband is properly joined as a party defendant, in order to answer to any interest or right of redemption he may claim in the land.<sup>86</sup>

But in a suit to enforce a lien against the property of a married woman arising under her own contract, in states

<sup>79</sup> *Shields v. Keys*, 24 Iowa 298.

<sup>80</sup> *Hooper v. Flood*, 54 Cal. 218.

<sup>81</sup> *Roman v. Thorn*, 83 Ala. 443, 3 So. 759.

<sup>82</sup> *Cornell v. Conine-Eaton Lumber Co.*, 9 Colo. App. 225, 47 Pac. 912.

<sup>83</sup> *Shields v. Sorg*, 129 Ill. App. 266.

<sup>84</sup> *Schnell v. Clements*, 73 Ill. 613. And see *Peck v. Hensley*, 21 Ind. 344.

<sup>85</sup> *Weston v. Weston*, 46 Wis. 130, 49 N. W. 834.

<sup>86</sup> *Scott v. Goldinhorst*, 123 Ind. 268, 24 N. E. 333; *Kelly v. McGehee*, 137 Pa. St. 443, 20 Atl. 623.

where her property is made absolutely her own by statute, the husband need not be joined as a party.<sup>87</sup>

A married woman who is not made a party to a suit to foreclose a mechanic's lien on her land is not bound by the decree, though her husband was made a party, and defended the suit, when she did not authorize him to act for her, and did not know of the suit until after the execution of a deed on foreclosure sale.<sup>88</sup>

**§ 1574. Contractor a necessary party in suit by subcontractor to enforce lien.**—The original contractor is a necessary party to a proceeding by a subcontractor, because the contract relation and state of accounts between the owner and the original contractor, and between the original and subcontractor, must be adjudicated before the lien can be established, and the rights and liabilities of the parties ascertained.<sup>89</sup> But a contractor is not a necessary party to an action to enforce liens for labor and materials furnished after the abandonment of his contract.<sup>90</sup>

<sup>87</sup> *Whitney v. Joslin*, 108 Mass. 103. The law of Maryland is contra. *Clark v. Boarman*, 89 Md. 428, 43 Atl. 926.

<sup>88</sup> *Franklin Sav. Bank v. Taylor*, 131 Ill. 376, 23 N. E. 397.

<sup>89</sup> *Kerns v. Flynn*, 51 Mich. 573, 17 N. W. 62; *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419; *Rombeck v. Devorss*, 19 Mo. App. 38; *Vreeland v. Ellsworth*, 71 Iowa 347, 32 N. W. 374; *Davis v. John Mouat Lumber Co.*, 2 Colo. 381, 31 Pac. 187; *Steinkamper v. McManus*, 26 Mo. App. 51; *Sinnickson v. Lynch*, 25 N. J. L. 317; *Lookout Lumber Co. v. Sanford*, 112 N. Car. 655, 16 S. E. 849; *Lookout Lumber Co. v. Mansion &c. R. Co.*, 109 N. Car. 658, 14 S. E. 35. See, however, *Crawford v.*

*Crockett*, 55 Ind. 220; *Wilder's &c. Co. v. Walker*, 98 Ga. 508, 25 S. E. 571; (contra under earlier statute); *Clayton v. Farrar Lumber Co.*, 119 Ga. 37, 45 S. E. 723; *Estey v. Hallack &c. Co.*, 4 Colo. App. 165, 34 Pac. 1113; *Augir v. Warde*, 68 W. Va. 752, 70 S. E. 719; *Sayre-Newton L. Co. v. Park*, 4 Colo. App. 482, 36 Pac. 445; *Union Pac. R. Co. v. Davidson*, 21 Colo. 93, 39 Pac. 1095. Thus lessees of a coal mine are necessary parties to a suit to establish a laborer's lien against the property of the coal company. *Hoye Coal Co. v. Colvin*, 83 Ark. 528, 104 S. W. 207.

<sup>90</sup> *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331. Where the owner has assumed a contract with a subcontractor, a personal judgment

Other authorities declare the contractor to be a proper but not necessary party to such a suit.<sup>91</sup>

If a contractor who is a necessary party to the suit is not made a party when the suit is instituted, he may afterwards be brought in within the time limited for bringing actions upon the lien, but not afterwards.<sup>92</sup>

**§ 1575. Not necessary to join all joint contractors.**—Where there are several joint contractors, it is not necessary to join all of them as defendants,<sup>93</sup> but one may be sued, and the court may, at the request of the owner, have the others brought in.<sup>94</sup> The nonjoinder of some of the contractors is not sufficient ground for sustaining a plea in abatement.<sup>95</sup>

Where a mechanic in his claim of lien has stated the name of the person by whom he was employed, and it turns out that such person was a member of a firm, and employed the mechanic on behalf of the firm, he should nevertheless, in his action to enforce the lien, make all the members of the firm defendants.<sup>96</sup>

**§ 1576. Contractor who has assigned his contract not a necessary party defendant.**—Where the original contractor has assigned his contract, and this has been performed by

and declaration of lien against him is valid though no decree is made against the original contractor who is also a party to the suit. *Harris v. Harris*, 18 Colo. App. 34, 69 Pac. 309.

<sup>91</sup> *Carney v. La Crosse & Milw. R. Co.*, 15 Wis. 503; *Crawfordsville v. Barr*, 65 Ind. 367; *Hubbard v. Moore*, 132 Ind. 178, 31 N. E. 534.

<sup>92</sup> *Fury v. Boeckler*, 6 Mo. App. 24; *Bombeck v. Devorss*, 19 Mo. App. 38. See *Hilton Bridge Con-*

*struction Co. v. New York Central & Hudson River R. Co.*, 145 N. Y. 390, 40 N. E. 86.

<sup>93</sup> *Putnam v. Ross*, 55 Mo. 116; *Hassett v. Rust*, 64 Mo. 325; *Fruin v. Mitchell Furniture Co.*, 20 Mo. App. 313; *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331.

<sup>94</sup> *Putnam v. Ross*, 55 Mo. 116.

<sup>95</sup> *Foster v. Wulffing*, 20 Mo. App. 85.

<sup>96</sup> *McDonald v. Backus*, 45 Cal. 262.

another with the consent of the owner, the original contractor is not a necessary party.<sup>97</sup>

§ 1577. **Indorser of note a proper party.**—If suit be brought by the indorsee of a promissory note given to a building contractor, the indorser or assignor is a proper if not necessary party, and may be joined in the complaint, or be afterwards brought in.<sup>98</sup>

§ 1578. **Grantor not a necessary party where he has conveyed the real estate.**—After a conveyance of the premises upon which a lien has attached, the original owner who contracted for the improvements is not a necessary party unless a personal judgment is demanded.<sup>99</sup> This is upon the same principle that a mortgagor who has parted with his interest in the mortgaged property need not be made a party to a bill to foreclose the mortgage. The object of the suit is to affect the property, and not to obtain a judgment upon the debt.<sup>1</sup>

But one who has purchased the premises before or after the filing of the lien, and before the commencement of the suit to enforce it, is a necessary party.<sup>2</sup> The purchaser should be given an opportunity to defend his rights. He stands in the place of the original owner.<sup>3</sup>

<sup>97</sup> *Harrison &c. Iron Co. v. Council Bluffs Water-Works Co.*, 25 Fed. 170.

<sup>98</sup> *Pairo v. Bethell*, 75 Va. 825.

<sup>99</sup> *Rose v. Perse &c. Paper Works*, 29 Conn. 256; *McCormick v. Lawton*, 3 Nebr. 449; *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325. "After assignment, the assignor has no longer any interest in the property to be affected, and is not a necessary party under the rule that the persons interested in the subject-matter in controversy should be made parties either as plaintiff or defendant."

*Per Anders, C. J. Bierschenk v. King*, 38 App. Div. (N. Y.) 360, 56 N. Y. S. 696.

<sup>1</sup> *Kellenberger v. Boyer*, 37 Ind. 188; *Stevens v. Campbell*, 21 Ind. 471.

<sup>2</sup> *Marvin v. Taylor*, 27 Ind. 73; *Holland v. Jones*, 9 Ind. 495; *Ortwin v. Caskey*, 43 Md. 134.

<sup>3</sup> *Robins v. Bunn*, 34 N. J. L. 322; *Rice v. Hall*, 41 Wis. 453; *Edwards v. Derrickson*, 28 N. J. L. 39, *affd.* 29 N. J. L. 468, 80 Am. Dec. 220; *Gordon v. Torrey*, 15 N. J. Eq. 112, 82 Am. Dec. 273.

§ 1579. **Subsequent mortgagee or other incumbrancer to be made a party.**—A subsequent mortgagee or other incumbrancer should be made a party defendant; otherwise the sale will not affect his rights, but he will still have the right to redeem.<sup>4</sup> An assignee of the fund, or of a part of the fund, should be made a party.<sup>5</sup> The owner of a leasehold interest in the property must be made a party.<sup>6</sup>

§ 1580. **Trustee and cestui que trust both to be made parties.**—Both the trustee and the cestui que trust should be made parties where the incumbrance is in the form of a trust deed.<sup>7</sup> But if the cestui que trust allows a decree to be entered upon the merits of the case, without asking to have the trustee joined as a party, the cestui que trust and those claiming under him will be bound by the decree.<sup>8</sup> The cestui que trust, the owner of the indebtedness, is, however, an indispensable party, as his interest alone is to be affected by the decree.<sup>9</sup> To establish a lien as superior to that of a trust deed, not only the trustee, but the cestui que trust, must be made a party to the proceed-

<sup>4</sup> Heim v. Vogel, 69 Mo. 529; Coe v. Ritter, 86 Mo. 277; Goodman v. White, 26 Conn. 317; Farwell v. Murphy, 2 Wis. 533; Kenney v. Apgar, 93 N. Y. 539; Bassett v. Menage, 52 Minn. 121, 53 N. W. 1064; Martin v. Berry, 159 Ind. 566, 64 N. E. 912. So by statute in New Jersey. Comp. Stats. 1910, p. 3308, § 23. See Stoermer v. People's Savings Bank, 152 Ind. 104, 52 N. E. 606, holding junior mortgagee is preferred because of failure to join him. To same effect Deming-Colborn Lumber Co. v. Union Nat. Savings &c. Assn., 151 Ind. 463, 51 N. E. 936.

<sup>5</sup> Williams v. Deutscher Verein Club, 14 N. Y. S. 368; Williams v.

Edison Electric Illuminating Co., 16 N. Y. S. 857.

<sup>6</sup> Wright v. Cowie, 5 Wash. 341, 31 Pac. 878.

<sup>7</sup> Bennitt v. Wilmington Star M. Co., 18 Bradw. (Ill.) 17, affd. 119 Ill. 9, 7 N. E. 498; Clark v. Manning, 4 Bradw. (Ill.) 649, affd. 95 Ill. 580; Bayard v. McGraw, 1 Bradw. (Ill.) 134; McGraw v. Bayard, 96 Ill. 146; Scanlan v. Cobb, 85 Ill. 296; Lunsford v. Wren, 64 W. Va. 458, 63 S. E. 308.

<sup>8</sup> Bennitt v. Wilmington Star M. Co., 18 Bradw. (Ill.) 17, affd. 119 Ill. 9, 7 N. E. 498.

<sup>9</sup> Clark v. Manning, 95 Ill. 580, affg. 4 Bradw. (Ill.) 649; Gaytes v. Franklin Savings Bank, 85 Ill. 256.

ing.<sup>10</sup> But where the property is held by a general trustee, who has power to charge it with liens for repairs, the cestui que trust need not be made parties defendant.<sup>11</sup>

**§ 1581. Prior lienholder not a necessary defendant.—**

A prior incumbrancer or prior lienholder is not ordinarily a necessary or proper party to a suit to foreclose a mechanic's lien,<sup>12</sup> especially if the petitioner subordinates his lien to that of the prior incumbrance.<sup>13</sup> A junior lien can be foreclosed by a sale of the property subject to the prior incumbrance or lien. If the prior incumbrancer or lienholder is willing to receive payment, and willing to have the entire property sold under the junior lien, he may be made a party to the suit, and the plaintiff will be required to pay off such prior incumbrance or lien in the first instance from the proceeds of the sale; and in the event of his failure to do so within a limited time, his lien should be declared to be barred.<sup>14</sup>

Persons claiming prior liens or interest in the property may be made parties where the order of the liens is involved in the litigation and should be determined by the decree.<sup>15</sup> But where the complaint or petition does not indicate that prior incumbrancers are made parties for the purpose of having the amounts due them ascertained and paid out of the proceeds, and no provision for such payment is made

<sup>10</sup> Paddock v. Stout, 121 Ill. 571, 13 N. E. 182; Clark v. Manning, 95 Ill. 580, affg. 4 Bradw. (Ill.) 649.

<sup>11</sup> Cheatham v. Rowland, 92 N. Car. 340.

<sup>12</sup> Jones on Mortgages, § 1439; Case Mfg. Co. v. Smith, 40 Fed. 339, 5 L. R. A. 231; Conlan v. Leonard, 82 N. J. L. 108, 81 Atl. 492; Brown v. Danforth, 37 App. Div. (N. Y.) 321, 55 N. Y. S. 825.

<sup>13</sup> Portoues v. Badenoch, 132 Ill. 377, 23 N. E. 349.

<sup>14</sup> Millard v. West, 50 Iowa 616. The foreclosure sale in such case should be in pursuance of the power in the prior mortgage. Watson v. Gardner, 119 Ill. 312, 10 N. E. 192.

<sup>15</sup> Fowler v. Mutual L. Ins. Co., 28 Hun (N. Y.) 195; Brown v. Volkening, 64 N. Y. 76.

in the judgment, the liens of such prior incumbrancers are not cut off by a foreclosure and sale of the property.<sup>16</sup>

Upon the foreclosure of a prior mortgage, the court should provide in the sale, if possible, for the protection of persons having equities under subsequent mechanics' liens.<sup>17</sup>

A prior mortgagee who is not made a party to an action to enforce a lien is not bound by a judgment rendered in such action. He is at liberty to assail its validity by enjoining the enforcement of the judgment.<sup>18</sup>

**§ 1582. Prior lien not affected by mortgage foreclosure.**—Where a mechanic's lien is prior to a mortgage, the lien is not affected by a foreclosure and sale under the mortgage. But if the lienor is made a party defendant to the foreclosure suit, either on his own application or otherwise, and consents to have the amount of his claim ascertained and paid out of the proceeds, the lien upon the property is cut off by the sale, and the lienor's claim is transferred to a demand upon the proceeds of the sale. It must appear, however, that the lienor consents to a sale of the property free from all claim of lien. His appearance in the foreclosure suit, and waiver of service of papers "except notice of sale and application for surplus moneys," is not a consent to come in subsequent to the mortgage, and does not operate as an estoppel against his making a claim upon the premises by virtue of the lien, in the absence of proof that the premises were sold clear of the lien with his knowledge and acquiescence.<sup>19</sup>

**§ 1583. Prior mortgagee necessary party where lienholder has prior lien on building alone.**—Where a mechanic's lien has priority as to the buildings and improvements

<sup>16</sup> *Emigrant Ind. Sav. Bank v. Goldman*, 75 N. Y. 127.

<sup>17</sup> *Livingston v. Mildrum*, 19 N. Y. 440.

<sup>18</sup> *Fleming v. Prudential Ins. Co.*, 19 Colo. App. 126, 73 Pac. 752.

<sup>19</sup> *Emigrant Ind. Sav. Bank v. Goldman*, 75 N. Y. 127.



erected, but a prior mortgage retains its priority as to the land, it is the duty of the court to find and adjudicate upon the rights of the prior incumbrancers, and it is proper to make them parties to the lien suit for this purpose.<sup>20</sup> In Illinois<sup>21</sup> the statute authorizes a sale in such case of the entire property, both the land and the buildings, and the application of the proceeds according to the rights of the parties; and of course the prior mortgagee becomes a necessary party to the suit. The proceedings and the decree then divest the lien of the prior mortgage.<sup>22</sup>

§ 1584. **Other lienors.**—To a proceeding to foreclose a mechanic's lien, other lienors, subsequent as well as prior, may properly be made parties defendant, for the purpose of having the amounts and priorities of their respective liens established; and the judgment may properly provide for a sale of the premises in behalf of all the lienors who are made parties, and for the payment to them of their liens according to their respective rights.<sup>23</sup> The rule is otherwise in the case of mortgages;<sup>24</sup> but in the case of liens it is deemed more convenient and expedient to permit the adjustment of all liens arising under the same contract in a single action.

A lienholder who is not made a party in the first instance is entitled, upon application, to come in at any time before final judgment, and, by an answer in the nature of a cross-petition, set forth his claim of lien, and ask to have the same foreclosed.<sup>25</sup>

<sup>20</sup> *Miller v. Ticknor*, 7 Bradw. (Ill.) 393.

<sup>21</sup> See ante, § 1199.

<sup>22</sup> *Topping v. Brown*, 63 Ill. 348.

<sup>23</sup> *Kenney v. Apgar*, 93 N. Y. 539; *Scherrer v. Music Hall Co.*, 18 N. Y. S. 459, 45 N. Y. St. 638. One foreclosing a mechanic's lien would probably not be allowed to gain priority by making other lien-

ors holding prior lien parties, under an allegation, such as is usual in foreclosure, that they claim some interest or lien subsequent to that of the plaintiff *Luscher v. Morris*, 18 Abb. N. Cas. (N. Y.) 67.

<sup>24</sup> *Jones on Mortgages*, § 1439.

<sup>25</sup> *Johnson v. Keeler*, 46 Kans. 304, 26 Pac. 728.

But it has been held that a subsequent lienor is not bound to intervene, and that in order to bind him by the decree, he should be made a party defendant in the first instance.<sup>26</sup>

Where a proceeding to foreclose a mechanic's lien is commenced by any claimant, and a prior or subsequent lienor is made a party and duly appears, he has thereafter a right to carry through the proceeding for his own benefit; and if the claimant instituting the proceedings in any way becomes disentitled to continue the proceedings, any other lienor who has appeared in the proceedings may continue them for the enforcement of his own lien.<sup>27</sup>

**§ 1585. New parties to be summoned any time prior to final decree.**—New parties may be summoned in pending action, at any time prior to final decree, where their interest is such as to render them necessary or proper parties, so that there may be a final adjudication of rights of all parties in interest.<sup>28</sup>

When a new party is brought in by amendment, the suit as to him is brought from the date of the amendment.<sup>29</sup> The suit, so far as the new party is concerned, can have no relation back to the time of bringing suit against the original defendants.<sup>30</sup>

According to some authorities, the petition or complaint may be amended and new parties brought in, after the expiration of the time limited for the enforcement of the lien.

<sup>26</sup> Wakefield v. Van Dorn, 53 Nebr. 23, 73 N. W. 226.

<sup>27</sup> Abham v. Boyd, 5 Daly (N. Y.) 321; Johnson v. Keeler, 46 Kans. 304, 26 Pac. 728.

<sup>28</sup> Snodgrass v. Holland, 6 Colo. 596. Though such action was commenced on the law side of the court, if the petition states facts such as would entitle plaintiff to relief in equity, new parties may be added by amendment as in

suits in equity. Gress Lumber Co. v. Rodgers, 85 Ga. 587, 11 S. E. 867.

<sup>29</sup> See ante, § 1562; Bennitt v. Wilmington Star M. Co., 119 Ill. 9, 7 N. E. 498, affg. 18 Bradw. (Ill.) 17; Crowl v. Nagle, 86 Ill. 437; Watson v. Gardner, 119 Ill. 312, 10 N. E. 192; Gardner v. Watson, 18 Bradw. (Ill.) 386, 392; Dunphy v. Riddle, 86 Ill. 22; Clark v. Manning, 95 Ill. 580.

<sup>30</sup> Crowl v. Nagle, 86 Ill. 437.

The limitation applies to the commencement of the action.<sup>31</sup>

But the generally accepted rule is that, as to the new party brought in, the amendment introducing such party is the commencement of the action as to such party; and if the time within which the action may be commenced against such party has expired, the action against such party is barred.<sup>32</sup> Thus, if the action was brought against the husband alone, and the wife is brought in as a defendant by amendment after the time limited by statute, the statute is a bar in her favor.<sup>33</sup>

If the plaintiff has sued the wrong person, he can not by motion substitute the right person as defendant.<sup>34</sup>

**§ 1586. Where the owner dies his executor or administrator to be substituted as party.**—Upon the death of the owner before suit is commenced, or pending the suit, to enforce the lien, the proceedings may be brought or continued against his executor or administrator as a party defendant, for the personal estate of the decedent is primarily liable for the lien debt.<sup>35</sup> But the real estate against which

<sup>31</sup> Manly v. Downing, 15 Nebr. 637, 19 N. W. 601.

<sup>32</sup> See ante, § 1562; Miller v. McIntyre, 6 Pet. (U. S.) 61, 8 L. ed. 320; Dunphy v. Riddle, 86 Ill. 22; Crowl v. Nagle, 86 Ill. 437; Green v. Sanford, 34 Nebr. 363, 51 N. W. 967, overruling Manly v. Downing, 15 Nebr. 637, 19 N. W. 601; Brown v. Goolsby, 34 Miss. 437; People v. Judge, 27 Mich. 138, 140; McGraw v. Bayard, 96 Ill. 146; East Line &c. R. Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. 805; Telfener v. Dillard, 70 Tex. 139, 7 S. W. 847; Jones v. Johnson, 81 Ga. 293, 6 S. E. 181; Glover Co. v. Rollins, 87 Maine 434, 32 Atl. 999; Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2

Am. St. 532; Bartley v. Smith, 43 N. J. L. 321; Adams v. Phillips, 75 Ala. 461; Young v. Stoutz, 74 Ala. 574; Russell v. Bell, 44 Pa. St. 47; Fourth Avenue Baptist Church v. Schreiner, 88 Pa. St. 124.

<sup>33</sup> Seibs v. Englehardt, 78 Ala. 508.

<sup>34</sup> Spence v. Griswold, 23 Abb. N. Cas. (N. Y.) 239, 7 N. Y. S. 145. The fact that the statute provides that a lien shall not be invalid because of a mistake in the name of the owner in the notice of claim does not aid the plaintiff in making an exchange of defendants.

<sup>35</sup> Taylor v. Taylor, 3 Bradf. (N. Y.) 54; Hughes v. Torgerson, 96 Ala. 346, 11 So. 209, 16 L. R. A.

the lien exists decends to the heirs or passes to the devisees under the will, and therefore the heirs or devisees become necessary parties by reason of their interest, and should be joined as defendants.<sup>36</sup> If the original owner has died, after having conveyed the property and taken back a mortgage for the purchase-money, it is not necessary to make his heirs parties defendant, but only his administrator.<sup>37</sup> Where the interest of the decedent, upon which the lien has attached, is a chattel interest, which passes to the administrator, he alone is a necessary party to the suit.<sup>38</sup>

An action to foreclose a mechanic's lien is an action in rem. Accordingly a statute which prohibits the bringing of any suits against heirs or devisees of real estate, in order to charge them with the debts of the testator or intestate, within three years after the granting of letters testamentary or of administration, does not apply to mechanics' liens.<sup>39</sup>

**§ 1587. Petition or complaint to substantially conform to the statute.**—In drafting the pleadings, the pleader should have the statute before him, with the view to seeing that all the essential requirements are met in the allegations of the petition or complaint. The statute which gives a mechanic a lien is in derogation of the common law, and a lien can be established only by a clear compliance with the require-

600, 38 Am. St. 105. It is so provided by statute in many states, as for instance in Ohio, where the provision is that executors and administrators of deceased owners shall have the same rights, and be subject to the same liabilities, under the mechanics' lien law, as such owners would enjoy and be subject to if alive. Gen. Code 1910, § 8322.

<sup>36</sup> *Guerrant v. Dawson*, 34 Miss. 149; *Mix v. Ely*, 2 G. Greene

(Iowa) 513; *Robins v. Bunn*, 34 N. J. L. 322, per Scudder, J.; *Shields v. Keys*, 24 Iowa 298; *Simonds v. Buford*, 18 Ind. 176; *Hughes v. Torgerson*, 96 Ala. 346, 11 So. 209, 16 L. R. A. 600, 38 Am. St. 105.

<sup>37</sup> *Shields v. Keys*, 24 Iowa 298.

<sup>38</sup> *Brown v. Zeiss*, 59 How. Pr. (N. Y.) 345, revd. 9 Daly (N. Y.) 240.

<sup>39</sup> *Marryatt v. Riley*, 2 Abb. Pr. (N. Y.) 119.

ments of the statute. The petition must allege everything essential to making out a case under the statute.<sup>40</sup>

§ 1588. What the complaint must show.—The complaint or petition must show affirmatively that all the necessary steps to acquire a lien have been taken.<sup>41</sup> It is not sufficient merely to recite the notice or claim of lien.<sup>42</sup> It must show that debt is due the plaintiff for work done or material furnished for the erection or repair of a building or other improvement within the terms of the statute.<sup>43</sup> It must show not only that the debt is owing, but that it had become payable, before the commencement of the action, so that there was at that time a cause of action.<sup>44</sup> It must state the particulars of the demand or account in accordance with the statutory provision.<sup>45</sup>

Inasmuch as the claim or notice of lien required by statute is the foundation of the action, the petition must allege the making of it, and should make a copy of it a part of the

<sup>40</sup> Belanger v. Hersey, 90 Ill. 70; McNeal &c. Foundry Co. v. Bullock, 38 Fed. 565; Street Lumber Co. v. Sullivan, 201 Mass. 484, 87 N. E. 905; Davis v. Treacy, 8 Cal. App. 395, 97 Pac. 78; Jorgensen Co. v. Sheldon, 2 Alaska 607; Canton Roll. & M. Co. v. Rolling Mill Co. of A., 155 Fed. 321.

<sup>41</sup> Foster v. Poillon, 2 E. D. Smith (N. Y.) 556, 1 Abb. Pr. (N. Y.) 321; Cronkright v. Thomson, 1 E. D. Smith (N. Y.) 661; Bailey v. Johnson, 1 Daly (N. Y.) 61; Porter v. Miles, 67 Ala. 130; Chaffin v. McFadden, 41 Ark. 42; The Mouat Lumber &c. Co. v. Freeman, 7 Colo. App. 152, 42 Pac. 1040. As to complaint in proceeding to have lien declared prior to other liens, see The San Juan Hdw. Co. v. Carrothers, 7 Colo. App. 413,

43 Pac. 1053; Adams v. Mackenzie, 59 Ore. 89, 114 Pac. 460.

<sup>42</sup> Duffy v. McManus, 3 E. D. Smith (N. Y.) 657; Russ Lumber Co. v. Garrettson, 87 Cal. 589, 25 Pac. 747.

<sup>43</sup> Dewey v. Fifield, 2 Wis. 73; Dean v. Wheeler, 2 Wis. 224; Roberts v. Campbell, 59 Iowa 675, 13 N. W. 846. If the debt is sufficiently stated in the notice or claim of lien, and this is recited in the complaint or petition to enforce the lien, it is sufficient. Hulse v. Washburn, 59 Wis. 414, 18 N. W. 341; Sorg v. Crandall, 233 Ill. 79, 84 N. E. 181.

<sup>44</sup> Harmon v. Ashmead, 60 Cal. 439.

<sup>45</sup> Spencer v. Doherty, 17 R. I. 89, 20 Atl. 232.

petition.<sup>46</sup> The petition should show affirmatively that the notice filed contained all the essential provisions required by statute.<sup>47</sup>

If the complaint is defective in failing to state all the necessary grounds for claiming a lien, objection to its efficiency must be taken by demurrer or answer, and can not be raised for the first time on appeal.<sup>48</sup>

It is not essential that the plaintiff should negative defenses which the statute permits to be interposed by the owner. It is not incumbent on the claimant to allege anything more than the statute declares shall constitute a *prima facie* case.<sup>49</sup>

In Indiana, a copy of the notice of intention to hold a lien must be filed with the complaint.<sup>50</sup>

**§ 1589. Averments in the complaint continued.**—It must aver that the labor was done or the materials furnished in accordance with a contract, or with the consent of the owner;<sup>51</sup> that the claim or notice of lien was properly verified;<sup>52</sup>

<sup>46</sup> *Scott v. Goldinhorst*, 123 Ind. 268, 24 N. E. 333. Where several causes are joined by a single plaintiff, it is not necessary to aver that in each separate cause of action he served the notice and filed the statement. *Rialto Mining & Milling Co. v. Lowell*, 23 Colo. 253, 47 Pac. 263.

<sup>47</sup> *Pilz v. Killingsworth*, 20 Ore. 432, 26 Pac. 305. It is sufficient to allege that the material was furnished within ninety days. *Stewart v. Simmons*, 101 Minn. 375, 112 N. W. 282.

<sup>48</sup> *Russ Lumber Co. v. Garretson*, 87 Cal. 589, 25 Pac. 747. But an affidavit, taking the place of a complaint, has been held bad on appeal because it alleges the labor was furnished more than six

months prior to the filing of suit. *Eddins v. Tweddle*, 35 Fla. 107, 17 So. 66.

<sup>49</sup> *Arnold v. Farmers' Exchange*, 123 Ga. 731, 51 S. E. 754.

<sup>50</sup> *Davis v. McMillan*, 13 Ind. App. 424, 41 N. E. 851.

<sup>51</sup> *Bertheolet v. Parker*, 43 Wis. 551; *Wheeler v. Hall*, 41 Wis. 447; *Doughty v. Devlin*, 1 E. D. Smith (N. Y.) 625; *Dixon v. La Farge*, 1 E. D. Smith (N. Y.) 722; *Broderick v. Poillon*, 2 E. D. Smith (N. Y.) 554; *Quinn v. The Mayor*, 2 E. D. Smith (N. Y.) 558; *Bailey v. Johnson*, 1 Daly (N. Y.) 61; *Adams v. Buhler*, 116 Ind. 100, 18

<sup>52</sup> *Hallagan v. Herbert*, 2 Daly (N. Y.) 253; *Conklin v. Wood*, 3 E. D. Smith (N. Y.) 662.

and filed within the time limited.<sup>53</sup> It must show that the materials furnished were furnished for use in the building or improvement in question.<sup>54</sup> It must show that the suit was brought within the time limited, and that the suit is to enforce the lien.<sup>55</sup> The character of the work must be shown, for it is not for all kinds of work that a lien is allowed. The completion of the work must be shown, so that it may appear that the notice or statement of the lien was filed within the time allowed.<sup>56</sup> As against mortgagees and other incumbrancers, the date of the commencement of the lien is important; and for this purpose the date of the contract, or the date of the commencement of the building, or the date of the commencement of the work, whichever is the date of the commencement of the lien, must be alleged.<sup>57</sup> It must show that the claim or notice of lien was duly made, verified,<sup>58</sup> and filed within the time prescribed.<sup>59</sup>

Where an architect's certificate is required, the complaint must allege that one is furnished or offer an excuse for failure to receive one.<sup>60</sup>

N. E. 269; *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598. The contract should generally be set forth in the petition or complaint. *Logan v. Attix*, 7 Iowa 77. A complaint is not demurrable because it shows that materials were furnished to a contractor employed by the owner, and not upon a contract made immediately with the owner or his agent. *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598; *Hudmon v. Trammell*, 86 Ala. 472, 6 So. 4; *Jarvis-Conklin Mortgage Trust Co. v. Sutton*, 46 Kans. 166, 26 Pac. 406.

<sup>53</sup> *Bailey v. Johnson*, 1 Daly (N. Y.) 61; *Dewey v. Fifield*, 2 Wis. 73; *Arkansas Cent. R. Co. v. McKay*, 30 Ark. 682.

<sup>54</sup> *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890; *Fathman Planing Mill Co. v. Ritter*, 33 Mo. App. 404; *Cohn v. Wright*, 89 Cal. 86, 26 Pac. 643.

<sup>55</sup> *Du Bay v. Uline*, 6 Wis. 588.

<sup>56</sup> *Davis v. Alvord*, 94 U. S. 545, 24 L. ed. 283, per Field, J.; *Henry v. Hinds*, 18 Mo. App. 497.

<sup>57</sup> *Davis v. Alvord*, 94 U. S. 545, 24 L. ed. 283; *McKee v. Travelers' Ins. Co.*, 41 Fed. 117.

<sup>58</sup> *Glass v. St. Paul Carriage Co.*, 43 Minn. 228, 45 N. W. 150.

<sup>59</sup> *Hurlbert v. New Ulm Basket Works*, 47 Minn. 81, 49 N. W. 521.

<sup>60</sup> *McGlaufflin v. Wormser*, 28 Mont. 177, 72 Pac. 428.

§ 1590. **Complaint to aver that the materials were used in the structure.**—A complaint to enforce a lien for materials should allege that they were used in the construction of the building or improvement upon which it is sought to establish a lien, or that they were furnished for such use.<sup>61</sup> Averments that the defendant employed a contractor to erect a house on his land described that the contractor procured from the plaintiff certain materials to be used in the construction of the house; that the materials were so used, and that the plaintiff, before the time of furnishing them, notified the defendant that he was about to furnish them,—taken together, sufficiently state that the materials were furnished for, and used in, the erection of the house, though the averments are not so direct and specific as they might be.<sup>62</sup>

Where the claim is for both labor and materials, the petition should specify what part of the sum is due for the labor and what part for the materials.<sup>63</sup>

§ 1591. **Complaint to show that defendant was owner or had some interest.**—The petition must allege that the defendant was the owner of, or had some title to, the land and buildings against which it is sought to establish the lien, or that he has some interest in them.<sup>64</sup> The fact that one was in possession of land, claiming title thereto, when he ordered improvements to be made upon it, or made his contract for labor or materials, is some evidence of ownership; and under

<sup>61</sup> Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890; Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Bottomly v. Grace Church, 2 Cal. 90; Watrous v. Elmendorf, 55 How. Pr. (N. Y.) 461; Missoula Mercantile Co. v. O'Donnell, 24 Mont. 65, 60 Pac. 594, 60 Pac. 991.

<sup>62</sup> Neeley v. Searight, 113 Ind.

316, 15 N. E. 598; Lawton v. Case, 73 Ind. 60.

<sup>63</sup> Smith v. Van Hoose, 110 Ga. 633, 36 S. E. 77.

<sup>64</sup> Clark v. Raymond, 27 Mich. 456; Fein v. Davis, 2 Wyo. 118; Hays v. Mercier, 22 Nebr. 656, 35 N. W. 894; Knapp Elec. Works v. Mecosta Elec. Co., 110 Mich. 547, 68 N. W. 245.



a statute which provides that a mechanic's lien shall extend to an estate in fee, for life, for years, or any other estate, or any right of redemption or other interest which one may have in land at the time of making the contract, is sufficient proof.<sup>65</sup> Whatever his interest may be, this may be subjected to a lien, and he can not demand that the extent of his title be proved. The title to the property sought to be charged with the lien can not be litigated. The title becomes material to a purchaser at the sale to enforce the lien, yet it is a matter not to be settled in the suit to foreclose the lien, but in some future proceeding.<sup>66</sup> A petition which fails to state that the improvement was erected under a contract with one having an interest in the land or the ownership of it is insufficient, and is not aided by a verdict.<sup>67</sup>

In a proceeding by a subcontractor it is essential that he should connect himself with the owner by showing with whom the original contract was made as owner, and that such person had an interest in the premises affected by the proceedings.<sup>68</sup>

A petition which prays for a lien against the entire premises, while it admits that defendant is owner of only an undivided half interest therein, is defective, but may be amended.<sup>69</sup>

### § 1592. Not required to prove the precise title of owner.

—But the petitioner or complainant is not required to allege and prove the precise title of the defendant to the land upon which the lien is claimed.<sup>70</sup> The lien is enforced only upon such interest as he has in the premises. It is sufficient to

<sup>65</sup> *Chisholm v. Williams*, 128 Ill. 115, 21 N. E. 215.

<sup>66</sup> *Chambers v. Benoist*, 25 Mo. App. 520; *Cole v. Barron*, 8 Mo. App. 509.

<sup>67</sup> *Peck v. Bridwell*, 6 Mo. App. 451.

<sup>68</sup> *Bertheolet v. Parker*, 43 Wis. 551.

<sup>69</sup> *Spencer v. Doherty*, 17 R. I. 89, 20 Atl. 232.

<sup>70</sup> *Willer v. Bergenthal*, 50 Wis. 474, 479, 7 N. W. 352; *Moritz v. Splitt*, 55 Wis. 441, 13 N. W. 555.

allege that the defendant has an interest in the premises;<sup>71</sup> if he has no interest the judgment and any sale under it are ineffectual.<sup>72</sup> An averment in regard to the interest of the defendant is sufficient, if enough appears to disclose the rights of the parties, and to admit all evidence bearing upon these rights.<sup>73</sup>

In a proceeding by a principal contractor it is not necessary to prove the title of the defendant to the land upon which the lien is claimed.<sup>74</sup> The reason is that the lien is enforceable only upon his interest, and if he has no interest, then the plaintiff takes nothing by his judgment. This rule is like that which applies in the case of a foreclosure of a mortgage. The petition in such case need not state that the person against whom the lien is claimed has any interest in the premises affected by the proceeding.<sup>75</sup>

§ 1593. **Necessary allegations of subcontractor.**—A subcontractor seeking to enforce a lien should allege such indebtedness to himself on the part of the contractor as will justify the decreeing of a lien.<sup>76</sup> A petition by a laborer which does not state that something is due him from his immediate employer, for the services on which the lien is founded, is defective. A statement to this effect, in the claim for a lien attached to the petition, can not have the effect of such an averment in the petition, for the claim of lien was made at an earlier date; and though it might amount to an averment that something was due then, it does not amount to an averment that something was due when the action was begun.<sup>77</sup>

<sup>71</sup> Rice v. Hall, 41 Wis. 453;  
Shaw v. Allen, 24 Wis. 563.

<sup>72</sup> Jessup v. Stone, 13 Wis. 466.

<sup>73</sup> Henderson v. Connolly, 123  
Ill. 98, 14 N. E. 1, 5 Am. St. 490.

<sup>74</sup> Willer v. Bergenthal, 50 Wis.  
474; Moritz v. Splitt, 55 Wis. 441,  
13 N. W. 555.

<sup>75</sup> Moritz v. Splitt, 55 Wis. 441,  
13 N. W. 555.

<sup>76</sup> Martin v. Morgan, 64 Iowa  
270, 20 N. W. 184.

<sup>77</sup> Stubbs v. Clarinda, C. S. & S.  
W. R. Co., 62 Iowa 280, 17 N. W.  
530.

§ 1594. **To aver an indebtedness by owner to original contractor.**—A subcontractor should, moreover, aver an indebtedness by the owner to the original contractor, or that the owner was notified by the subcontractor of his claim in pursuance of statute, so that the owner became liable for the payment of the claim.<sup>78</sup> A subcontractor is only entitled to be paid by the owner while something is due from the latter to the original contractor; and if the complainant fails to allege that something was due from the owner to the original contractor when the plaintiff filed his lien, he fails to state a cause of action.<sup>79</sup> An allegation that the owner compelled the contractor to abandon the work, took possession of the building, completed it, used materials furnished by the plaintiff to the contractor, and withholds a large portion of the contract price, is not a sufficient allegation that something is due from the owner to the contractor.<sup>80</sup>

The owner may file a bill of interpleader alleging that the claims of subcontractors exceed the amount due from him to the principal contractor, and an injunction may issue restraining the prosecution of suits against plaintiff by the lien claimants. If the contractor answers that the complaint incorrectly stated the amount due from plaintiff, as the plaintiff's liability is limited to the amount due to the contractor, the plaintiff is entitled to have the case retained

<sup>78</sup> *Rosenkranz v. Wagner*, 62 Cal. 151; *Russ Lumber Co. v. Garrettson*, 87 Cal. 589, 25 Pac. 747; *Epley v. Scherer*, 5 Colo. 536; *Leigene v. Schwarzler*, 67 How. Pr. (N. Y.) 130, 10 Daly (N. Y.) 547; *Bailey v. Johnson*, 1 Daly (N. Y.) 61, 67; *Fullenwider v. Longmoor*, 73 Tex. 480, 11 S. W. 500; *Parsley v. David*, 106 N. Car. 225, 10 S. E. 1028; *Merritt v. Crane Co.*, 225 Ill. 181, 80 N. E. 103.

<sup>79</sup> *Turner v. Strenzel*, 70 Cal. 28, 11 Pac. 389. Furthermore the claimant must allege that the amount due the contractor from the owner is due under the contract for the building in respect to which the lien is claimed. *Hathorne v. Panama Park Co.*, 44 Fla. 194, 32 So. 812, 103 Am. St. 138.

<sup>80</sup> *Turner v. Strenzel*, 70 Cal. 28, 11 Pac. 389.

until the amount of the indebtedness to the contractor is ascertained.<sup>81</sup>

§ 1595. Not necessary to allege in the complaint that the indebtedness arose under a particular contract.—It is enough to state the indebtedness, and it is immaterial whether it arose under one contract or several. If it be alleged that it arose under a contract of a certain date, the plaintiff may prove one of any other date, for time is not of the essence of the contract.<sup>82</sup>

§ 1596. Allegations as to date of execution of contract.—The date of the execution of the contract is material under statutes which give effect to the lien, as regards priority, from the time of its execution. But under statutes which refer the fixing of the lien to the time of the maturing of the contract instead of the time of making it, the latter date becomes immaterial, and the petition need not state it.<sup>83</sup>

§ 1597. One contract.—The lien is enforceable for all the items furnished by a contractor under one contract, but not under several contracts.<sup>84</sup> Although there be no distinct allegation that all the articles were furnished under one contract, it may be inferred that there was but one contract from the statement that the articles were furnished by the plaintiff as an original contractor.<sup>85</sup> If it is sought to enforce a lien

<sup>81</sup> Aleck v. Jackson, 49 N. J. Eq. 507, 23 Atl. 760.

<sup>82</sup> Kiel v. Carll, 51 Conn. 440.

<sup>83</sup> Gillespie v. Remington, 66 Tex. 108, 18 S. W. 338.

<sup>84</sup> O'Connor v. Current Riv. R. Co., 111 Mo. 185, 20 S. W. 16, per Gantt, P. J. "That plaintiff has so joined in one account and one notice and one count in his petition the work done under both of these contracts is apparent upon the face of the petition. What is the effect of such a commingling? It destroys his lien, because he

has mingled in one account the labor performed under two distinct contracts. The statute has been uniformly construed to discountenance such a practice and claim." And see Schmeiding v. Ewing, 57 Mo. 78; Fitzgerald v. Thomas, 61 Mo. 499; Allen v. Frumet M. & S. Co., 73 Mo. 688, 693.

<sup>85</sup> Fulton Iron Works v. North Center Creek M. & S. Co., 80 Mo. 265; Indiana Mut. B. & L. Assn. v. Paxton, 18 Ind. App. 304, 47 N. E. 1082.

against more than one building, it should appear from the petition either that all the buildings in fact constitute a single building, or that they were built under one contract upon land of the same owner. It may be sufficient, however, that this may be gathered from the petition, though not explicitly stated.<sup>86</sup>

**§ 1598. Abandonment of contract through no fault of contractor.**—Where there has been an abandonment of a building contract through no fault of the contractor, it is not necessary for him, in an action to foreclose his lien and to recover upon a quantum meruit, to show a legal excuse for not performing the contract, nor, where the time fixed for the performance of the contract has been waived, to notify the owner of his intention, and to demand performance on his part.<sup>87</sup>

Delay in the completion of a contract is not a defense to a claim for lien, where such delay is directly attributable to the owner's acts, notwithstanding the contract provides that no additional allowance of time shall be made unless a claim therefor is presented within a specified time.<sup>88</sup>

**§ 1599. Damages allowed to defendant by way of set-off.**—Damages may be allowed to the defendant by way of set-off for the failure of the plaintiff to complete a building within the time prescribed by his contract; or for breach of the contract in performing the work in an unworkmanlike manner;<sup>89</sup> or for breach of the contract in any way;<sup>90</sup>

<sup>86</sup> Peck v. Bridwell, 10 Mo. App. 524.

<sup>87</sup> Powers v. Hogan, 67 How. Pr. (N. Y.) 255, distinguished from Lawson v. Hogan, 93 N. Y. 39.

<sup>88</sup> Central Bldg. Co. v. Karr Supply Co., 115 Ill. App. 610.

<sup>89</sup> New York: Cheney v. Troy Hospital, 65 N. Y. 282; Miller v. Moore, 1 E. D. Smith (N. Y.) 739;

Gourdier v. Thorp, 1 E. D. Smith (N. Y.) 697, 698; Hoyt v. Miner, 7 Hill (N. Y.) 525; Develin v. Mack, 2 Daly (N. Y.) 94, 100; Bulkly v. Healy, 58 Hun (N. Y.) 608, 12 N. Y. S. 54, 34 N. Y. St. 630. Other states: Burn v. Whit-

<sup>90</sup> Millsap v. Ball, 30 Nebr. 728, 46 N. W. 1125.

or for breach of a warranty as to the working of a machine.<sup>91</sup> Of course there can be no set-off for damages against a mechanic for defects not arising from the execution of the work, but from the architect's plan, or other plan of the structure.<sup>92</sup> There can be no damages for delay caused by the owner's requiring extra work to be done.<sup>93</sup>

Whether the work is properly done and complies with the contract is a question for the jury.<sup>94</sup> A literal performance of a building contract is not a condition precedent to the right to assert a lien.<sup>95</sup> A failure to perform the contract within the time specified is no defense if it be substantially

tlesey, 2 MacAr. (D. C.) 189; Hoagland v. Van Etten, 22 Nebr. 681, 35 N. W. 869; Porter v. Wilder, 62 Ga. 520; Koch v. Sumner, 145 Mich. 358, 108 N. W. 725, 116 Am. St. 302; Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 Pac. 982; Spears v. Du Rant, 76 S. Car. 19, 56 S. E. 652; Steltz v. Armory Co., 15 Idaho 551, 99 Pac. 98, 20 L. R. A. (N. S.) 872; Fosssett v. Rock Island Lumber & Mfg. Co., 76 Kans. 428, 92 Pac. 833; American Radiator Co. v. McKee, 140 Ky. 105, 130 S. W. 977.

<sup>91</sup> Cox v. Colles, 17 Bradw. (Ill.) 503; Ruff v. Jarrett, 94 Ill. 475; Wentworth v. Dows, 117 Mass. 14.

<sup>92</sup> Welch v. Sherer, 93 Ill. 64.

<sup>93</sup> St. Louis Nat. Stock Yards v. O'Reilly, 85 Ill. 546.

<sup>94</sup> Girard Point Storage Co. v. Riehle, 7 Sad. (Pa.) 594, 12 Atl. 172.

<sup>95</sup> Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. 686. Per Harrison, J. "Especially is this the rule in contracts for labor by mechanics or artisans, where the quality of the work done, or the manner of its

performance, is the sole matter in dispute, and is to be decided upon conflicting testimony. In contracts for the construction or repair of buildings, a substantial performance of his contract is sufficient to entitle the contractor to compensation for the work done by him under the contract. If there has been no wilful departure from its provisions, and no omission of any of its essential parts, and the contractor has, in good faith, performed all of its substantive terms, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed. If the omission or imperfection is so slight that it can not be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by a recongment for damages, the contractor does not lose his right of action." Where architect's certificate is withheld by fraud and collusion it does not defeat the right of lien. Bird v. St. John's Episcopal Church, 154 Ind. 138, 56 N. E. 129; Leads v. Little, 42

performed.<sup>96</sup> It is a sufficient excuse for a failure to complete the contract within the time limited that the owner or his agents or workmen did not seasonably perform other tractor could complete his work.<sup>97</sup>

As between the owner and contractor, any matter in defence may be taken advantage of that would be available in a personal action between the parties, though arising out of other matters than those connected with the building contract.<sup>98</sup>

**§ 1600. Description of the land.**—The complaint or petition must contain a sufficient description of the land on which the building is situated to enable the sheriff to determine the property to be sold.<sup>99</sup> It must be sufficient to enable a person familiar with the locality to identify it.<sup>1</sup> Whether the property can reasonably be recognized from the description is a question for the jury.<sup>2</sup> A petition which describes the land as lot "one or two" in a certain block is insufficient.<sup>3</sup> But an erroneous description may generally

Minn. 414, 44 N. W. 309; Hankee v. Arundel Realty Co., 98 Minn. 219, 108 N. W. 842. See Healy v. Fallon, 69 Conn. 228, 37 Atl. 495; Boyce v. Expanded Metal & Co., 136 Ill. App. 352; Crilly v. Philip Rinn Co., 135 Ill. App. 198, as to waiver of architect's certificate.

<sup>96</sup> Heckmann v. Pinkney, 81 N. Y. 211; Woodward v. Fuller, 80 N. Y. 312; Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Phillip v. Gallant, 62 N. Y. 256, 264; Johnson v. De Peyster, 50 N. Y. 666; Nunan v. Doyle, 18 N. Y. S. 192, 44 N. Y. St. 826, 60 N. Y. Super. Ct. 377, affd. 139 N. Y. 643, 35 N. E. 206.

<sup>97</sup> Weeks v. Little, 89 N. Y. 566, 11 Abb. N. Cas. (N. Y.) 415.

<sup>98</sup> Owens v. Ackerson, 8 How. Pr. (N. Y.) 199, 1 E. D. Smith (N.

Y.) 691; Minor v. Hoyt, 4 Hill (N. Y.) 193.

<sup>99</sup> Duffy v. McManus, 3 E. D. Smith (N. Y.) 657; Curnow v. Blue Gravel & H. Co., 68 Cal. 262, 9 Pac. 149; Gillespie v. Remington, 66 Tex. 108, 18 S. W. 338; Cole v. Custer County Agric. & C. Assn., 3 S. Dak. 272, 52 N. W. 1086; Brown v. La Crosse City Gaslight Co., 16 Wis. 555; see ante, § 1421.

<sup>1</sup> Hughes v. Torgerson, 96 Ala. 346, 11 So. 209; Dodge v. Hall, 168 Mass. 435, 47 N. E. 110; Sawyer-Austin Lumber Co. v. Clark, 82 Mo. App. 225, affd. 172 Mo. 588, 73 S. W. 137.

<sup>2</sup> Cleverly v. Moseley, 148 Mass. 280, 19 N. E. 394. See Buck v. Hall, 170 Mass. 419, 49 N. E. 658.

<sup>3</sup> Lyon v. Logan, 66 Tex. 57, 17 S. W. 264.

be amended at any time during the progress of the case. Even after the expiration of the statutory time allowed for bringing the action to enforce the lien, a petition to enforce it may be amended so as to correct an erroneous description of the land,<sup>4</sup> or an insufficient description.<sup>5</sup> If the plaintiff has erroneously claimed a lien upon more than one lot of land, he should strike out his claim to a lien on any but the lot on which the building is situated.<sup>6</sup>

In a suit by a material-man to enforce a lien, if the owner makes no objection to the sufficiency of the description the contractors can not set up its insufficiency.<sup>7</sup>

If the petition properly describes the land it is immaterial that the building is described merely as a certain building.<sup>8</sup> The description in the petition and that in the claim of lien must appear on the face of the papers to show that they refer to the same property, or evidence must be produced to show that they refer to the same property. Thus, if the claim of lien describes the property by referring to the date and record of the deed of the land, and the petition describes it by metes and bounds only, evidence should be offered to show that the petition and the claim of lien describe the same property.<sup>9</sup> If the description be proved to be erroneous, and that the dwelling-house for which a lien is claimed is situated partly on the lot described and partly on another, there is no lien on that part of the house not situated on the lot named, and it would work great injury

<sup>4</sup> *Huse v. Washburn*, 59 Wis. 414, 18 N. W. 341; *Brown v. The La Crosse City Gaslight Co.*, 18 Wis. 555; *O'Leary v. Burns*, 53 Miss. 171; *Gray v. Dunham*, 50 Iowa 170.

<sup>5</sup> *Duffy v. Brady*, 4 Abb. Pr. (N. Y.) 432; *Mann v. Schroer*, 50 Mo. 306; *Sherry v. Schraage*, 48 Wis. 93, 4 N. W. 117.

<sup>6</sup> *Miller v. Hoffman*, 26 Mo. App. 199.

<sup>7</sup> *Wethered v. Garrett*, 140 Pa. St. 224, 21 Atl. 319.

<sup>8</sup> *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633.

<sup>9</sup> *Morehouse v. Collins*, 23 Ore. 138, 31 Pac. 295.



to the owner to allow the lien to be enforced against a part only of the house.<sup>10</sup>

A decree foreclosing a mechanic's lien is not invalid by reason of the failure of the court to define the exact amount of land necessary to the use of the building,<sup>11</sup> though it may be that the purchaser would acquire no land beyond that covered by the building. But the judgment is good.<sup>12</sup>

A decree giving a lien on more land than that described in the petition and the evidence is erroneous.<sup>13</sup>

But a judgment may be corrected which declares a lien upon more land than the law allows to be embraced in the lien.<sup>14</sup>

Where a complaint is for the foreclosure of mechanic's liens upon a well, it can not be inferred from the name of the defendant that the well was an oil well.<sup>15</sup>

**§ 1601. Effect of variance in description in notice and in the complaint.**—If the description of the land in the statement of claim is contradicted by the description in the petition for the enforcement of the lien, no lien can be enforced. A petition for enforcing a lien on a lot of land, described as being upon the west side of a street, is not supported by proof of a statement of lien filed in which the premises are described as being upon the east side of the street, and there is no point of agreement and identification between the two descriptions except that the petitioner had performed labor on a building then in process of erection.<sup>16</sup>

<sup>10</sup> Willamette Lumber Co. v. Kremer, 94 Cal. 205, 29 Pac. 633.

<sup>11</sup> Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. 932.

<sup>12</sup> Tibbetts v. Moore, 23 Cal. 208, 213.

<sup>13</sup> Portoues v. Badenoch, 132 Ill. 377, 23 N. E. 349.

<sup>14</sup> Hill v. La Crosse & Milw. R. Co., 11 Wis. 214; McCoy v. Quick, 30 Wis. 521.

<sup>15</sup> Parke & Lacy Co. v. Inter Nos. Oil & Co., 147 Cal. 490, 82 Pac. 51.

<sup>16</sup> Bristow v. Evans, 124 Mass. 548; Windfall Nat. Gas M. & Oil Co. v. Roc, 41 Ind. App. 687, 84 N. E. 996. Under a statute providing that a variance between the pleading and proof as to description shall not be material unless the defendant is misled thereby it

Where the allegations in the complaint are inconsistent with statements contained in the notice of the lien, which is made a part of the complaint, the defendant may demur for ambiguity and uncertainty.<sup>17</sup>

**§ 1602. Variance as to the parties between claim filed and the complaint, not ground for dismissal.**—A variance as to the parties between the claim filed and the complaint is not necessarily any ground for dismissing the action. Thus, where the claim filed named a single person as contractor, whereas the complaint made him and his son parties to the suit, and it appeared in evidence that both were interested in the contract, though the claimant at the time of filing his claim of lien supposed that the father was the sole contractor, it was held that the proceedings should not be dismissed on account of the error in stating the claim.<sup>18</sup>

**§ 1603. Case proved to be substantially as alleged.**—If the case proved be not in substance the case alleged in the petition, the latter should be dismissed for variance. Thus, if the case stated in the petition be simply one of a sale and delivery of lumber by the petitioner to the defendant to be used by the latter in building a house, and the case made out by the proof is a purchase of the lumber by the petitioner

is held that one not misled can not defend on the ground of a variance between the pleading and proof as to description of premises. *Stetson & Post Lumber Co. v. W. & J. Sloane Co.*, 60 Wash. 180, 112 Pac. 248.

<sup>17</sup> *Frazer v. Barlow*, 63 Cal. 71; *Lyon v. Logan*, 66 Tex. 57, 17 S. W. 264.

<sup>18</sup> *Brown v. Welch*, 5 Hun (N. Y.) 582, 586. "Courts of equity are not disposed to withhold action because too many or too few parties appear upon the record.

If there be too few, the absent persons will be brought in. If there be too many, the plaintiff may be subjected to the payment of the costs of those who have been unnecessarily brought into court. But in either case the court will retain the case and do justice. The law applicable to such proceedings as the suit at bar has not yet been well settled, and analogies may mislead." Per Boardman, J. See also to same effect, *Shaw v. Martin*, 20 Idaho 168, 117 Pac. 853.

of a third party, and a delivery of the lumber to the defendant on his promise to pay for the same, the petitioner having been in fact a surety for the defendant in the original purchase of the lumber, and having been obliged to pay for it on the failure of the defendant to do so, there is such a variance as to require the dismissal of the petition.<sup>19</sup>

The fact that the petition for the lien charges the sale of the materials to two defendants, while the complaint charges the sale to one of them alone, is an immaterial variance.<sup>20</sup>

There is no variance where the allegation is that the plaintiff performed labor at the request of the defendant, who agreed to pay for it, though the proof is that the defendant employed a person to run a tunnel in a mine, for a sum named for the entire contract, and this contractor employed the plaintiff to work at a stipulated price per day.<sup>21</sup>

A variance as to the day of the completion of the work is immaterial if the proof shows that the completion was within the time limited for filing the certificate of lien.<sup>22</sup>

**§ 1604. Variance as to the amount of the lien claim.**—A variance between the complaint and the claim filed, in that the complaint gives in the bill of particulars the whole amount due for labor and materials, whereas the lien filed states only the balance due after deducting payments, is immaterial, where the statute only requires the amount of the lien to be stated in the claim filed. In the complaint it is necessary to give all the items of the claim. The defendant is entitled to notice of these, but as to payments he presumably has equal knowledge with the plaintiff; but if not,

<sup>19</sup> *Ruggles v. Blank*, 15 Bradw. (Ill.) 436.

<sup>20</sup> *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633.

<sup>21</sup> Allegation of a written contract and proof of contract partly in writing and partly by parol

is not a fatal variance. *Stepina v. Conklin Lumber Co.*, 134 Ill. App. 173; *Parker v. Savage Placer Mining Co.*, 61 Cal. 348.

<sup>22</sup> *Cole v. Uhl*, 46 Conn. 296; *Fourth Baptist Church v. Trout*, 28 Pa. St. 153.

he could ask the court for an order for further particulars.<sup>23</sup> A variance in the proof as to the time when the several items of materials were furnished, when it appears that the statement of lien was in any event filed in time, and the variance does not prejudice any one, is not fatal to the lien.<sup>24</sup>

A plea by way of general denial has been held sufficient to put the material-man on proof of the amount due for materials furnished.<sup>24a</sup>

**§ 1604a. Owner to appear and answer complaint to enforce lien.**—It is a matter of prudence for the owner to appear and answer a suit by a subcontractor, or other person occupying a similar position, though he has no defense as against the lien itself. "By failing to defend the action, the owner takes the risk of a judgment against his property in excess of what he may deem to be the amount in which he is indebted to his contractor. But he can not complain of this, because he has had the opportunity to defend, and prove the exact amount of his indebtedness. If he neglect to do so, the lienor will proceed in the action, and recover a judgment according to the pleadings and proof, and his judgment will be regular, notwithstanding any defense which the owner had and omitted to make."<sup>25</sup>

If the defendant claims that the quantity of land on which the lien is claimed is not within the statutory limit, he must set up this defense, and upon the fact so appearing the court will designate the tract within the limit to which the lien shall attach.<sup>26</sup>

The defense of infancy must be pleaded. It is not available for setting aside a judgment. The decree is not invalid

<sup>23</sup> Nichols v. Culver, 51 Conn. 177.

<sup>24</sup> Linne v. Stout, 41 Minn. 483, 43 N. W. 377; Lucas v. Rea, (Cal.) 101 Pac. 537.

<sup>24a</sup> Lee v. Storz Brew. Co., 75 Nebr. 212, 106 N. W. 220.

<sup>25</sup> Holler v. Apa, 18 N. Y. S. 588, 47 N. Y. St. 485. See Caserly v. Wayne Circuit Judge, 124 Mich. 157, 82 N. W. 841, 83 Am. St. 320.

<sup>26</sup> Boyd v. Blake, 42 Minn. 1, 43 N. W. 485.

for the reason that the infant appeared by attorney, instead of a guardian ad litem appointed by the court.<sup>27</sup>

§ 1605. **Amendment of complaint.**—A liberal exercise of the power of amendment is allowed in order to save a limitation of the lien; and this is especially the case where the rights of third persons are not injuriously affected by allowing the amendment.<sup>28</sup> Thus, the petition or complaint may be amended so as to allege that the labor and materials were furnished in conformity with the original contract;<sup>29</sup> or to set out a new contract;<sup>30</sup> or to ask that a lien be decreed;<sup>31</sup> or to correct the name of the plaintiff;<sup>32</sup> or to bring in an additional party;<sup>33</sup> or to correct an error as to the date of filing the notice or claim of lien;<sup>34</sup> or to correct an error in the description of the property;<sup>35</sup> or to correct an error as to the date when the last material was furnished;<sup>36</sup> or to correct an error as to who held legal title to the property.<sup>37</sup>

<sup>27</sup> *Cohee v. Baer*, 134 Ind. 375, 32 N. E. 920, 39 Am. St. 270.

<sup>28</sup> *Hannon v. Gibson*, 14 Mo. App. 331; *Cherry v. Strong*, 96 Ga. 183, 22 S. E. 707. In Michigan it is provided by statute that amendments at any time before final decree is rendered, to any process, pleadings or proceedings in such actions to enforce the liens given by this act either in form or in substance, shall be allowed on application of either party upon such terms and conditions as justice may require. *Howell's Stats.* 1912, § 13792. But an amendment will not be allowed after the time for filing a lien has expired, if the rights of third parties have attached. *Meehan v. St. Paul & C. R. Co.*, 83 Minn. 187, 86 N. W. 19.

<sup>29</sup> *Broderick v. Poillon*, 2 E. D. Smith (N. Y.) 554, 1 Abb. Pr. (N. Y.) 319.

<sup>30</sup> *Phoenix Mut. L. Ins. Co. v. Batchen*, 6 Bradw. (Ill.) 621; *Brosnan v. Trulson*, 164 Mass. 410, 41 N. E. 660.

<sup>31</sup> *Lackner v. Turnbull*, 7 Wis. 105.

<sup>32</sup> *Witte v. Meyer*, 11 Wis. 295; *Kleinert v. Knoop*, 147 Mich. 387, 110 N. W. 941.

<sup>33</sup> *Challoner v. Howard*, 41 Wis. 355.

<sup>34</sup> *Willer v. Bergenthal*, 50 Wis. 474, 7 N. W. 352.

<sup>35</sup> *Atkinson v. Woodmansee*, 68 Kans. 71, 74 Pac. 640.

<sup>36</sup> *Burrell v. Way*, 176 Mass.

<sup>37</sup> *Real Estate Co. v. Phillips*, 90 Md. 515, 45 Atl. 174.

So long as the original and amended petitions are based upon the same contract between the same owner and name the same persons as parties defendant, it can not be said that the amended petition states a new cause of action.

§ 1606. **Evidence admissible.**—Evidence is admissible to show a mistake in the claim or certificate of lien; as, for instance, a statement in the certificate that the work was completed on the ninth day of December may be shown to be a mistake for the seventeenth day of December, in the absence of any interest of third parties, or proof of injury to the respondent;<sup>38</sup> though the result of the correction of the mistake is to bring the time of the filing of the certificate within the statutory period, when, according to the date of completion of the work as originally given, the filing of the certificate was not in due season, and no lien could be established under it.

Where a contractor has agreed to take payment in property, he is not thereby deprived of his lien, but the owner may in defense to his suit show that the contractor had agreed to take his pay in property, and that the defendant has always been ready to pay him in that way, and he may have that issue submitted to the jury for a special verdict.<sup>39</sup>

§ 1607. **Question for the court to determine whether a lien exists.**—It is a question for the court whether there is a lien or not.<sup>40</sup> It is also for the court to determine the pri-

164, 57 N. E. 335; *Miller v. Calumet Lumber & Mfg. Co.*, 121 Ill. App. 56. But where the petition contained no allegation that notice of the lien was filed, one court refused to allow this defect to be remedied by amendment after the statutory period for bringing action had elapsed. *Powers v. Badgers Lumber Co.*, 75 Kans. 687, 90 Pac. 254. But see

*Western S. & D. Co. v. Heiman*, 65 Kans. 5, 68 Pac. 1080.

<sup>38</sup> *Westland v. Goodman*, 47 Conn. 83.

<sup>39</sup> *Pierce v. Marple*, 148 Pa. St. 69, 23 Atl. 1008, 33 Am. St. 808.

<sup>40</sup> In Missouri it is a question for the jury. *Williams v. Porter*, 51 Mo. 441; *Brooks v. Blackwell*, 76 Mo. 309; *Mehl v. Fisher*, 13 Pa. Super. Ct. 330.

orities of different lienholders.<sup>41</sup> There are, however, cases which hold that the jury must not only find an indebtedness on the part of the defendant, but also that the plaintiff has taken the proper steps to secure his lien.<sup>42</sup>

Where there is a suit in equity to foreclose a lien and a cross action for damages, the parties have a right to have the cross action tried by a jury, but it is discretionary with the court whether it will submit a special question in the equity suit to the jury. The jury's answers in the equity suit would be simply advisory.<sup>43</sup>

**§ 1608. Judgment to direct a sale of owner's interest.**—The judgment should direct a sale of the owner's interest in the property rather than a sale of the property, and that the proceeds be applied to the satisfaction of the claim and the costs of suit.<sup>44</sup> A judgment which directs the sale of the lands and premises described may be modified so as to direct a sale of the defendant's right only.<sup>45</sup> If the ownership of the defendant is in fee, the lien is coextensive with the fee, and the sale carries the fee with it.<sup>46</sup>

In New York, where land is sold on foreclosure of a mechanic's lien, a writ will issue to put the purchaser in possession.<sup>47</sup>

<sup>41</sup> Carr v. Hooper, 48 Kans. 253, 29 Pac. 398.

<sup>42</sup> Hall v. Johnson, 57 Mo. 521; Williams v. Porter, 51 Mo. 441.

<sup>43</sup> Sandstrom v. Smith, 12 Idaho 446, 86 Pac. 416.

<sup>44</sup> Meehan v. Williams, 2 Daly (N. Y.) 367, 36 How. Pr. (N. Y.) 73; Bremen v. Foreman, 1 Ariz. 413, 25 Pac. 539; Smith v. Corey, 3 E. D. Smith (N. Y.) 642; Alt-hause v. Warren, 2 E. D. Smith (N. Y.) 657; Lenox v. Yorkville Co., 2 E. D. Smith (N. Y.) 673. The execution of such a judgment will not be enjoined in the absence of a showing of fraud. Meyer v.

Ives, 28 Colo. 461, 65 Pac. 627. The judgment declares the priority where there are different liens on the same property in:—California: See ante, § 1190. Colorado: See ante, § 1191. Idaho: See ante, § 1198. New Mexico: See ante, § 1217.

<sup>45</sup> Schmidt v. Gilson, 14 Wis. 514; Bailey v. Hull, 11 Wis. 289, 78 Am. Dec. 706.

<sup>46</sup> Reilly v. Hudson, 62 Mo. 383.

<sup>47</sup> O'Connor v. Schaeffel, 11 N. Y. S. 737, 25 Abb. N. Cas. (N. Y.) 344, 19 Civ. Proc. (N. Y.) 378, 33 N. Y. St. 143.

Where the statute directs that the amount of land required for the convenient use of the building shall "be determined by the court on rendering judgment," it is a fatal error to leave it to the sheriff to determine that question. The intention of the legislature is obvious. The court has power to call witnesses and after the facts are ascertained to make a proper finding and draw up the judgment accordingly.<sup>48</sup>

**§ 1609. Interest allowed from date of finding.**—Interest from the date of the petition is properly included in a judgment or finding in favor of the petitioner for a lien,<sup>49</sup> even if it is not claimed in the statement of the debt or in the petition.<sup>50</sup> If interest be charged in the bill of particulars, though no amount be carried out, if the evidence shows that the materials were furnished for cash, interest is properly chargeable from the date of the delivery of the last article furnished.<sup>51</sup> In other cases interest should be charged from the time of filing the claim of lien, for the lien debt must then be due.<sup>52</sup>

**§ 1610. Decree for sale of separate buildings on separate lots.**—In case there are separate buildings upon separate lots, it is error to decree a sale of the whole property in *solido*. The lien must be apportioned against each house and lot according to the value of the work and materials furnished upon each, and the decree should be for the sale of each separately to satisfy the separate lien upon each.<sup>53</sup>

<sup>48</sup> *Robertson v. Moore*, 10 Idaho 115, 77 Pac. 218.

<sup>49</sup> *Casey v. Weaver*, 141 Mass. 280, 6 N. E. 372; *McDonald v. Paterson & Co.*, 84 Ill. App. 326.

<sup>50</sup> *Johnson v. Boudry*, 116 Mass. 196; *Barstow v. Robinson*, 2 Allen (Mass.) 695; *Mills v. Heeney*, 35 Ill. 173.

<sup>51</sup> *Smith v. Shaffer*, 50 Md. 132.

<sup>52</sup> *German Luth. Church v. Heise*, 44 Md. 453.

<sup>53</sup> *Culver v. Elwell*, 73 Ill. 536; 541; *Steigleman v. McBride*, 17 Ill. 300; *Major v. Collins*, 11 Bradw. (Ill.) 658; *Curie v. Wright*, 140 Iowa 651, 119 N. W. 74.



§ 1611. Judgment where money has been paid into court.—When the lien has been discharged by payment into court, the judgment should direct payment out of the fund, and should not give a lien upon the property.<sup>54</sup> A judgment against the property would be erroneous, because this had already been freed from the lien, and the money had been substituted in its place.

§ 1612. Sale on Credit.—Where a statute provides that the property may be sold for cash, or on such credit as may seem best, property of considerable value should be sold on a reasonable credit, unless the circumstances appearing of record are peculiar.<sup>55</sup> Except where a statute or the judgment provides for giving credit upon the sale, the sale should be for cash.

§ 1613. Judgment for a deficiency.—It is proper in a judgment for the foreclosure of a lien to embody an order that, after the confirmation of the sale, judgment be rendered for any deficiency there may be.<sup>56</sup> This is proper under the general prayer for relief, though not specially demanded in the complaint; or the complaint may be treated as amended in that respect to conform to the order. The power to render a personal judgment is regarded as incidental to the enforcement of the lien. When the court has once acquired jurisdiction, it may render such a judgment as is equitably required.

Of course a personal judgment can not be rendered against

<sup>54</sup> *Dunning v. Clark*, 2 E. D. Smith (N. Y.) 535, 539.

<sup>55</sup> *Pairo v. Bethell*, 75 Va. 825.

<sup>56</sup> *Huse v. Washburn*, 59 Wis. 414, 18 N. W. 341; *Jarboe v. Temp-ler*, 38 Fed. 213; *Willer v. Bergen-thal*, 50 Wis. 474, 7 N. W. 352; *Durkee v. Koehler*, 73 Nebr. 833, 103 N. W. 767. *New York: Schaettler v. Gardiner*, 47 N. Y.

404, 41 How. Pr. (N. Y.) 243; *Mc-Graw v. Godfrey*, 56 N. Y. 610, 16 Abb. Pr. (N. S.) (N. Y.) 358; *Dar-row v. Morgan*, 65 N. Y. 333; *Bar-ton v. Herman*, 3 Daly (N. Y.) 320, 325, 8 Abb. Pr. (N. S.) (N. Y.) 399; *Althause v. Warren*, 2 E. D. Smith (N. Y.) 657; *Dennistoun v. McAllister*, 4 E. D. Smith (N. Y.) 729.

the owner where he is not a party to the contract with the plaintiff, and has not assumed the indebtedness, or otherwise become personally bound to the plaintiff for it.<sup>57</sup>

The right of a mechanic to a deficiency judgment against the person who employs the mechanic or purchases the material is not lost or waived by his proceeding to enforce the lien, or to recover from the owner the balance of the contract price unpaid.<sup>58</sup>

**§ 1614. A personal judgment to be rendered only for a deficiency after a sale.**—Where no valid lien for any amount exists at the time of the commencement of the proceeding to foreclose, the court can not entertain the proceeding for the purpose of granting a personal judgment.<sup>59</sup> The action

<sup>57</sup> *Williams v. Porter*, 51 Mo. 441; *Schmeiding v. Ewing*, 57 Mo. 78; *Hassett v. Rust*, 64 Mo. 325; *Reilly v. Hudson*, 62 Mo. 383; *Mauck v. Rosser*, 126 Ga. 268, 55 S. E. 32; *Copeland v. Dixie Lumber Co.*, (Ala.) 57 So. 124; *Augir v. Warder*, 68 W. Va. 752, 70 S. E. 719.

<sup>58</sup> *Bates v. Santa Barbara*, 90 Cal. 543, 27 Pac. 438; *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507; *Germania B. & L. Assn. v. Wagner*, 61 Cal. 349.

<sup>59</sup> *New York*: *Weyer v. Beach*, 79 N. Y. 409, 412, affg. 14 Hun (N. Y.) 231; *Childs v. Bostwick*, 65 How. Pr. (N. Y.) 146, 12 Daly (N. Y.) 15; *Burroughs v. Tostevan*, 75 N. Y. 567, 571; *Beals v. The Congregation*, 1 E. D. Smith (N. Y.) 654; *Cronkright v. Thomson*, 1 E. D. Smith 661; *Walker v. Paine*, 2 E. D. Smith (N. Y.) 662; *Quimby v. Sloan*, 2 E. D. Smith (N. Y.) 594, 609; 2 Abb. Pr. (N. Y.) 93; *Sin-*

*clair v. Fitch*, 3 E. D. Smith (N. Y.) 677; *Hubbell v. Schreyer*, 4 Daly (N. Y.) 362, 381, 14 Abb. Pr. (N. S.) (N. Y.) 284, revd. 56 N. Y. 604, 15 Abb. Pr. (N. S.) (N. Y.) 300; *Fogarty v. Wick*, 8 Daly (N. Y.) 166; *Huxford v. Bogardus*, 40 How. Pr. (N. Y.) 94; *Hickey v. O'Brien*, 11 Daly (N. Y.) 292; *Barton v. Herman*, 3 Daly (N. Y.) 320, 8 Abb. Pr. (N. S.) (N. Y.) 399; *Grant v. Vandercook*, 57 Barb. (N. Y.) 165, 171. *Illinois*: *Sprague v. Green*, 18 Bradw. (Ill.) 476, affd. 120 Ill. 416, 11 N. E. 859, where the court said: "The statute does not contemplate that there shall be any such thing as a personal decree alone." *Bouton v. McDonough*, 84 Ill. 384; *First Baptist Church v. Andrews*, 87 Ill. 172; *Martin v. Swift*, 120 Ill. 488, 12 N. E. 201. *California*: *Barber v. Reynolds*, 44 Cal. 519; *Southern Cal. L. Co. v. Schmitt*, 74 Cal. 625, 16 Pac. 516; *Santa Clara Val. Mill*

to enforce a mechanic's lien is in the nature of a proceeding in rem, and a personal judgment is only incident thereto; and the complainant, having failed to establish a lien upon the land, can not, in the same proceeding, have a judgment for the debt, as upon a distinct and independent claim of action.<sup>60</sup> But under a statute which provides that a mechanic's lien claimant, on establishing his claim, "shall have a judgment against the party personally liable," and also a decree establishing the lien, a lien claimant may have a personal judgment for the sum due him, though the lien itself fail.<sup>61</sup>

A personal judgment is not proper in a lien proceeding except against the owner or contractor who has promised to pay the consideration for the work and labor.<sup>62</sup>

§ 1614a. **Receivers.**—In the absence of any statutory provision authorizing it to be done, the complainant, in an action for the foreclosure of a mechanic's lien, is not en-

Co. v. Williams, 96 Cal. xviii, 31 Pac. 1128. Mississippi: Hursey v. Hassam, 45 Miss. 133. Washington: Hilderbrandt v. Savage, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109; Eisenbeis v. Wakeman, 3 Wash. St. 534, 28 Pac. 923. See, however, Bedsole v. Peters, 79 Ala. 133; Barnard v. McKenzie, 4 Colo. 251; Hart v. Mullen, 4 Colo. 512.

<sup>60</sup> Burroughs v. Tostevan, 75 N. Y. 567, 571; Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449, 4 Hun (N. Y.) 91, is an exceptional case, and is distinguished in the preceding case. Lowrey v. Svard, 8 Colo. App. 357, 46 Pac. 619. Contra, Cannon v. Williams, 14 Colo. 21, 23 Pac. 456; Finch v. Turner, 21 Colo. 287, 40 Pac. 565; St. Kevin

Min. Co. v. Isaacs, 18 Colo. 400, 32 Pac. 822.

<sup>61</sup> Crouch v. Moll, 56 Hun (N. Y.) 603, 8 N. Y. S. 183, 28 N. Y. St. 48, 3 Silvernail (N. Y.) 601; Cannon v. Williams, 14 Colo. 21, 23 Pac. 456; Lowrey v. Svard, 8 Colo. App. 357, 46 Pac. 619. Under the previous lien laws, if a lien failed, no personal judgment could be rendered. Barnard v. McKenzie, 4 Colo. 251. The statute under which Cannon v. Williams arose authorized the rendition of a judgment for the full amount of the claim proved.

<sup>62</sup> Gilmour v. Colcord, 183 N. Y. 342, 76 N. E. 273, modifying 96 App. Div. (N. Y.) 358, 89 N. Y. S. 689.

titled to a receiver of the rents and profits of the property pendente lite.<sup>63</sup>

§ 1615. **Judgment against contractor in suit by subcontractor.**—In a suit by a subcontractor, judgment for a deficiency may be entered against the contractor who is a party to the suit;<sup>64</sup> and in a few states he may have a personal judgment against the contractor, though he may fail to sustain a lien upon the property.<sup>65</sup> In fact, it has been held that a judgment charging the premises with a lien can not be rendered except as an incident to a personal judgment against some one holding a contract relation to the plaintiff.<sup>66</sup> But on the other hand it has been held that a judgment against the parties personally liable is not necessary to support a lien.<sup>67</sup>

§ 1616. **Costs.**—Generally, in the code states, an action to foreclose a lien is regarded as equitable in its nature,<sup>68</sup> and the court may, as in other equitable actions, exercise a discretion based upon equitable considerations in withholding or imposing costs.<sup>69</sup> But where the statute expressly gives

<sup>63</sup> *Stone v. Tyler*, 173 Ill. 147, 50 N. E. 688, revg. 67 Ill. App. 17; *Meyer v. Seebald*, 11 Abb. Pr. (N. S.) (N. Y.) 326; *Pratt v. Tudor*, 14 Tex. 37.

<sup>64</sup> *Eagleson v. Clark*, 2 E. D. Smith (N. Y.) 644; *Searly v. Wegenaar*, 120 App. Div. (N. Y.) 419, 104 N. Y. S. 1055; *Frost v. Falgetter*, 52 Nebr. 692, 73 N. W. 12. A personal judgment can not be taken against the owner in a suit by a subcontractor to enforce a lien on a debt due him by the contractor. *Ponti v. Eckels*, 129 Wis. 26, 108 N. W. 62; *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 982.

<sup>65</sup> *Williams v. Porter*, 51 Mo. 441; *Cole v. Barron*, 8 Mo. App.

509; *Alberti v. Moore*, 20 Okla. 78, 93 Pac. 543.

<sup>66</sup> *Steinkamper v. McManus*, 26 Mo. App. 51.

<sup>67</sup> *Russ Lumber & Mill Co. v. Garrettson*, 87 Cal. 589, 25 Pac. 747. The case of *Phelps v. Maxwell's Creek & Co. Min. Co.*, 49 Cal. 336, cited in support of the contention, only holds that the material-man, in an action to enforce a lien, is not entitled to a personal judgment against the owner.

<sup>68</sup> See ante, § 1559.

<sup>69</sup> *Weston v. Olsen*, 55 Wis. 613, 13 N. W. 700; *Charles v. Godfrey*, 125 Wis. 594, 104 N. W. 814; *Condon v. Church of St. Augustine*, 112 App. Div. 168, 98 N. Y. S. 253.

costs, the prevailing party recovers costs as a matter of right.<sup>70</sup>

Where no lien exists, the costs of filing notice thereof and counsel fees for its attempted enforcement can not be allowed.<sup>71</sup> The owner who does not defend can not be made personally liable for costs incurred by trial of issues between the claimant and the contractor; but, if the sums due from the owner to the contractor be sufficient to cover the lien and costs, the claimant is entitled to full satisfaction.<sup>72</sup>

The attorney's fees of the plaintiff are not a part of the costs, but are an incident to the foreclosure of the lien under statutes providing for the allowance of such fees.<sup>73</sup>

§ 1616a. **Attorneys' fees.**—Statutes allowing a lien claimant an attorney's fee are usually held unconstitutional.<sup>74</sup> Such a provision violates the fourteenth amendment of the federal constitution, which guarantees to every person the equal protection of the law, and the provisions of state constitutions which provide that general laws shall be uniform.

<sup>70</sup> *Weston v. Olsen*, 55 Wis. 613, 13 N. W. 700; *George v. Everhart*, 57 Wis. 397, 15 N. W. 387.

<sup>71</sup> *Bates v. Santa Barbara*, 90 Cal. 543, 27 Pac. 438.

<sup>72</sup> *Holler v. Apa*, 18 N. Y. S. 588, 17 N. Y. St. 485.

<sup>73</sup> *McIntyre v. Trautner*, 78 Cal. 449, 21 Pac. 15. In California, where the allowance of such fees is provided for, an attorney's fee will be allowed in the Supreme Court on the affirmance of a judgment foreclosing a lien. *Clark v. Taylor*, 91 Cal. 552, 27 Pac. 860. See *Jewell v. McKay*, 82 Cal. 144, 23 Pac. 139, as to reasonable allowance. An attorney's fee is provided for in Montana. *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280.

<sup>74</sup> *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 Pac. 962; *Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077; *Antlers' Park &c. Min. Co. v. Vincent*, 29 Colo. 284, 68 Pac. 226; *Campbell v. Los Angeles Gold Mine Co.*, 28 Colo. 256, 64 Pac. 194; *Davidson v. Jennings*, 27 Colo. 187, 60 Pac. 354, 48 L. R. A. 340, 83 Am. St. 49; *Perkins v. Boyd*, 16 Colo. App. 266, 65 Pac. 350; *Atkinson v. Woodmansee*, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325; *The Los Angeles &c. Co. v. Campbell*, 13 Colo. App. 1, 56 Pac. 246; *Manlowsky v. Stephan*, 233 Ill. 409, 84 N. E. 365; *Atkinson v. Woodmansee*, 68 Kans. 71, 74 Pac. 640, 64 L. R. A. 325; *Elkins v. Schillinger*, 151 Ill. App. 571.

prohibit special laws, and declare the inalienable rights of all men of acquiring, possessing, and protecting property. A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions, without founding the distinction on natural differences, is clearly violative of these constitutional provisions. Such a law imposes a penalty upon a defendant for exercising the common right of making a defense, without giving him a reciprocal right if he is victorious. It is immaterial under such acts whether the defendant successfully defeats the larger part of the claim; he may nevertheless be mulcted for the attorney's fee.<sup>75</sup> On the other hand such a statute has been held valid. The case reaching this conclusion was decided on the ground that the special class of lien claimants was singled out and protected upon some reasonable ground. The class of laborers provided for in the statute was singled out by the framers of the organic law and legislation for their special benefit was commanded. If there exists some just basis, some real public policy, or just need for the classification and distinction made in favor of the class of persons mentioned, or if there is some difference which bears a just and proper relation to the attempted classification, the act should be sustained. Applying this test the court held that the law was constitutional.

§ 1617.—**Reversal of decree of sale.**—A party to a suit to foreclose a mechanic's lien who purchases and goes into possession under a sale in the suit is treated as a purchaser relying upon the validity of the judicial sale. He is not

<sup>75</sup> *Dell v. Marvin*, 41 Fla. 221, 26 So. 188, 43 L. R. A. 201, 79 Am. St. 171; *Thompson v. Wise Boy Min. & Co.*, 9 Idaho 363, 74 Pac. 958; *Peckham v. Fox*, 1 Cal. App. 307, 82 Pac. 91; *Gray v. New Mexico Public Stone Co.*, 15 N. Mex. 473,

110 Pac. 603. The Indiana mechanic's lien statutes allowing the recovery of plaintiff's attorney's fees is held to be constitutional. *Duckwall v. Jones*, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797.

regarded as a mortgagee in possession, so as to be allowed the cost of a new building erected by him as against a prior mortgagee. Upon a reversal of the decree, the title acquired under the sale is divested, and any improvements he has placed upon the land are at his peril. If a decree be entered establishing a prior mortgage on the same property and ordering a sale, the surplus, after paying the mortgage debt and the lien debt, should be ordered to be paid to the purchaser at the prior sale, to apply upon the improvements made by him upon the premises, in case the original owner makes no defense and no claim to the surplus.<sup>76</sup>

**§ 1617a. Appeal.**—A decree that all mechanics' liens shall share equally in the proceeds of sale, after the payment of costs and the sums due certain mortgagees, is not a joint decree as respects the lienholders, but is several as to each, and one lienholder may alone take an appeal. In such case all the other lienholders are necessary parties, since the court could not subordinate their liens in their absence.<sup>77</sup>

A decree foreclosing a mechanic's lien against property without a personal judgment against the owner is a final judgment affecting the property and the owner is not entitled to have it reviewed either on appeal or writ of error.<sup>78</sup>

A decree in a proceeding to establish a mechanic's lien is final only when it terminates the litigation between the parties upon the merits of the case.<sup>79</sup>

<sup>76</sup> *Powell v. Rogers*, 105 Ill. 318.

<sup>77</sup> *Gray v. Havemeyer*, 53 Fed. 174, 3 C. C. A. 497, where personal judgment is rendered against some of the defendants, others, against whom a lien alone has been declared, may appeal without giving bond to secure the personal judgment. *Davidson v. Jennings*, 27 Colo. 187, 60 Pac. 354, 48

L. R. A. 340, 83 Am. St. 49. Any complainant in a consolidated action has the right to take an appeal. *Orman v. Crystal River & Co.*, 5 Colo. App. 493, 39 Pac. 434.

<sup>78</sup> *Marean v. Stanley*, 34 Colo. 91, 81 Pac. 759.

<sup>79</sup> *Jenkins & Reynolds Co. v. Wells*, 220 Ill. 452, 77 N. E. 236.

§ 1617b. **Distribution of proceeds of sale.**—The proper method of distributing the proceeds of sale where a mortgage lien intervenes, and is prior to some of the liens for labor and material and subsequent to others, is first to set aside, as applicable to the payment of liens under the statute, an amount of the proceeds equal to the amount of the liens prior to the mortgage; then next out of the remainder, if sufficient for that purpose, to pay the mortgage in full, and then to apply whatever is left, if anything, together with what was first set aside for that purpose, ratably among all the lien claimants in proportion to the amount due each, whether their liens attached prior or subsequently to the mortgage. This is in case all the lien claimants are to be paid without priority among themselves.<sup>80</sup>

§ 1617c. **Effect of agreement to postpone execution.**—An agreement to postpone the execution in a judgment to enforce a lien does not destroy the lien. An order to sell is not part of the mechanic's lien; this lien exists as well before as after an order of sale has been made and the mere postponement of the order does not destroy or affect the lien. In this respect it differs from the lien of an execution. The analogy is to a decree for foreclosure of a mortgage in which the mortgagor is allowed sixty days before the sale to redeem. In such case the lien of a junior mortgage would not be preferred to the senior incumbrance.<sup>81</sup>

<sup>80</sup> *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398.

*ence Mut. Bldg. L. & S. Assn.*, 104 Ala. 584, 18 So. 48.

<sup>81</sup> *Leftwich Lumber Co. v. Flor-*



## CHAPTER XL.

### LIENS OF MECHANICS AND OTHERS UPON RAILROADS.

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1666. Rhode Island.  
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 1670. Vermont.  
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1672. Washington.  
 1673. Wisconsin.  
 1674. Vendor's lien on railroad  
       company's land.  
 1675. Priority of mortgage over  
       subsequent judgment.

§ 1618. **General lien laws usually not applicable to railroads.**—The general lien laws in favor of mechanics and others who perform labor and furnish material for the construction of buildings are usually regarded as having no application to railroads, except so far as they give a lien for structure connected with railroads which come strictly within the designation of buildings.<sup>1</sup> Objection is made to the application of the general lien laws to railroads, for the reason that it is regarded as contrary to public policy to allow them to be sold in pieces and destroyed, when they

<sup>1</sup> *Graham v. Mt. Sterling Coal road Co.*, 14 Bush (Ky.) 425, 29 Am. Rep. 412; *Tommey v. Spartanburg & A. R. Co.*, 7 Fed. 429, 4 Hughes (U. S.) 640; *Buncombe v. Tommey*, 115 U. S. 122, 29 L. ed. 308, 5 Sup. Ct. 626; *Rutherford v. Cincinnati & P. R. Co.*, 35 Ohio St. 559. This case left undecided the question whether the general lien law of the state provided for a lien on bridges which form part of a railroad. But in a later case it was held that this statute included a railroad bridge. *Smith Bridge Co. v. Bowman* 41 Ohio St. 37, 52 Am. Rep. 66. A railroad bridge is not exempt from the lien on the ground that the enforcement of it would seriously interfere with the interests of traffic and trade. *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37, 52 Am. Rep. 66. See *Cleveland C. & S. R.*

*Co. v. Knickerbocker Trust Co.*, 86 Fed. 73, where it is held that a lien can not be asserted on a railroad bridge in Ohio under the general mechanics' lien law but can only be asserted under the railroad lien law. In support of the proposition in the text, see in particular *Buncombe v. Tommey*, 115 U. S. 122, 29 L. ed. 305, 5 Sup. Ct. 626, where Mr. Justice Harlan says: "A different construction of the statute would enable parties having liens for amounts within the jurisdiction of justices of the peace, to destroy a public highway and defeat the important objects which the state intended to subserve by its construction. No such intention should be imputed to the legislature, unless the words of the statute clearly requires it to be done."

are so necessary to public use and convenience.<sup>2</sup> This view seems to prevail in Pennsylvania,<sup>3</sup> and has been entertained elsewhere, and on this ground buildings of a railroad have been held not to be subject to lien under the general lien laws.

Other authorities, however, hold that a building erected for a railroad company is within a statute giving a lien for work done and materials furnished in the construction of "any dwelling-house or other building."<sup>4</sup> The doctrine that a railroad is an entire thing can not be applied, it is said, so as to cut off such a lien, because the property to which it attaches does not become a part of the entirety for that purpose, until the lien is discharged, any more than it would if the lien had been created by a mortgage executed by the company.<sup>5</sup>

<sup>2</sup> *Buncombe v. Tommey*, 115 U. S. 122, 29 L. ed. 308, 5 Sup. Ct. 626; *Tyler Tap. R. Co. v. Driscoll*, 52 Tex. 13; *McPheters v. Merimac Bridge Co.*, 28 Mo. 465; *Dunn v. North Mo. R. Co.*, 24 Mo. 493. The question was raised, but not decided, in *Boston v. C. & O. R. R. Co.*, 76 Va. 180. In *Schulenburg v. Memphis, C. & N. W. R. Co.*, 67 Mo. 442, a lien under the general mechanic's law was refused for lumber furnished to a railroad company for a freight depot. And in *Skrainka v. Rohan*, 18 Mo. App. 340, a lien was refused for a building erected as a freight depot and for office rooms, on land held by a railroad company in fee.

<sup>3</sup> *Foster v. Fowler*, 60 Pa. St. 27; *McIlvain v. Hestonville & M. R. Co.*, 5 Phila. (Pa.) 13.

<sup>4</sup> *Hill v. La Crosse & M. R. Co.*, 11 Wis. 214; *Botsford v. New Ha-*

*ven, M. & W. R. Co.*, 41 Conn. 454.

<sup>5</sup> *Hill v. La Crosse & M. R. Co.*, 11 Wis. 214; *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. 43 (affd. 59 Fed. 19, 7 C. C. A. 603); *Purtell v. Chicago & C. Bolt Co.*, 74 Wis. 132, 42 N. W. 265. In this case the lien laws were held to comprehend a railroad bridge, although it was part and parcel of the railway, and essential to its operation. The court observes: "But there is no public policy prevailing in this state against enforcing a laborer's lien upon any bridge or other structure of a railroad company, for work performed thereon, no matter whether such structure is or is not part and parcel of the railroad, or to what extent the enforcement of a lien thereon may interfere with or impede the operation of the railway, or the exercise by the

"Public policy," says Judge Deady,<sup>6</sup> "is manifested by public acts, legislative and judicial, and not private opinion, however eminent. I have no knowledge of any such public policy prevailing in this state. A railway is nothing but private property devoted to public use, the same as a warehouse, and is so far, and no further, the subject of public policy. The owner, be he a natural person or a private corporation, can disuse or dispose of it, in whole or in part, at his or its pleasure. \* \* \* But there is a public policy of this state, as shown by its legislation, that should be considered in this connection, which is that persons who furnish labor or materials to be used in the construction of railways shall have a lien thereon as a security for the value of such labor and materials. To promote this policy, and to produce the practical results intended by the legislature, the statute giving this lien should be construed so far as in reason and right it may, and all mere doubts as to the extent and manner of its application should be so resolved."

§ 1619. **Railroad considered as an entirety.**—That a railroad is an entirety, and that a lien can not attach to a section of it, or to a bridge or any other structure which is part of the road, is the view sustained by the greater number of authorities.<sup>7</sup> Even under a statute giving a lien for work

company of its corporate franchises. On the contrary, the public policy of this state is to enforce such a lien, and the company operates its railway, and uses its franchises, subject to the obligation to pay the claim of the lienor as established by the judgment. All this was settled by this court in *Hill v. La Crosse & M. R. Co.*, 11 Wis. 214, and the rules there established were not abrogated or shaken by the judgment in *Wilkinson v. Hoffman*, 61 Wis.

637, 21 N. W. 816, and have not been disturbed by any other adjudication of this court."

<sup>6</sup> *Giant Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. 470, 474, 8 L. R. A. 700. See also to same effect *Dnnavant v. Caldwell & N. R. Co.*, 122 N. Car. 999, 29 S. E. 837.

<sup>7</sup> *Dano v. Mississippi, O. & C. R. Co.*, 27 Ark. 564; *Cox v. Western Pac. R. Co.*, 44 Cal. 18, 47 Cal. 87; *Farmers' Loan & T. Co. v. Candler*, 87 Ga. 241, 13 S. E. 560; *Grham v. Mt. Sterling Coalroad Co.*,

done and materials furnished in constructing or improving the road-bed, rolling stock, station-houses, depots, bridges, or culverts of a railroad company upon such road-bed, station-houses, depots, bridges, rolling stock, real estate, and improvements of such railroad, the lien is against the whole road, and the whole must be sold.<sup>8</sup> This is upon the ground that it is against public policy to permit detached portions of a railroad to be sold under any judgment or execution.<sup>9</sup> If a lien under the general laws relating to mechanics' liens attaches to a railroad in its entirety, it can only be secured by filing the account in the proper clerk's office of every county or corporation through which the road passes in the state.<sup>10</sup>

It does not follow, however, that the lien attaches to all the rolling stock of a railroad, as well as the entire road-bed, and that there must be a sale of the whole rolling stock of the road under a judgment enforcing a lien against the road.

14 Bush (Ky.) 425, 29 Am. Rep. 412; Cleveland C. & S. R. Co. v. Knickerbocker Trust Co., 86 Fed. 73; Lyons v. Carter, 84 Mo. App. 483.

<sup>8</sup> Knapp v. St. Louis, K. C. & N. R. Co., 74 Mo. 374, 7 Amer. & Eng. R. Cas. 394, affg. 6 Mo. App. 205; Midland R. Co. v. Wilcox, 122 Ind. 84, 23 N. E. 506. Elliott, J., said: "Franchise can not be divided into fragmentary parts without injury to the public, to the owners of the road, and to the creditors. The public which grants these franchises have some interest in their exercise, and it is not to be presumed that the legislature meant to impair their interests." In Knapp v. St. Louis, K. C. & N. R. Co., 74 Mo. 374, 7 Amer. & Eng. R. Cas. 394, it was said: "A railroad, with its depots, bridges and other appurtenances, is no less an

entirety than a dwelling-house, with its kitchen, its chimneys and its doorsteps; and yet no one has ever supposed that a mechanic's lien could be enforced against the doorsteps or chimneys of a dwelling-house, or that they could be sold and removed, to the utter destruction of the whole property." See also to same effect Lyons v. Carter, 84 Mo. App. 483; Adams v. Grand Island & W. C. R. Co., 10 S. Dak. 239, 72 N. W. 577 (modified on rehearing, 12 S. Dak. 424, 81 N. W. 960).

<sup>9</sup> So held in numerous cases relating to ordinary executions. See cases cited in Knapp v. St. Louis, K. C. & N. R. Co., 74 Mo. 374, 7 Amer. & Eng. R. Cas. 394; Cranston v. Union Trust Co., 75 Mo. 29.

<sup>10</sup> Boston v. C. & O. R. Co., 76 Va. 180.

While the road-bed must be sold as an entirety, the rolling stock and other movable property of the road may be sold in such quantities as may be necessary to satisfy the judgment. This distinction is specifically made by the Constitution of the state of Missouri, which declares the rolling stock and other movable property of a corporation to be personal property, and to be subject to execution and sale in the same manner as the personal property of individuals.<sup>11</sup> The rolling stock of a railroad does not constitute a part of its real estate, and a mechanic's lien upon the railroad does not embrace such property.<sup>12</sup>

Where a part only of a railroad lies within the state under the laws of which the lien is enforced, the lien can not, of course, be enforced against that part of the road not within the state;<sup>13</sup> but it must be enforced against the whole of that part within the state, and not against a section or portion of it only.<sup>14</sup>

§ 1620. **Railroad regarded as one improvement.**—The fact that the road was built in sections, and that there was a separation in space and time in the construction of the different sections, does not avail to prevent the railroad from being regarded as one improvement. On the contrary, a lien for work upon any part of the road attaches to the entire road.<sup>15</sup> Mr. Justice Miller said: "In every respect,

<sup>11</sup> Constitution of 1875, art. 12, § 16.

<sup>12</sup> *Neilson v. Iowa Eastern R. Co.*, 51 Iowa 184, 33 Am. Rep. 124. As to the legal nature of rolling stock of railroads, see *Jones on Corporate Bonds and Mortgages*, (3d ed.), §§ 121-168, where the subject is examined at length, and with reference to the statutory provisions.

<sup>13</sup> *St. Louis Bridge & Construc-*

*tion Co. v. Memphis, C. & N. W. R. Co.*, 72 Mo. 664.

<sup>14</sup> *Knapp v. St. Louis K. C. & N., R. Co.*, 74 Mo. 374; *Cranston v. Union Trust Co.*, 75 Mo. 29; *Ireland v. Atchison, T. & S. F. R. Co.*, 79 Mo. 572.

<sup>15</sup> *Broks v. Railway Co.*, 101 U. S. 443, 451, 25 L. ed. 1057. The case of *Canal Co. v. Gordon*, 6 Wall. (U. S.) 561, 18 L. ed. 894, where it was held that the part

except this one of its construction, the road is a unit, an entirety. Its route is selected and surveyed as one road. It is owned and built and run by one corporation. Its trains run over it all. The mortgage of appellants can have no lien on any of the road beyond the first few miles upon any other theory, for its descriptive language refers to the road as one and not as several subdivisions. It is not easy to see how it can be held to be one road for the purposes of the mortgage, and two or three pieces of road for the purposes of the mechanic's lien."

§ 1621. No lien on subscription for railroad.—A contractor who has done the work upon a section of a railroad has no lien upon a subscription made expressly for the building of that section, unless by special agreement. The company may apply the subscription to the payment of other debts of the company, and no one but the subscriber can complain. Though the company expressly contracted with the subscriber that the subscription should be applied to the construction of that particular part of the road, and the contractor may have contracted upon the faith that this fund would build this part of the road, still he has no lien upon it.<sup>16</sup>

of the canal first finished was not to be subject to a lien for work done on that constructed afterwards, is distinguished on the ground that the first part had been in full operation for some time before the work for which a lien was claimed was done upon the other part; and the time may have been long enough to justify the belief that for a time the further prosecution of the work had been abandoned. But the more conclusive consideration was, that the doctrine of this case is at vari-

ance with the decisions of the state of Iowa, construing her own statute, which the Supreme Court is bound to follow in a case arising in that state. And see *Neilson v. Iowa Eastern R. Co.*, 51 Iowa 184, 33 Am. Rep. 124; *Cox v. Western Pac. R. Co.*, 44 Cal. 18, 47 Cal. 87; *Adams v. Grand Island & W. C. R. Co.*, 10 S. Dak. 239, 72 N. W. 577 (modified, on rehearing, 12 S. Dak. 424, 81 N. W. 960).

<sup>16</sup> *Myer v. Dupont*, 79 Ky. 416, 3 Ky. L. 36.

§ 1622. **Railroad bridge not a building.**—A railroad bridge is not a building within the meaning of the word in a general lien law. Thus, under a statute giving a lien for work done or materials furnished in the erection or construction of “any dwelling-house or other building,” a railroad bridge is not included as subject to the lien.<sup>17</sup> A bridge is not a “building.” This word is common usage, and in its exact signification as well, means a structure designed for the habitation of man or animals, or for the sheltering of property. A bridge may be built, but the structure is not a building. A railroad may be built, and the structure is just as much a building as is a bridge. The statute, also, by speaking of the lot on which the building stands, and making the interest of the owner therein, to an amount not exceeding one acre in a city or forty acres in the country, liable to the lien, indicates that it did not contemplate any such structure as a bridge.

But a general lien law which gives a lien upon “any bridge” applies to railroad bridges, and the enforcement of such a lien is declared to be within the public policy of the state of Wisconsin.<sup>18</sup>

§ 1623. **Railroad bridge not an improvement.**—A railroad bridge is not an improvement within the meaning of that word as used in a general lien law. Under a former lien law of Missouri, applicable to the county of St. Louis, it was held that there could be no lien for labor performed or materials furnished for the construction of bridges and culverts upon a railroad, although the law gave such a lien for “improvements” as well as buildings. The decision was placed upon the ground that a railroad is a public work, established by public authority for the public use and benefit; and that a lien, with a power of enforcing it by execution,

<sup>17</sup> *La Crosse & M. R. Co. v. Vanderpool*, 11 Wis. 119, 78 Am. Dec. 691.      <sup>18</sup> *Purtell v. Chicago Forge & Bolt Co.*, 74 Wis. 132, 42 N. W. 265.



would subject the portion of the road affected by it to sale, and might deprive the public of the benefit contemplated in the grant of the corporate franchises. The Constitution of the state then required the fostering of public improvements, and the state had assumed great responsibilities in building railroads for the public use, and it was regarded as unreasonable to suppose a power remained in any individual to deprive the public of the benefit of such improvements.<sup>19</sup>

§ 1623a. Tools used in building bridge not materials used.—Under a statute giving a lien on a bridge for all materials used “in or about” its construction, one furnishing a contractor with machinery wherewith to build a bridge could not have such a lien, for the machinery did not enter into the structure and become a part of it. It was a part of the contractor’s plant, and retained its identity and fitness for further use.<sup>20</sup> But giant powder furnished by the manufacturer to a contractor for the construction of a railway, and used by the latter in the progress of such work, is “material,” within the purview of the lien law for the value of which such manufacturer is entitled to a lien on the railway, or such portion thereof as the powder was used in the construction of.<sup>21</sup>

§ 1624. Terms “structure,” “erection,” or “improvement.”—The general lien laws in some of the states give a lien for labor done and materials furnished in the erection or alteration not only of a house or other building, but also of any “structure,” “erection,” or “improvement” upon land. Under these general terms it is of course possible to establish a lien for almost anything that can be attached to the realty. Accordingly, under such a statute, a lien has

<sup>19</sup> *Dunn v. North Mo. R. Co.*, 24 Mo. 493.

<sup>21</sup> *Giant Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. 470, 8 L. R. A.

<sup>20</sup> *Basshor v. Baltimore & O. R. Co.*, 65 Md. 99, 3 Atl. 285.

700.

been established against a railroad for ties furnished the company;<sup>22</sup> and doubtless a lien might be established for almost any part of a railroad, such, for instance, as the grading of the line of road as an "improvement" upon land. The application of such statutes has not often been the subject of adjudication, because in nearly all the states there are now statutes which apply specifically to railroads, giving liens for labor performed and materials supplied in their construction and repair. "A railway is literally and technically a 'structure.' It consists of the bed or foundation, which may be of earth, stone, or trestlework, on which are laid the ties and rails. These, taken together, constitute a 'structure' in the full sense of the word,—a something joined together, built, constructed."<sup>23</sup>

Under a statute giving a lien upon a "railroad" or "any other structure," and the land upon which it is erected, there can be no lien upon a street railway, because there can be no lien upon the land, the fee of the street being in the city, or in the owners of the adjacent land.<sup>24</sup>

§ 1625. **Lien for railroad ties superior to lien of mortgage.**—Under a statute providing that a mechanic's lien for work and material shall attach from the commencement of "the building, erection, or other improvement," it has been held that a lien for railroad ties may be sustained against a mortgage made before such ties were furnished to the company or contracted for, in case the construction of the road had been commenced before the making of the mortgage,

<sup>22</sup> Neilson v. Iowa Eastern R. Co., 44 Iowa 71, 51 Iowa 184, 33 Am. Rep. 124, 8 Am. Rep. 82. The decision in this case is fully stated and examined in the following section. Other states have similar statutes.

<sup>23</sup> Giant Powder Co. v. Oregon Pac. R. Co., 42 Fed. 470, 8 L. R.

A. 700, per Deady, J. And see Forbes v. Willamette Falls Electric Co., 19 Ore. 61, 23 Pac. 670, 20 Am. St. 793; H. C. Houston Lumber Co. v. Wetzel & T. R. Co., 69 W. Va. 682, 72 S. E. 786.

<sup>24</sup> Front St. Cable R. Co. v. Johnson, 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693.

and was not then completed, although the person who furnished the ties and claimed the lien had nothing to do with the previous construction of the road.<sup>25</sup> In the case before the court, sixteen miles of road had been graded before the making of the mortgage, and the ties were, some months afterwards, furnished apparently to a contractor who had undertaken to equip the road. Upon the first argument of the case before the Supreme Court of Iowa, the lien was established against the road, subject to the mortgage;<sup>26</sup> but upon a reargument of the case, the lien was given priority of the mortgage, by reason of the terms of the statute, which was interpreted to mean something different from a statute providing that the lien shall attach only from the commencement of the work, or of the furnishing of the materials.<sup>27</sup> In the latter decision, in reply to the suggestion that it would be unjust to the mortgagee to make his mortgage subject to liens for work subsequently commenced, it was urged that a person who takes a mortgage upon a partially constructed building or other improvement has notice, from the condition of the property, of the possibility that mechanics' liens may attach upon it; that, although he can not know the amount of the lien, or whether the work will

<sup>25</sup> Neilson v. Iowa Eastern R. Co., 44 Iowa 71, 51 Iowa 184, 33 Am. Rep. 124, 8 Am. R. Rep. 82. And see Taylor v. Burlington, C. R. & M. R. Co., 4 Dill. (U. S.) 570, Fed. Cas. No. 13783, 11 West Jur. 337, 4 Cent. L. J. 536; Brooks v. R. Co., 101 U. S. 443, 25 L. ed. 1057; Meyer v. Hornby, 101 U. S. 728, 25 L. ed. 1078. It must be confessed that, under this statute, or under this construction of it, a mortgage of an unfinished railroad is, in Iowa, a very poor security. Reynolds v. Manhattan Trust Co., 83 Fed. 593, 27 C. C. A. 620.

<sup>26</sup> Neilson v. Iowa Eastern R.

Co., 44 Iowa 71, 51 Iowa 184, 33 Am. Rep. 124, 8 Am. R. Rep. 82. Followed in Brooks v. R. Co., 101 U. S. 443, 25 L. ed. 1057; Meyer v. Hornby, 101 U. S. 728, 25 L. ed. 1078.

<sup>27</sup> Code 1897, § 3095, provides that such liens "shall be preferred to all other liens and incumbrances which may attach to or upon such buildings, erections, or other improvements, and to the land on which they are situated, made subsequent to the commencement of said buildings, erections, or other improvements."

be completed in pursuance of the plan of the mortgagor, according to which the work was commenced, yet, having elected to deal with the mortgagor, he may be required to rely upon his good faith and prudence; and that, although hardship might sometimes result from such a construction, yet the danger to be apprehended is not such as to control the construction of a statute having so little ambiguity. "In regard to the policy of the statute, as we construe it," say the court, "this may be said: it is not desirable that the execution of a mortgage upon land upon which a building or other improvement is in process of construction should arrest the work and prevent its completion. Both mortgagor and mortgagee are interested in its completion. Without it, the money already expended must ordinarily, to a great extent be lost. Take the present case as illustration. The intervenors are holders of mortgage bonds upon a road, sixteen miles of which had been graded at the time the mortgage was made. The value of their security depended upon the further construction of the road. They foresaw that work and materials must be furnished by somebody or nothing could be realized from what had been done. Yet the construction of the statute which they contend for would require the mortgagor to keep a fund on hand for the daily payment of the laborers, and material-men, or that the work and materials should be furnished practically, without security."

The construction of this statute adopted by the court proceeds upon the ground that a railroad is an entirety; so that, if the work of construction of any portion of the road has been commenced before the execution of the mortgage, it does not matter that the particular work was done, or the materials were furnished, for some other portion of the road, and after the execution of the mortgage. The claim relates back to the commencement of the work.

§ 1625a. **Prior mortgage on railroad property superior to mechanic's lien.**—A recorded mortgage, given by a railroad company on its road-bed and other property, creates a lien whose priority can not be displaced thereafter by any compact between the company and a third party for the erection of buildings or other works of original construction.<sup>28</sup> In the case first cited, Mr. Justice Brewer said: "It is true cases have arisen in which, upon equitable reasons, the priority of a mortgage debt has been displaced in favor of even unsecured subsequent creditors."<sup>29</sup> But the principles underlying these cases have no application here. "The work which Hamilton [the contractor] did was in original construction, and not in keeping up, as a going concern, a railroad already built. The amount due him was no part of the current expenses of operating the road. There was, as to him, no diversion of current earnings to the payment of current expenses."

§ 1626. **Rule in some states.**—In several states, priority in respect to buildings is given to a lien over a mortgage executed before the commencement of the building or other improvement. The lien attaches in preference to any prior mortgage; "the court may, in its discretion, order and direct such building, erection or improvement to be sold separately under execution, and the purchaser may remove the same in such reasonable time as the court may fix."<sup>30</sup> The relative rights of a mortgagee of a railroad and a mechanic, in

<sup>28</sup> Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. 546; Dunham v. Cincinnati, Peru & R. Co., 1 Wall. (U. S.) 254, 267, 17 L. ed. 584; Mather Humane Stock Transp. Co. v. Anderson, 76 Fed. 164, 22 C. C. A. 109; Ten Eyck v. Pontiac, O. & P. A. R. Co., 114 Mich. 494, 72 N. W. 362.

<sup>29</sup> See St. Louis, A. & T. H. R.

Co. v. Cleveland, C., C. & I. R. Co., 125 U. S. 658, 673, 31 L. ed. 832, 8 Sup. Ct. 1011, in which many such cases are collected; Porter v. Pittsburg Bessemer Steel Co., 120 U. S. 649, 671, 30 L. ed. 830, 7 Sup. Ct. 741; Jones on Corporate Bonds and Mortgages (3d. ed.), §§ 584, 585.

<sup>30</sup> Code 1897, § 3095.

such case, would be that the mortgagee would retain his priority as to the land; but the mechanic would have priority over the mortgagee as to the buildings, erections or improvements put upon the land subsequent to the mortgage, and might enforce his lien upon the building or other independent structure by causing it to be sold and removed.<sup>31</sup>

§ 1627. **Liens for repairs subordinate to lien of existing mortgage.**—Liens for repairs of a completed railroad are subordinate to an existing mortgage of the road. A petition was filed by a firm of bridge-makers to establish a lien for one span of a bridge furnished to a railroad after it had been fully completed and was in operation.<sup>32</sup> A portion of a bridge had been broken down or carried away by high water, and the span for which a lien was claimed was to replace this. The court held that any lien which could be claimed would be subject to the mortgage. Judge Dillon, delivering the opinion of the court, said: "As against the owner, the lien attaches from the time the repairs are begun. This is plain enough, and just. But when does this lien attach as against a prior mortgagee of land and building? The answer is, at the same time it attaches as against the owner. The result is that repairs on a previously completed building or railway on which a mortgage rested prior to the commencement of such repairs, do not give a lien which will override the lien of the mortgage. The legislature has

<sup>31</sup> Taylor v. Burlington, C. R. & M. R. Co., 4 Dill. (U. S.) 570, Fed. Cas. No. 13783, 11 West Jur. 337, 4 Cent. L. J. 535, per Dillon, J. And see Getchell v. Allen, 34 Iowa 559; Equitable L. Ins. Co. v. Slye, 45 Iowa 615.

<sup>32</sup> Taylor v. Burlington, C. R. & M. R. Co., 4 Dill. (U. S.) 570, Fed. Cas. No. 13783, 11 West Jur. 337, 4 Cent. L. J. 535. Judge Dillon, in this case, remarked that there were

probably forty intervening petitions filed in the various railway foreclosure cases pending at that time, in that court, seeking to establish, on behalf of claimants, mechanics' liens upon the property covered by the railway mortgages. Waters-Pierce Oil Co. v. United States-Mexican Trust Co., 44 Tex. Civ. App. 397, 99 S. W. 212.

not authorized the owner of a building or railway, on which such owner has given a mortgage, to improve the mortgagee out of existence by making repairs ad libitum, and furnishing the owner the necessary credit therefor, by giving the mechanic and material-man a lien paramount to the mortgage. Such a view has neither law, justice, equity, nor public policy to recommend it."

The same rule is applicable in respect to any repairs made upon a mortgaged railroad already completed and in operation, such as the laying of new steel or iron rails. There may be a lien for such repairs, but it is subject to the lien of the mortgage.<sup>33</sup>

It would seem that there could be no mechanics' lien upon a railroad for engines or cars furnished for use upon it, although the seller verbally reserved the title until payment shall be made.<sup>34</sup>

**§ 1628. Liens of contractors and laborers.**—It is within the legitimate scope of legislative power to provide that laborers and contractors may have liens for labor performed and for materials furnished in the construction or improvement of a railroad in preference to all mortgages or other incumbrances placed upon the property subsequent to the passage of the act. The statute of the state of Missouri to this effect was held by the circuit court of the United States to be constitutional, and to give priority to such claims over a mortgage executed just after the passage of the act; the phrase "subsequent to the passage of this act" being interpreted to mean subsequent to the approval of it by the governor, and not subsequent to the expiration of ninety days

<sup>33</sup> Taylor v. Burlington, C. R. & M. R. Co., 4 Dill. (U. S.) 570, Fed. Cas. No. 13783, 11 West Jur. 337, 4 Cent. L. J. 535.

<sup>34</sup> See New England Car Spring Co. v. Baltimore & O. R. Co., 11

Md. 81, 69 Am. Dec. 181; Taylor v. Burlington, C. R. & M. R. Co., 4 Dill. (U. S.) 570, Fed. Cas. No. 13783, 11 West Jur. 337, 4 Cent. L. J. 535.

from the passage of the act, at which time, by general law, every act takes effect, unless a different time is therein appointed.<sup>35</sup>

§ 1629. **Who a laborer.**—A general agent or superintendent of a corporation employed at a stipulated salary is not entitled to the benefit of a lien in favor of mechanics, builders, lumbermen, artisans, workmen, laborers, or other persons who may perform any work upon or furnish materials for any building. Such an agent or superintendent stands in the place of the corporation itself towards others intended to be protected by the law.<sup>36</sup> Nor is a contractor who agrees to build a railroad, or to furnish the labor of others, a laborer or servant;<sup>37</sup> nor is the secretary of a corporation a laborer or servant;<sup>38</sup> nor is a consulting engineer a laborer or operative;<sup>39</sup> nor is a civil engineer a laborer or workman;<sup>40</sup> nor is a time-keeper and superintendent in the employ of a contractor a laborer;<sup>41</sup> nor is a subcontractor an employee.<sup>42</sup>

§ 1630. **Lien of laborer personal.**—The right conferred by a lien in favor of laborers is personal, and can not be availed of by one who furnishes labor. Under the statute of

<sup>35</sup> Walker v. Mississippi Val. & W. R. Co., 2 Cent. L. J. 481; Strang v. Richmond, P. & C. R. Co., 101 Fed. 511, 41 C. C. A. 474.

<sup>36</sup> Smallhouse v. Kentucky & Mont. G. & S. M. Co., 2 Mont. 443; Blakey v. Blakey, 27 Mo. 39.

<sup>37</sup> Balch v. New York & O. M. R. Co., 46 N. Y. 521; Aiken v. Watson, 24 N. Y. 482; Little Rock, H. S. & T. R. Co. v. Spencer, 65 Ark. 183, 47 S. W. 196, 42 L. R. A. 334. A subcontractor is not entitled to a lien as a laborer under the provisions of the Texas railroad laws. Ft. Worth & D. C.

R. Co. v. Read Bros. & Montgomery (Tex. Civ. App.), 140 S. W. 111.

<sup>38</sup> Coffin v. Reynolds, 37 N. Y. 640; Wells v. Southern Minn. R. Co., 1 Fed. 270, 1 McCrary (U. S.) 18.

<sup>39</sup> Ericsson v. Brown, 38 Barb. (N. Y.) 390.

<sup>40</sup> Pennsylvania & D. R. Co. v. Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189.

<sup>41</sup> Missouri, K. & T. R. Co. v. Baker, 14 Kans. 563.

<sup>42</sup> Ney v. Dubuque & S. C. R. Co., 20 Iowa 347.



New Jersey,<sup>43</sup> giving to the laborers in the employ of any corporation, in case of its insolvency, a lien upon its assets for the amount of wages due them, it is held that the right conferred is personal, inhering alone in the person who actually performs labor or service, and not in one who furnishes the labor of others under a contract. Thus one who has contracted with a railroad company, whose road is located in New Jersey and has its terminus at Jersey City, to transfer by his own teams or drays over the company's ferry all freight received in New York for transportation over the road, and all freight received in Jersey City to be delivered in New York, is not an employé entitled to such lien, but a contractor.<sup>44</sup> "I think it is very plain," said the vice-chancellor, "the legislature did not intend to give a lien or preference for wages due for vicarious labor or service, or to confer upon one person the power to depute or delegate to himself the labor of many others, so that he can be an employé of a corporation to the extent of one hundred or one thousand men daily. Such a purpose would have been expressed by giving preference to the debt, as that all debts due for labor or service should be a lien, and not to the creditor, as it now stands, that the employés in the employ of a corporation shall have a lien upon its assets for the wages due to them respectively." Moreover, the obvious purpose of the statute was, in the first place, to render it certain that the laborers whose services are essential to the continued operation of a railroad or like enterprise should be paid in any event, so that there should not be even a temporary suspension of the business; and, in the second place, to protect a class of persons who are dependent upon their wages for support, and who are unable to protect themselves against the misfortune or fraud of the company. The preference given by the statute grows out of the char-

<sup>43</sup> Comp. Stats. 1919, p. 1650.  
§ 83.

<sup>44</sup> Lehigh Coal & Nav. Co. v.  
Central R. Co., 29 N. J. Eq. 252.

acter of the creditor, and not out of the character of the debt.

Under such statute, persons holding claims for wages, who are not in the employ of the corporation at the time it becomes insolvent, are not within the policy of the act, and have no lien under it; but laborers in its employ at that time have a lien for the whole amount due them, no matter how long before the date of insolvency the wages may have accrued. The lien does not, however, include interest which has accrued before that time.<sup>45</sup>

§ 1631. **No lien for money advanced to laborers.**—No lien can be claimed for money advanced to laborers at the request of a railroad company. Thus, if certificates of indebtedness issued by a railroad company to its laborers for work are taken up by a third person, at the request of the company and on its agreement to settle with him for the same, he is entitled to recover of the company for money advanced; but he can not claim a lien for goods and supplies furnished necessary for the operation of its road, under contract therefor. The fact that the certificates were issued to enable the laborers to procure board, and to enable boardinghouse keepers to obtain groceries and provisions for hands engaged in the construction of the road, does not enable one who has advanced money to take up such certificates to claim that he has supplied goods under contract necessary for the operation of the road. The statute embraces materials used, supplies furnished and labor performed, in constructing, repairing, operating or maintaining a railroad; but not money loaned to the company, or paid to

<sup>45</sup> Delaware, L. & W. R. Co. v. Oxford Iron Co., 33 N. J. Eq. 192. In Texas it is held that a lien secured to laborers upon a railroad may be assigned by transferring properly certified evidence

of the debt for labor performed for the company, and may be enforced by the assignee. Austin & N. W. R. Co. v. Rucker, 59 Tex. 587.

its creditors at its request. A person advancing money upon such certificates can not stand in the place of the former holders in respect to their lien, because the lien is not assignable at law.<sup>46</sup>

§ 1632. **Equitable subrogation to lien.**—One who lends or advances money to a corporation voluntarily, to enable it to pay laborers who would have been entitled to a lien therefor, is not, merely by virtue of such loan or advance, entitled to such lien by way of equitable subrogation. Thus, where the superintendent of the work of constructing a railroad, without any contract with the company for substitution to the liens of the workmen employed under him, but merely to befriend them, advanced his own money to pay their wages, it was held that he was not entitled to enforce their statutory lien for those payments.<sup>47</sup> Where at the request of a railroad company its agent pays taxes due on its property he becomes entitled to a lien for the amount advanced and such a lien is superior to the lien of a mortgage.<sup>48</sup>

§ 1633. **Contractor who is stockholder not estopped from asserting contractor's lien.**—A contractor is not estopped from setting up his lien as against the mortgagee for the

<sup>46</sup> *Cairo V. R. Co. v. Fackney*, 78 Ill. 116.

<sup>47</sup> *In re North River Const. Co.*, 38 N. J. Eq. 433, 437 (aff'd., 40 N. J. Eq. 340). Chancellor Runyon said: "The statutory lien given to workmen is to be confined within its legitimate limits. It is not to be extended, by a forced application of the principle of subrogation in equity to cases not within the mischief which the law was designed to remedy. The object of the legislature was to secure to a very meritorious but helpless

class of persons the payment of the wages of their toil, and to that end to give them, personally a paramount lien on the assets of the employer. It did not contemplate giving to creditors from whom the company might borrow money on its own credit with which to pay its workmen, such a lien on the assets for their reimbursement."

<sup>48</sup> *Farmers' Loan & Trust Co. v. Stuttgart & A. R. R. Co.*, 92 Fed. 246.

reason that he is a stockholder in a construction company which, when it placed on the market the bonds secured by the mortgage, gave a guaranty that the local subscriptions and grants should be sufficient to prepare the road for the reception of the rails, and also undertook to make good any deficiency. If the bondholders sustained any loss by reason of the guaranty, the company which gave it is liable in damages.<sup>49</sup>

**§ 1633a. Statute creating liens upon railroads.**—In a great majority of the states there are now statutes giving liens specifically upon railroads for labor performed and materials supplied in their construction or operation. These statutes are so diverse in their operation, and have a bearing so important upon the value of the securities issued by companies whose roads are subject to these laws, that it is deemed best to give the leading provisions of the statutes in full. It will be observed that in several states the general mechanics' lien law includes a lien for work done and materials furnished in the construction or repair of a railroad, notwithstanding the difficulties that exist in applying these general provisions to such property as a railroad.

**§ 1634. Alabama.**<sup>50</sup>—A lien is created in favor of laborers and employees of any railroad company operated in the state, except the officers of said companies, for all debts due to them for work and labor done and performed by them for such company; and such lien extends to all the property, rights, effects, and credits of every description of such railroad company situated in this state.

**§ 1635. Arizona.**<sup>51</sup>—All contractors, subcontractors, laborers, operatives and other persons who may labor, or furnish labor, teams, material, machinery, fixtures, or tools, in the

<sup>49</sup> *Meyer v. Hornby*, 101 U. S. 728, 25 L. ed. 1078.

<sup>50</sup> Civ. Code 1907, § 4794.

<sup>51</sup> Rev. Stat. 1901, § 2902.

construction or repair of any railroad, locomotive, car, or other equipment, or who may labor in the operating of a railroad, and to whom money or wages are due or owing for such labor or material, shall hereafter have a lien upon such railroad and its equipment for such sums as are unpaid.

§ 1636. **Arkansas.**<sup>52</sup>—Every mechanic, contractor, subcontractor, builder, artisan, workman, laborer, or other person who shall do or perform any work or labor, or cause to be done or performed any work or labor upon, or furnish any materials, machinery, fixtures or other things toward the building, construction or equipment of any railroad, or to facilitate the operation of any railroad whether completed or not, and every person who performs work of any kind in the construction or repair of any railroad, whether under contract with the railroad or with a contractor or subcontractor thereof, and every person who furnishes any board, provisions or supplies for any employees, or teams of any railroad employed in the construction or repair thereof with the consent or authority of the person authorized to make such construction or repair; and every person who shall sustain loss or damage to person or property from any railroad for which a liability may exist at law, and every person who performs any valuable services, manual or professional, for any railroad by or from which such railroad receives a benefit, shall have a lien on said railroad for said labor, materials, machinery, fixtures, board, provisions, supplies, loss, damage and services upon the road-bed, buildings, equipments, income, franchise, right-of-way, and all other appurtenances of said railroad superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees and beneficiaries under trusts or owners.

<sup>52</sup> Dig. of Stats. 1904, § 6661.

§ 1637. **California.**<sup>53</sup>—The general mechanics' lien law provides that every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair of, any building, bridge, railroad, or any other structure, shall have a lien upon the same. Under such statute a lien can not be acquired on a portion of the road, but must be filed on the entire road. One contractor or subcontractor can not file a lien for the part of the road upon which he worked, or for which he furnished material, so that while one might acquire a lien upon a bridge another might have a lien upon a tunnel, and a third upon a culvert. Neither does the statute contemplate that there may be a separate lien upon each mile or section of the road.<sup>54</sup>

§ 1638. **Colorado.**<sup>55</sup>—By the general mechanics' lien law, all persons who perform labor upon or who furnish materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any railroad, bridge, tunnel, wagon road, tramway or any other structure or improvement, upon land, shall have a lien upon the property upon which they have rendered service or bestowed labor or for which they have furnished materials. Such liens attach to all the franchises and charter privileges that may in any manner pertain to said specified property. The liens granted by this act shall extend to and cover so much of the lands whereon such building, structure or improvement shall be made as may be necessary for the convenient use and occupation of such building, structure or improvement, and the same shall be subject to such liens.

<sup>53</sup> See ante, § 1190; Code Civ. Proc. 1906, § 1183. A material-man who furnishes materials to a subcontractor for railroad construction is given a lien. *Midland Val. R. Co. v. Moran Bolt & Nut Mfg. Co.*, 80 Ark. 399, 97 S. W. 679. For a sufficient description

of a railroad in a lien claim against it, see, *Brigham v. Knox*, 127 Cal. 40, 59 Pac. 198.

<sup>54</sup> *Cox v. Western Pac. R. Co.*, 44 Cal. 18, 47 Cal. 87.

<sup>55</sup> *Mills' Ann. Stats.* 1912, §§ 4580, 4582, 4586. See also, ante, § 1191.

§ 1639. **Connecticut.**<sup>56</sup>—Every railroad for the construction of which, or of any of its appurtenances, any person shall have a claim for materials furnished or services rendered, under any contract with or approved by the corporation owning or managing such road, is subject, with its real estate, right of way, material, equipment, rolling stock, and franchise, to the payment of such claim, and said claim shall be a lien on said railroad, railroad property, and franchise; and the manner of asserting and perfecting such lien, by notice, certificate, and foreclosure, shall be in all respects in accordance with the provisions of the general mechanics' lien law;<sup>57</sup> except that the certificates of the lien and of its discharge shall be filed in the office of the secretary of state, who shall record them in a book kept for that purpose.

§ 1641. **Florida.**<sup>58</sup>—A lien prior in dignity to all others accruing thereafter shall exist in favor of any person performing by himself or others any labor upon any railroad, canal, telegraph, or telephone line, wharf, mill, distillery or other manufactory, whether in the construction, operation, or repair thereof, upon such line, wharf, mill, distillery or other manufactory, any and all franchises, machinery and equipments connected therewith or thereon and on the land upon which they stand.

§ 1642. **Georgia.**<sup>59</sup>—The general mechanics' lien law provides that all contractors to build railroads have a special

<sup>56</sup> Gen. Stats. 1902, § 4140.

<sup>57</sup> The general mechanics' lien law extends only to services rendered or materials furnished in constructing or repairing a building. This statute, however, applies to buildings of a railroad company. *Botsford v. New Haven, M. & W. R. Co.*, 41 Conn. 454. Without the question being raised, such a lien was enforced

upon a passenger station in Danbury, in the case of *Benedict v. Danbury & N. R. Co.*, 24 Conn. 320.

<sup>58</sup> Gen. Stats. 1906, § 2191. A contractor furnishing work and labor in constructing a railroad is entitled to a lien on such road. *Couper v. Gaboury*, 69 Fed. 7, 16 C. C. A. 112.

<sup>59</sup> Code 1911, § 3352.

lien upon the road for work done and materials furnished therefor.<sup>60</sup> Persons who contract with a railroad in the capacity of mechanics have a lien on the road for the work done, but not if they made the contract in the capacity of contractors.<sup>61</sup>

§ 1643. **Idaho.**<sup>62</sup>—By the general mechanics' lien law, every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair of, any building, wharf, bridge, railroad, or wagon-road, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent.

§ 1644. **Illinois.**<sup>63</sup>—All persons who may have furnished, or who shall hereafter furnish to any railroad corporation now existing or hereafter to be organized, under the laws of this state, any fuel, ties, materials, supplies, or any other

<sup>60</sup> The laws of Georgia give no liens upon mortgaged property superior to the mortgage lien, except for the taxes due on the property and to laborers, mechanics and material-men who take the proper steps to protect their liens. Therefore, in distributing the earnings of a mortgaged railroad, while the same are in the hands of a receiver, and the proceeds of its sale, the court would give priority only to those laborers and material-men who had perfected their liens according to the state law. But in requiring the liens to be perfected, we do not mean that the parties should have taken any judicial steps in order to enforce their liens, but that they should have performed those preliminary requirements which entitle them to a judicial enforcement

of the liens. If the statute requires the lien to be recorded, that should have been done in the time required by law. If it requires an oath to be taken verifying the lien, that should have been done within the time required. Having done this, then application to this court may stand in lieu of proceedings in the county courts or otherwise. *Jessup v. Atlantic & G. R. Co.*, 3 Woods (U. S.) 441, 442, Fed. Cas. No. 7299, per Bradley, C. J.

<sup>61</sup> *Savannah, G. & N. R. Co. v. Grant*, 56 Ga. 68.

<sup>62</sup> Rev. Code 1908, § 5110.

<sup>63</sup> Rev. Stats. 1912, p. 1476, §§ 7-10, 14. This act did not apply to labor and materials furnished before its passage. *Arbuckle v. Ill. Mid. R. Co.*, 81 Ill. 429.



article or thing necessary for the construction, maintenance, operation or repair of such roads, by contract with said corporation, or who shall have done and performed any work or labor for such construction, maintenance, operation, or repair by like contract, shall be entitled to be paid for the same as part of the current expenses of said road;<sup>64</sup> and in order to secure the same, shall have a lien on all the property, real, personal and mixed, of said railroad corporation as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor: provided, suit must be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or material furnished.<sup>65</sup>

A subcontractor, material-man, or laborer who furnishes

<sup>64</sup> The lien given by the statute is only for materials used, supplies furnished and labor performed, in constructing, repairing, operating or maintaining the road. The loan of money, or the payment of its creditors, is not embraced in the statute giving the lien. A party who, at the request of a railway company, takes up its certificates of indebtedness given to its laborers and others for the boarding of hands, is not entitled to any lien, under the statute, against the company or its property. *Cairo & V. R. Co. v. Fackney*, 78 Ill. 116.

<sup>65</sup> A person contracted to deliver rails to a railroad company, the deliveries to extend over a period of time, and, having complied with his contract, commenced suit within six months after the date of the last delivery to enforce his

lien. It was held that he had a valid lien upon the property superior to that acquired by a trust created between the date of the last delivery and the commencement of proceedings to enforce the lien. Such lien was not affected by a special agreement that the contractor should have a lien on the rails till payment, and that the possession of the railroad should be the possession of the contractor; nor by an agreement to give credit to the purchaser beyond the time within which the statutory lien should be enforced, when the purchaser failed to perform the conditions upon which that credit was agreed to be given. *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 27 L. ed. 1081, 3 Sup. Ct. 594.

to any contractor with any such railroad corporation any fuel, ties, materials, supplies, or any other article or thing, or who performs any work or labor for such contractor in conformity with any terms of any contract, express or implied, which such contractor may have made with any such railroad corporation, has a lien upon all the property, real, personal, and mixed, of said railroad corporation: provided, such subcontractor, material-man or laborer shall have complied with the provisions of this act; but the aggregate of all liens hereby authorized shall not, in any case, exceed the price agreed upon in the original contract to be paid by such corporation to the original contractor: and, provided, further, no such lien takes priority over any existing lien.<sup>66</sup>

Notice in writing of the claim<sup>67</sup> must be served on the president or secretary of such railroad company, with a copy of any written contract there may be between the original contractor and the subcontractor, material-man, or laborer,

<sup>66</sup> This act giving subcontractors a lien relates only to labor and materials furnished after its passage. Act of March 25, 1874; Rev. Stats. 1913, p. 1558, § 8. Under an act of 1861 no one was entitled to a lien unless his contract was directly with the railroad company. *Arbuckle v. Illinois M. R. Co.*, 81 Ill. 429. A subcontractor is not, under the present law, entitled to a lien on a railroad, unless he complies with the statute in regard to giving notice. *Cairo & St. L. R. Co. v. Cauble*, 85 Ill. 555; *Atlantic Dynamite Co. v. Baltimore & O. S. W. R. Co.*, 101 Ill. App. 13. There is no lien in favor of anyone who may have done labor for or furnished materials or supplies to subcontractors. The statute having no apt word to extend the liens given beyond sub-

contractors, the court has no right by judicial construction to extend the meaning of the act beyond the intention plainly expressed. No lien exists against a railroad in favor of remote contractors. *Cairo & St. L. R. Co. v. Watson*, 85 Ill. 531, 5 Rep. 261. And see *Rothgerber v. Dupuy*, 64 Ill. 452; *Ahern v. Evans*, 66 Ill. 125; *Newhall v. Kastens*, 70 Ill. 156. The statute gives a lien only for materials, supplies and labor. There is no lien under it for money loaned or for money advanced at the request of a railroad company to take up certificates of indebtedness given to its laborers and other creditors. *Cairo & V. R. Co. v. Fackney*, 78 Ill. 116.

<sup>67</sup> Form of Notice. To ———, president ( or secretary, as the case may be) of the ———. You

if the same can be obtained, within twenty days after the completion of such subcontract or labor. No lien can attach until such notice has been served, or, in case neither the president or secretary reside or can be found in the country, filed in the office of the clerk of the circuit court.<sup>68</sup>

The lien continues for three months from the time of the performance of the subcontract, or the doing of the work or furnishing the material as aforesaid.

§ 1645. *Indiana*.<sup>69</sup>—The employes of any corporation doing business in this state, whether organized under the laws of this state or otherwise, shall be, and they are hereby entitled to have and hold a first and prior lien upon the corporate

are hereby notified that I am (or have been) employed by — as a laborer (or have furnished supplies, as the case may be) on or for the —, and that I shall hold all the property of said railroad (or railway, as the case may be) company, to secure my pay. *Rev. Stats. 1912, p. 1476, § 9.*

<sup>68</sup> A subcontractor is not entitled to the lien unless he complies with the statute in regard to giving notice. A petition to enforce the lien which shows the filing of the notice with the circuit court, without averring that the president and secretary did not reside in the county, or could not be found in the county, is fatally defective, as failing to show a right to the lien. *Cairo & St. L. R. Co. v. Cauble*, 85 Ill. 555, 4 Bradw. (Ill.) 133.

<sup>69</sup> *Burns Ann. Stats. 1914, §§ 8288-8290.* One digging a well at a stock yard owned by a railroad company is entitled to a lien. *Wabash R. Co. v. Achemire*, 19

*Ind. App. 482, 49 N. E. 835.* The lien is upon the railroad as a unit and not upon fragmentary parts thereon. *Midland Val. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506; *Farmers' L. & T. Co. v. Canada & St. L. R. Co.*, 127 Ind. 250, 26 N. E. 784; *Indiana I. & I. R. Co. v. Larrew*, 130 Ind. 368, 30 N. E. 517. Laborers for subcontractors may acquire liens. *Pere Marquette R. Co. v. Smith*, 36 Ind. App. 439, 74 N. E. 545. Notice need be filed only in the county where the materials were furnished or work done. *Ferguson v. Despo*, 8 Ind. App. 523, 34 N. E. 575. A person who contracts with a telegraph company to put up certain lines of wire on poles is not an employe of the corporation within the meaning of this statute. Such person is a contractor and not a laborer. *Vane v. Newcombe*, 132 U. S. 220, 33 L. ed. 310, 10 Sup. Ct. 60. See also, *Aiken v. Wasson*, 24 N. Y. 482; *Munger v. Lenroot*, 32 Wis. 541.

property of any corporation, and the earnings thereof, for all work and labor done and performed by such employés for such corporation, from the date of their employment by such corporation, which lien shall lie prior to any and all liens created or acquired, subsequent to the date of the employment of such employés by such corporation, except as in this act provided. Any employé wishing to acquire such lien upon the corporate property of any corporation, or the earnings thereof, whether his claim be due or not, shall file in the recorder's office of the county where such corporation is located as doing business, notice of his intention to hold a lien upon such property and earnings aforesaid for the amount of his claim, setting forth the date of such employment, the name of the corporation, and the amount of such claim; and it shall be the duty of the recorder of any county, when such notice is presented for record, to record the same in the record now required by law for notice of mechanics' liens, for which he shall receive twenty-five cents; and the lien so created shall relate to the time when such employé was employed by such corporation or to any subsequent date during such employment, at the election of such employé, and shall have priority over all liens suffered or created thereafter, except other employés' liens, over which there shall be no such priority: provided, that where any person, other than an employé, shall acquire a lien upon the corporate property of any corporation located or doing business in this state, and such lien remains a matter of record for a period of sixty days in any county in this state where such corporation is located or doing business, and no lien shall have been acquired by any employé of such corporation during that period, then and in that case such lien so created shall have priority over the lien of such employé in the county where such corporation is located or doing business, and not otherwise: provided, further, that this paragraph shall not apply to any lien acquired by any person for purchase-money.

Any employé having acquired such lien may enforce the same by filing his complaint therefor in the circuit or superior court in any county where such lien was acquired, at any time within six months from the date of acquiring such lien, or, if a credit be given, from the date of such credit; and the court rendering judgment for such claim shall declare the same a lien upon such property, and order the same sold to pay and satisfy such judgment and costs,<sup>70</sup> as other lands are sold on execution or decree, without relief from valuation or appraisement laws; and in such action the court shall make such orders as to the application of the earnings of such corporation, if any there be, as shall be just and equitable, whether the same be asked for in the complaint or not.

It is also provided<sup>71</sup> that all persons who shall perform work or labor in the way of grading, building embankments, making excavations for the track, building bridges, trestle-work, works of masonry, fencing or other structure, or who shall perform work of any kind in the construction or repair of any railroad, or part thereof, in this state, and all persons who shall furnish any material for any such bridge, trestle-work, work of masonry, fence or other structure, or who shall furnish any material for use in the construction or repair of any railroad, or part thereof, in this state, whether such work or labor be performed, or such material furnished, in the pursuance of a contract with the railroad corporation building, repairing or owning such railroad, or whether such work or labor be performed, or materials furnished, in pursuance of a contract with any person, corporation or company engaged as lessee, contractor, subcontractor or agent of such railroad corporation, in the work of con-

<sup>70</sup> For all matters under this law apply. Burns' Ann. Stat. 1914, § 8293.

the rules, practice, and pleadings under the general mechanics' lien <sup>71</sup> Burns' Ann. Stats. 1914, § 8605.

structing or repairing any such railroad, or part thereof, in this state, may have a lien to the extent of the work or labor performed, or material furnished, or both, upon the right of way and franchises of such railroad corporation, within the limits of the county<sup>72</sup> in which such work or labor may be performed or material may be furnished, and upon all works and structures, mentioned in this paragraph, that may be upon the right of way and franchise of such railroad corporation within the limits of such county. In case such work or labor shall be performed or material furnished in pursuance of a contract with any person, corporation or company engaged as lessee, subcontractor or agent of any railroad corporation in the construction or repairing of any railroad, as heretofore mentioned in this paragraph, the person performing such labor or furnishing such material shall not be required to give notice to such corporation, as is required of subcontractors, journeymen and laborers, in order to entitle him to acquire and hold a lien for labor performed or material furnished under the provisions of this paragraph, but the performance of such labor, or the furnishing of such material, shall be sufficient notice to such corporation. All the provisions of the general lien<sup>73</sup> law, in so far as they can be made applicable to this paragraph, except that part in regard to notice to owner, shall apply to this section, and be in aid thereof. Liens thus acquired shall be enforced as other mechanic's liens are enforced in this state.

§ 1646. Iowa.<sup>74</sup>—When material has been furnished or labor performed<sup>75</sup> in the construction, repair or equipment

<sup>72</sup> It was not the intention to limit the lien to a single county, but where the work extends into two or more counties, it may be enforced in any one of the counties as to the entire line of unfinished road. *Midland R. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506.

<sup>73</sup> See § 1200.

<sup>74</sup> Code 1897, § 3091. "In many respects," remarked Dillon, J., in

<sup>75</sup> A day-laborer upon a railroad is entitled to a lien for his wages. *Mornan v. Carroll*, 35 Iowa 22.

of any railroad, canal, viaduct or other similar improvement, the lien therefor shall attach to the erections, excavations, embankments, bridges, road-bed, and all land upon which the same may be situated, and the rolling stock and other equipment belonging to any such railroad, canal, viaduct or other company, all of which, except the easement or right of way, constitutes the building, erection or improvement.<sup>76</sup>

Every person, whether contractor or subcontractor, who wishes to avail himself of the provisions of this act, shall file with the clerk of the district court of the county in which the building, erection or other improvement to be charged with the lien is situated a verified statement or account of the demand due him, after allowing all credits, setting forth the time when such material was furnished or labor performed, and when completed, and containing a correct description of the property to be charged with the lien, which statement or account must be filed by a principal contractor within ninety days, and by a subcontractor within thirty days, from the date on which the last of the material shall have been furnished or the last of the labor was performed; but a failure to file the same within said periods shall not

Taylor v. Burlington, C. R. & M. R. Co., 4 Dill. (U. S.) 570, Fed. Cas. No. 13783, "nothing is more unlike than the erection of an ordinary building and the construction and equipment of a line of railway, and much of the difficulty in construing the legislation of the state has arisen out of the grouping of the two by the legislature and making an uniform and single provision for both." One constructing a depot for a railway company has a mechanic's lien on the entire railroad property and the lien is superior to liens attaching thereto after the commencement of such depot.

Beach v. Wakefield, 107 Iowa 567, 76 N. W. 688.

<sup>76</sup> The rolling stock of a railroad does not constitute a part of its real estate; and a lien for furnishing ties to the road does not attach to the rolling stock as appurtenant to the land, road-bed and right of way. Neilson v. Iowa Eastern R. Co., 51 Iowa 184, 33 Am. Rep. 124. A laborer under the Iowa Code 1897, § 2091 (see Supp. 1907 for amendments) has a lien on a tax voted in aid of a railroad. Kent v. Muscatine, N. & S. R. Co., 115 Iowa 383, 88 N. W. 935.

defeat the lien, except against purchasers or incumbrancers in good faith, without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed; but where a lien is claimed upon a railway, the subcontractor shall have sixty days from the last day of the month in which such labor was done or material furnished within which to file his claim therefor.<sup>77</sup>

It is also provided that a judgment against any railway corporation for an injury to any person or property shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, 1862, the time when the original statute went into effect.<sup>78</sup> Under this statute, the purchaser of railroad bonds secured by mortgage is required to take notice that his lien under the mortgage, although prior in time, must be postponed to judgments for injuries to persons or property occurring at any time after the execution of the mortgage, so long as the property is in the possession of the company. But the right of action is not a lien, nor is an action pending a lien. The lien does not attach until a judgment is rendered. Therefore, if the mortgaged property be sold under a decree of foreclosure before judgment is recovered, the company has then no title to the property, and no lien can attach to it. There is nothing in the statute charging a purchaser at the foreclosure sale with notice of the action, or making the claim at the time of the injury, or at the time of commencing the action, a lien upon the company's property. The action is purely personal. Until judgment is rendered, any one may purchase the company's property unaffected by the action.<sup>79</sup>

<sup>77</sup> The sixty days are reckoned from the last day of the calendar month in which the labor was done or materials furnished. *San-*

*dval v. Ford*, 55 Iowa 461, 8 N. W. 324.

<sup>78</sup> Code 1897, § 2075.

<sup>79</sup> *Burlington, C. R. & N. R. Co.*



§ 1647. **Kansas.**<sup>80</sup>—Whenever any railroad company contracts with any person for the construction of its road or any part thereof, such railroad company is required to take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay to laborers, mechanics and material-men, and persons who supply such contractor<sup>80a</sup> with provisions or goods of any kind, all just debts due to such persons, or to any person to whom any part of such work is given, incurred in carrying on such work, which bond shall be filed by such railroad company in the office of the register of deeds in each county where the work of such contractor shall be. And if any such railroad company shall fail to take such bond, such railroad company is liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor.<sup>81</sup>

v. Verry, 48 Iowa 458, 7 Cent. L. J. 65. And where a judgment is reversed and a new trial had but before a second judgment is procured the railroad company sells its property, such a judgment is not a lien. *Winter v. Iowa Cent. R. Co.*, 111 Iowa 342, 82 N. W. 760.

<sup>80</sup> Gen. Stats. 1909, § 7006.

<sup>80a</sup> As to proof that one is a contractor within meaning of the statute, see *Atchison, T. & S. F. R. Co. v. McConnell*, 25 Kans. 370.

<sup>81</sup> Under this statute the company, rather than the laborers and mechanics, is the proper obligee. The liability of a railroad company in such case is purely statutory, and a party seeking to enforce the liability must show all the facts required by the statute. If the bond contains all the conditions provided for, it is not vitiated by an additional stipulation to save the company harmless

from all trouble, damage, costs, or suits by reason of the debts. *Atchison, T. & S. F. R. Co. v. Cuthbert*, 14 Kans. 212. The term "laborer" in this statute refers to those engaged in manual labor, in accordance with its common acceptance. It does not include a timekeeper and superintendent. *Missouri, K. & T. R. Co. v. Baker*, 14 Kans. 563. See, also, *Mann v. Corrigan*, 28 Kans. 194. A railroad company failing to take the bond required is liable not merely to the laborers personally, but to any persons to whom they may transfer their claims. *Missouri, K. & T. R. Co. v. Brown*, 14 Kans. 557. If a railroad company fails to take the statutory bond, laborers and mechanics employed by a subcontractor in building the road may maintain an action against the company at any time before the claims are barred by the stat-

§ 1648. **Kentucky.**<sup>82</sup>—When the property or effects of any [mine], railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator, the employés of such company, owner or operator in such business, and the persons who shall have furnished materials or supplies for the carrying on of such business shall have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business.

The said lien shall be superior to the lien of any mortgage or other incumbrance thereafter created, and shall be for the whole amount due such employés, as such, or due for

ute of limitations. *Mann v. Corrigan*, 28 Kans. 194. This statute applies not merely when a railroad company is engaged in the construction of its first and main track, but also whenever it is enlarging its road by the addition of side tracks. *Missouri, K. & T. R. Co. v. Brown*, 14 Kans. 557. Or replacing an old bridge with a new and larger one of a permanent character. *Atchison, T. & S. F. R. Co. v. McConnell*, 25 Kans. 370. The liability of a contractor on such a bond given by him to a railroad company does not extend to an account for provisions furnished to laborers employed by

a subcontractor; for the provisions are not in such case supplied to the contractor within the meaning of the statute. *Wells v. Mehl*, 25 Kans. 205; *St. Louis, W. & W. R. Co. v. Ritz*, 30 Kans. 30, 1 Pac. 27.

<sup>82</sup> Stat. 1909, §§ 2487, 2489, 2492, 2494, 2495. A mechanic's lien on a railroad attaches with the beginning of the work, but there is no lien for money paid out in securing rights of way and paying salaries or expenses. *Richmond & I. Const. Co. v. Richmond, N. I. & B. R. Co.*, 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625.

such materials or supplies; that for wages coming due to employes within six months before the property or effects shall in any wise come to be distributed among creditors, as provided in the preceding paragraph, the lien of such employes shall be superior to the lien of any mortgage or other incumbrance theretofore or thereafter created; but no president or other chief officer, nor any director or stockholder of any such company, shall be deemed an employe within the meaning of this paragraph.

When the trustee or other person having the administration or distribution of such property or effects shall continue the operation of the business it shall be his duty, at the end of each calendar month, after payment of current expenses, and after payment of any debt due the United States or the state of Kentucky, to distribute the remaining money in his hands among the persons to whom this lien is hereby given pro rata, except twenty per cent. thereof, which he may, if necessary, reserve for contingent expenses.

It is further provided in a later act<sup>83</sup> that all persons who

<sup>83</sup> Act of March 27, 1888, as amended by Act of March 21, 1896. Contractors supplying laborers and teams for the construction and repair of a railroad, being paid for the same by the day, and either party having the right to stop work at the end of any day, are not "laborers" or "employees" within the terms of the first-named act, that of March 20, 1876, but must rely on the contractors' Act of March 27, 1888, which gives a lien in favor of persons "furnishing labor or materials for the construction or improvement" of any railroad, canal, or other public improvement. *Tod v. Kentucky Union R. Co.*, 52 Fed. 241, 3 C. C. A. 60, 18 L. R. A. 305. In

*Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. 405, it was said that an employee implies continuity of service, and excludes those employed for a special or single transaction. In *Graham v. Mt. Sterling Coalroad Co.*, 14 Bush (Ky.) 425, 29 Am. Rep. 412, it was held, after the passage of the act of 1876, that neither under that statute, nor the general mechanics' lien law of 1858, was there any lien against or upon a railroad for work performed thereon or materials furnished. This denial of a lien upon railroads under the then existing statutes created the necessity for and led to the passage of said act of 1888. Where

perform or furnish labor, materials, supplies or teams, for the construction or improvement of any canal, railroad, turnpike or other public improvement in this commonwealth, by contract, express or implied, with the owner or owners thereof, or by subcontract thereunder, shall have a lien thereon, and upon all of the property and franchise of the owner or owners thereof, for the full contract price of such labor, material, supplies and teams so furnished or performed, which said lien shall be prior and superior to all other liens thereafter created thereon; but any person undertaking or expecting to perform or furnish labor, material, supplies or teams, in the manner provided in this section, may acquire a lien therefor, as herein provided, by filing in the clerk's office of each county, wherein he shall have so undertaken to perform or furnish labor, materials, supplies or teams, a statement in writing, stating that he has so undertaken and expects to perform or furnish labor, material, supplies or teams, and the price at which the same is to be furnished, and the lien for labor performed, material, supplies or teams furnished thereafter shall relate back and take effect from the date of the filing of such statement: provided, that as to all original construction such lien shall be prior to all liens theretofore or thereafter created on the part so constructed, and on no other part. No lien shall attach unless the person who performs or furnishes the labor or teams shall, within sixty days after the last day of the

supplies, suitable either for the construction of the unfinished part of a railroad or the carrying on of the finished part, are furnished without any contract as to how they shall be used, the material-man has a lien under the general lien law for the part actually used in operating the railroad, and another lien under the contractors' act above given in sub-

stance for the part actually used for construction and repairs; but where he has lost the lien under the latter act because of a failure to file his statement within sixty days, the burden of proof is on him to show what part of the supplies was actually used for the operation of the road. *Tod v. Kentucky Union R. Co.*, 52 Fed. 241, 3 C. C. A. 60, 18 L. R. A. 305.

last month in which any labor was performed or materials or teams were furnished, file in the county clerk's office of each county in which the labor was performed, or materials or teams were furnished, a statement in writing, verified by affidavit, setting forth the amount due therefor, and for which the lien is claimed, and the name of the canal, railroad, turnpike or other public improvement upon which it is claimed. Said claim shall be filed and indorsed by the clerk of the court, giving the date of its filing. The clerk shall also make an abstract and entry thereof as now provided by a law in case of mechanics' liens, and in the same book used for that purpose, and shall make proper index thereof. For his services the clerk shall be paid one dollar by the party filing the claim, which may be recovered by him as costs from the party against whom the claim is filed. Such liens shall be enforced by proper proceedings in equity, to which other lienholders must be made parties; but such proceedings must be begun within one year from the filing of the claim in the county clerk's office.

§ 1649. **Maine.**<sup>84</sup>—Every railroad company, in making contracts for the building of its road, shall require sufficient security from the contractors for the payment of all labor thereafter performed in constructing the road by persons in their employment; and such company is liable to the laborers employed for labor actually performed on the road, if they, within twenty days after the completion of such labor, in writing, notify its treasurer that they have not been paid by the contractors. But such liability termi-

<sup>84</sup> Rev. Stats. 1903, ch. 51, § 47. A laborer paid monthly need not give notice at the end of each month of default. The statute extends also to subcontractors. *George v. Washington County R. Co.*, 93 Maine 134, 44 Atl. 377. A lumber company building a railroad on its own land to aid its work is not a railroad company within the terms of the railroad lien law. *Palangio v. Wild River Lumber Co.*, 86 Maine 315, 29 Atl. 1087.

dates unless the laborer commences an action against the company within six months after giving such notice.

• § 1650. **Maryland.**—The general lien law applies to buildings only. Coal cars were held not to be subjects of a mechanic's lien under a statute<sup>85</sup> which provided that every machine erected, constructed, or repaired, should be subject to a lien in like manner with buildings; even admitting that coal cars could be called machines, the statute was construed to apply only to fixed or stationary machinery.<sup>86</sup> Such a statute is to be construed with reference to the general purpose of lien laws in favor of mechanics. By the common law, mechanics who erected a house or stationary machinery lost all claim upon the property as soon as it became fixed to the realty; and the lien provided by statute was designed to obviate the insecurity arising from the vesting of the title in the owner of the realty without any voluntary delivery of the property by the mechanics who had done the work and furnished the materials for the additions to the realty. But the reason of the law does not apply to movable machines. With reference to these the law affords ample and complete security to the mechanic by leaving in him the right of property, or, in the case of repairs done, giving him a lien thereon while they remain in his possession; and he has the right to retain the possession, and his right of property or his lien, until his claim for construction or repair is paid.

• § 1651. **Massachusetts.**<sup>87</sup>—A person to whom a debt is due for labor performed or for materials furnished and actually used in constructing a railroad under a contract with a person other than the owner thereof, who has authority from or is rightfully acting for such owner in furnishing

<sup>85</sup> Pub. Gen. Laws 1904, ch. 63, § 22.

<sup>86</sup> New England Car Spring Co.

v. Baltimore & O. R. Co., 11 Md. 81, 69 Am. Dec. 181.

<sup>87</sup> Rev. Laws 1902, ch. 111, §§ 164-168.

such labor or materials, shall have a right of action against such owner to recover such debt with costs except as hereinafter provided. No person who has contracted to construct the whole or a specified part of such railroad shall have such right of action. No such person shall have such right of action for labor performed, unless, within thirty days after ceasing to perform it, he files in the office of the clerk of a city or town in which any of said labor was performed a written statement, under his oath, of the amount of the debt so due him and of the name of the person or persons for whom and by whose employment the labor was performed. Such right of action shall not be lost by a mistake in stating the amount due; but the claimant shall not recover as damages a larger amount than is named in said statement as due him, with interest thereon. No such person shall have such right of action for materials furnished, unless, before beginning to furnish them, he files in the office of the clerk of the city or town in which any of the materials were furnished a written notice of his intention to claim such right, in the manner before provided. No such action can be maintained unless it is commenced within sixty days after the plaintiff has ceased to perform such labor or to furnish such materials.

This statute applies to a person performing labor under an agreement with a contractor, who acts under a contract with the owner of the railroad. While subcontractors have no right of action under this statute, persons employed by them or furnishing them materials are protected.<sup>88</sup> If a subcontractor abandons his contract, and a laborer who was employed by him continues to work for another contractor in order to recover for his claim under the former contractor, he must file his statement of claim within thirty days after he ceased to labor for that contractor.<sup>89</sup>

<sup>88</sup> *Hart v. Boston, R. B. & L. R. Co.*, 121 Mass. 510.

<sup>89</sup> *Lyon v. New York & N. E. R. Co.*, 127 Mass. 101.

This statute does not afford any remedy to a person to whom a debt is due for labor performed in constructing a railroad, by virtue of an agreement with a contractor whose contract with the owner of the railroad was made before the passage of the statute, although the labor was performed after the statute took effect.<sup>90</sup>

§ 1652. **Michigan.**<sup>91</sup>—It is lawful for all railroad companies, when contracts are made by them with a contractor or contractors, for work, labor, or materials to be used in repairing or constructing railroads, to provide in the contract or contracts with such contractor or contractors, for the payment of laborers and persons furnishing material to said contractors or subcontractors to be used in said contract; and if no such provision is made in said contract or contracts, it shall be lawful for said railroad companies to withhold payment until such laborers and persons furnishing material are paid: and it shall be the duty of such railroad companies, by agent or otherwise, at each pay day, on said road or roads, to see that all laborers and persons furnishing material employed by contractor or contractors, or subcontractors are paid before payment is made to said contractors, not to exceed, however, the amount due to said contractors: provided, the provisions of this act shall not apply to any iron or other materials and property used in ironing and equipping said railroad: provided, further, that

<sup>90</sup> *Parker v. Mass. R. Co.*, 115 Mass. 580.

<sup>91</sup> *Howell's Stats.* 1912, §§ 6708-6710. The true intent and meaning of the statute is to protect laborers and persons furnishing material for the construction and repairs of railroads, which protection is limited to the amount due from the railroad company to its contractor at the time the bill of items of the labor and materials

is furnished to the company. *Dudley v. Toledo, A. A. & N. M. R. Co.*, 65 Mich. 655, 32 N. W. 884. The labor covered by the statute is manual labor. It does not include teams nor feed furnished teams, nor clothing or board of the laborers employed. *Dudley v. Toledo, A. A. & N. M. R. Co.*, 65 Mich. 655, 32 N. W. 884. See post, § 1657.



a bill of items of the material and labor furnished to said contractor or subcontractors shall be furnished to the company, through their agent, or otherwise, together with the amount claimed, prior to the usual pay day of said company, when such claim shall be due, or, in case the contractor or contractors are not then paid, then prior to the payment then due. On compliance with the provisions of this act the persons performing the labor, or furnishing the materials aforementioned, shall have the right to collect pay for the same from said railroad companies by action, as in case of other claims against said railroad companies, if the said claim or claims are undisputed and acknowledged to be due from said contractor or subcontractors. If the amount claimed to be due from the contractor or subcontractors is disputed by them, then said company shall withhold the payment from both till the same has been adjudicated as in other actions, before some court having jurisdiction of the amount in controversy, and judgment duly rendered, when the company shall pay over the amount of the judgment to the party recovering the same against said contractor or subcontractors, provided the amount of said judgment is due to said contractor or contractors from said company; if not, then so much as is due on said contract.

§ 1653. **Minnesota.**<sup>92</sup>—Whoever performs labor, or furnishes skill, material or machinery for the construction, alteration or repair of any line of railway, or any structure or appurtenance of such railway, or of any telegraph, telephone or electric light line, or of any line of pipe, conduit or subway, or any appliance or fixture pertaining to either shall have a lien upon the line so improved, and upon all the rights, franchises, and privileges of the owner appertaining thereto.

<sup>92</sup> Gen. Stats. 1913, §§ 7020, 7022. These provisions are a part of the general lien law of the state, and

are of course enforced under the provisions of that law.

§ 1654. *Mississippi*.<sup>93</sup>—The benefit of the general mechanics' lien law is extended to laborers on railroads, who are given the same rights and remedies as mechanics. Their rights, however, are subject to all the obligations imposed by that law upon other mechanics. They can not, therefore, impose upon the railroad company any higher duty or further payment than it has by contract imposed upon itself. The railroad company is not liable for a greater sum than that which remains unpaid to the person with whom the railroad company contracted, though the contractor may owe a larger sum to a subcontractor, or the subcontractor may owe a larger sum to the laborers employed.<sup>94</sup>

§ 1655. *Missouri*.<sup>95</sup>—All person who shall do any work or labor in constructing or improving the road-bed, rolling stock, station-houses, depots, bridges or culverts of any railroad company incorporated under the laws of this state, or owning or operating a railroad within this state, and all persons who shall furnish ties,<sup>96</sup> fuel, bridges, or material<sup>97</sup>

<sup>93</sup> Code 1906, § 3058.

<sup>94</sup> *Herrin v. Warren*, 61 Miss. 509. See also, *Central Trust Co. v. Georgia Pac. R. Co.*, 83 Fed. 386, *revd.* 87 Fed. 288, 30 C. C. A. 648.

<sup>95</sup> Rev. Stats. 1909, §§ 8249-8251. This statute applies to horse railroads also. *St. Louis Bolt & Co. v. Donahoe*, 3 Mo. App. 559.

<sup>96</sup> Materials furnished to a contractor for the construction of a railroad, and used by him for that purpose, are in the eye of the law furnished to the railroad. *Heltzell v. Chicago & A. R. Co.*, 77 Mo. 315. But the materials must be actually used in the construction. *Heltzell v. Chicago & A. R. Co.*, 77 Mo. 315; *Central Trust Co. v. Texas & St. L. R. Co.*, 27 Fed.

178. Labor and materials provided for in the contract and necessary for the work are covered by the lien, though not actually incorporated in the structure. *Andrews v. St. Louis Tunnel R. Co.*, 16 Mo. App. 299.

<sup>97</sup> The materials for which a lien is given by this statute are such things only as pass into the permanent structure of the railroad. Such articles as scales, trucks and letter-presses do not pass into the structure of the road; and the fact that they become a part of the permanent equipment of the road is not sufficient to bring them within the scope of the act. *Central Trust Co. v. Texas & St. L. R. Co.*, 23 Fed. 703, 27 Fed. 178. *Brewer, J.*,

to such railroad company, shall have for the work done and labor performed, and for the materials furnished, a lien upon the road-bed, station-houses, depots, bridges, rolling stock, real estate and improvements of such railroad, upon complying with the provisions hereinafter mentioned; provided such work and labor is performed, and such materials are furnished, under and in pursuance of a contract with such railroad company, its agents, contractors, subcontractors, lessees, trustees or construction company organized for the uses and purposes of such railroad company, or having in charge the building, construction or improvement of such railroad, or any part thereof.

This lien attaches to the buildings, erections, improvements, road-bed and property mentioned from the date of the commencement of such work and labor, or from the time such materials were furnished or delivered, and is prior to all mortgages or incumbrances placed upon the property affected by this lien subsequent to the passage of this act.<sup>98</sup>

delivering the decision in the last-named report, said: "The only difference of moment between the railroad lien law and the general mechanic's lien law is that in the former word 'fuel,' is used, giving to those who sell fuel, as well as to those who do labor and furnish materials, a lien. Of course, fuel does not pass into the structure of the road, and by reason of the use of that word 'fuel,' it is claimed that the intent of the legislature was to enlarge the scope of the word 'material,' and make it include anything and everything which passed, not merely into the structure, but into the permanent equipment. \* \* \* Although 'fuel,' was named in the statute as a matter in respect to which a lien might be claimed, yet it was not

the intent of the legislature, by the use of that word, to enlarge the scope of the word, 'material,' as used in ordinary lien laws."

<sup>98</sup> The statutory liens are payable before mortgage bonds. *Blair v. St. Louis, H. & K. R. Co.*, 25 Fed. 232. Where supplies for rebuilding bridges, building side tracks, and in making repairs were furnished a railroad company from time to time under a continuous verbal contract made after a default in the payment of interest on an existing mortgage, which contract was not terminated until the appointment of a receiver, more than two years after the first supplies were furnished, it was held that the material-men were entitled to a lien superior to that of the mortgage creditors.

It shall be the duty of all persons claiming the benefit of such lien, within ninety days after the completion of the work, or after the materials are finished,<sup>99</sup> to file in the office of the circuit clerk of any county through which said railroad is located a just and true account of the amount due after all just credits have been given, which account shall state the amount claimed as due, the general nature of the work, amount of labor performed or of materials furnished; the dates when the work was done and when materials were furnished, and the place or places at which said labor and work were performed or said materials were furnished, the name or names of the parties with whom the contract for said work or furnishing said materials was made, and also the name of the railroad against which said lien is intended to apply; and it shall be the duty of all persons claiming said lien, within said ninety days, to serve a copy of the above account on the person or corporation owning or operating or having

Blair v. St. Louis, H. & K. R. Co., 23 Fed. 704. The insolvency of a railroad company and the appointment of a receiver for it will not prevent one entitled to a lien from enforcing it. Van Frank v. St. Louis, C. G. & Ft. S. R. Co., 93 Mo. App. 412, 67 S. W. 688. A sale of the property under a decree of foreclosure in the circuit court of the United States does not bar the enforcement of judgments of the state court establishing statutory liens against the property, where the lien creditors have sought to intervene in the foreclosure proceedings, and their petitions have been dismissed without prejudice, although such judgments have been recovered pending the foreclosure suit, and while the property was in the hands of a receiver. Blair v. Walker, 26 Fed. 73.

<sup>99</sup> If materials are furnished in carload lots, under separate and independent orders, no lien can be acquired for such carloads as were furnished more than ninety days before the filing of the account, claimed to be a lien, although others were furnished within that time. Heltzell v. Chicago & A. R. Co., 77 Mo. 315. Whether the furnishing was under one contract, or under different and distinct contracts, is a question for the jury. Heltzell v. Chicago & A. R. Co., 77 Mo. 315. If, after filing a defective claim of lien against a railroad, another claim for the same demand is filed within ninety days from the time the work was finished, the latter claim may be prosecuted. Williams v. Chicago, S. F. & C. R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. 403.

charge of said road or of the property to which said lien attaches,<sup>1</sup> which said copy of account may be served in the same manner as now provided by law for the service of summons on corporations.

§ 1656. **Montana.**<sup>2</sup>—The general lien law applies to labor done and materials furnished for a railroad, telegraph, telephone, or other improvements.

§ 1657. **Nebraska.**<sup>3</sup>—Whenever any laborer upon any railroad, canal, viaduct, bridge, ditch, or other similar im-

<sup>1</sup> For proceedings for enforcing such lien, see Rev. Stats. 1909, § 8251. In the absence of any statute prescribing the manner of serving such notice on a domestic corporation, the service should be made on the chief officer or managing agent of the corporation; and when it can not be had on either of such officers, it may be served on any officer whose official relations to the governing body, or chief officer, or managing agent of the corporation, is such as to make it his duty to communicate such notice to such body, officer, or agent. *Heltzell v. Chicago & A. R. Co.*, 77 Mo. 315. Service on a person who had desk-room in the office of the company, but no connection with its affairs, is insufficient. *Heltzell v. Kansas City, St. L. & C. R. Co.*, 77 Mo. 482. Service upon a station agent of a foreign railroad company operating a road in this state is sufficient. *Morgan v. Chicago & A. R. Co.*, 76 Mo. 161. Successive liens for the same labor and materials can not be filed. The filing of one account, sufficient to create a lien under the

statute, exhausts the contractor's power to incumber the property; and the ninety days run from such time, and can not be extended by the filing of an amendment or a new lien within the original ninety days. *Battle v. McArthur*, 49 Fed. 715, 717. To secure the lien one must proceed in the manner prescribed by the statutes giving such lien. *Rapauno Chemical Co. v. Greenfield & N. R. Co.*, 59 Mo. App. 6.

<sup>2</sup> See ante, § 1212. One is entitled to a mechanic's lien for work in hauling cross-ties contracted by parties to be furnished to a railroad company. *Duignan v. Montana Club*, 16 Mont. 189, 40 Pac. 294. See also to same effect, *Eccleston v. Hetting*, 17 Mont. 88, 42 Pac. 105.

<sup>3</sup> Ann. Stats. 1911, §§ 7114-7116. A draft by a subcontractor upon the contractor, presented by the holder, is an equitable assignment of the amount called for in the draft, subject to the statutory liens in favor of the laborers. *Code v. Carlton*, 18 Nebr. 328, 25 N. W. 353. Lumber, sold to a subcontractor engaged in building

provement in this state, shall have just claim or demand for labor performed on any such railroad, canal, bridge, ditch, viaduct or other similar improvement against any person or persons who are or any company which is a contractor on such railroad, canal, viaduct, or bridge, or against any person or persons who are subcontractors with any person or persons or company contracting with any such railroad, bridge, viaduct, or ditching company for the construction of any part of such railroad, bridge, canal, viaduct, or ditch of any such company, every such railroad, canal, bridge, or ditch company shall be liable to pay such laborer the amount of such claim or demand with ten per cent interest thereon; provided, such laborer shall have given notice within sixty days after the last item of labor shall have been performed, that he or she has such claim or demand. Such notice shall be given in writing and shall specify the peculiar nature and amount of the claim or demand, and shall be delivered to the president or vice-president, superintendent, agent, or the managing director or chief engineer of any such company, or to the engineer in charge of that portion of the work, or any portion of the railroad, canal, viaduct, bridge or ditch upon which such labor is performed.

And where material shall have been furnished, or labor performed in the construction, repair, and equipment of any railroad, canal, bridge, viaduct, or other similar improvement, such laborer and material-man, contractor or subcontractor, shall have a lien therefor, and the said lien therefor shall extend and attach to the erections, excavations, embankments, bridges, road-bed, and all land upon which the same may be situated, including the rolling stock thereto ap-

a railroad, to be used in the erection of boarding-houses or stables, for the use of the men and animals employed and used by the subcontractor in such work, are not materials furnished in the construction of the railroad, with-

in the intent and meaning of the statute. *Stewart-Chute Lumber Co. v. Missouri Pac. Lumber Co.*, 33 Nebr. 29, 49 N. W. 769, overruling 28 Nebr. 39, 44 N. W. 47. See ante, § 1652.

pertaining and belonging, all of which, including the right of way, shall constitute the excavation, erection or improvement provided for and mentioned in this act.

Every person, whether contractor or subcontractor or laborer or material-man, who wishes to avail himself of such provisions, shall file with the clerk of the county in which the building, erection, excavation, or other similar improvement, to be charged with the lien is situated, a just and true statement or account of the demand due him after allowing all credits, setting forth the time when such material was furnished or labor performed, and when completed, and containing a correct description of the property to be charged with the lien and verified by affidavit; such verified statement or account must be filed by a principal contractor within ninety days, and by a subcontractor within sixty days, from the date on which the last of the material shall have been furnished, or the last of the labor is performed; but a failure or omission to file the same within such periods shall not defeat the lien except against purchasers or incumbrancers in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed; provided, that when a lien is claimed upon a railway, the subcontractor shall have sixty days from the last day of the month in which said labor was done or material furnished within which to file his claim therefor; and provided further, that when any such material is furnished or work done in any unorganized county in this state, such statement of the demand due, verified as aforesaid, may be filed in any county in this state into or through which any such railroad or canal may run, or in the organized counties lying next nearest, east of the county where said work was done or material furnished; provided further, that such lien shall continue for the period of two years, and any person holding such lien may proceed to obtain a judgment for the amount of his account thereon by civil action; and when any suit or suits shall be commenced on such accounts

within the time of such lien, the lien shall continue until such suit or suits be finally determined and satisfied.

§ 1658. **Nevada.**<sup>4</sup>—The general lien law provides for a lien upon a railroad, tramway, toll-road, or canal for work done or materials furnished in the construction, alteration, or repair of the same.

§ 1659. **New Hampshire.**<sup>5</sup>—If a person shall, by himself or others, perform labor or furnish materials to the amount of fifteen dollars or more, in the grading, masonry, bridging, or track-laying of any railroad, under a contract with an agent, contractor, or subcontractor of the proprietors thereof, he shall have a lien upon the railroad and the land upon which it is constructed, provided he gave notice in writing to such proprietors, or to the person having charge of the railroad, that he should claim such lien before performing the labor or furnishing the materials for which it is claimed. The lien continues for ninety days, and may be enforced by attachment as provided in the general mechanics' lien law.<sup>6</sup>

§ 1660. **New Jersey.**<sup>7</sup>—Any laborer employed by a contractor for the construction of any part of a railroad may give notice to the company of any indebtedness due him by the contractor by written notice served on an engineer, agent or superintendent of the company having charge of the section of the road on which such labor was performed, personally or by leaving at his office or usual place of business with some suitable person, which notice shall be served within twenty days after the last day of the performance of the labor for which the claim is made, and shall state the number of days' labor, the time when performed, the amount due, the name of the contractor and shall be signed by the laborer or

<sup>4</sup> See ante, § 1214.

<sup>5</sup> Pub. Stats. & Sess. Laws 1901, ch. 141, §§ 14, 16, 17.

<sup>6</sup> See ante, § 1215.

<sup>7</sup> Comp. Stats. 1910, p. 4253, § 79.

Where lien exists a conveyance by railroad corporation does not defeat it. *Bates Machine Co. v. Trenton & N. B. R. Co.*, 70 N. J. L. 684, 58 Atl. 935, 103 Am. St. 811.



his attorney, and said company shall be liable to pay to such laborer the amount so due to him not exceeding wages for thirty days, and an action may be maintained therefor if brought within thirty days after such service of such notice; the liability of the company shall not exceed its liability to the contractor, and any payment lawfully made to such laborer shall be a discharge to the company from the contractor for the amount so paid.

Whenever a receiver is appointed over any railroad company,<sup>8</sup> the receiver is required to apply all unincumbered personal effects not required in the operation of the road, and all moneys transferred to him at the time of his appointment, towards the payment of wages then due to employes of the company not exceeding two months' wages.<sup>9</sup>

In case of the insolvency of any corporation,<sup>10</sup> the laborers and workmen, and all persons doing labor or service of what-

<sup>8</sup> Comp. Stats. 1910, p. 4256, § 86.

<sup>9</sup> By virtue of this act, the employes are entitled to a lien on the unincumbered property of the company, and on its incumbered property subject to existing incumbrances, for the wages, not exceeding wages for two months, due them when the receiver entered upon his duties. *Williamson v. New Jersey S. R. Co.*, 28 N. J. Eq. 277, revd. 29 N. J. Eq. 311; *Coe v. New Jersey M. R. Co.*, 31 N. J. Eq. 105, modified 34 N. J. Eq. 266.

<sup>10</sup> Comp. Stats. 1910, p. 1650, § 83. The lien which this act gives can not be extended so as to impair the obligation of contracts, or to diminish or impair the liens of judgment creditors or mortgagees whose incumbrances existed before the passage of the act. *Coe v. New Jersey M. R. Co.*, 31 N. J. Eq. 105,

130, modified, 34 N. J. Eq. 266; *Williamson v. New Jersey S. R. Co.*, 28 N. J. Eq. 277, revd. 29 N. J. Eq. 311. The right conferred by this act is strictly personal, inhering alone in the person who actually performs the labor or service, and he who furnishes the labor or services of others under a contract to do the whole business of a corporation, or a particular branch of it, is neither within the letter nor spirit of the act. It is further held that the wages, to be within the protection of the statute, must be due to a person in the employ of the corporation at the time when it became insolvent; that only those in the employ of the corporation at the time of its insolvency are within either the words or policy of the statute. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq. 192.

ever character, in the regular employ of such corporation, shall have a first and prior lien upon the assets thereof for the amount of wages due to them respectively for all labor, work and services done, performed or rendered within two months next preceding the date when proceedings in insolvency shall be actually instituted and begun against such insolvent corporation. The word "laborers" shall be construed to include all persons doing labor or service of whatever character for or as workmen or employees in the regular employ of such corporation.<sup>11</sup>

§ 1661. **New Mexico.**<sup>12</sup>—The general lien law provides that every person performing labor upon or furnishing materials to be used in the construction, alteration, or repair of, any railroad or wagon-road, shall have a lien upon the same.

§ 1662. **New York.**<sup>13</sup>—Any person who shall hereafter perform any labor for a railroad corporation shall have a lien for the value of such labor upon the railroad track, rolling stock and appurtenances of such railroad corporation and upon the land upon which such railroad track and appurtenances are situated, by filing a notice of such lien in the office of the clerk of the county wherein any part of such railroad is situated, to the extent of the right, title and interest of such corporation in such property, existing at the time of such filing.<sup>14</sup> The provisions of the statute relating to the con-

<sup>11</sup> The president of a corporation is not a laborer entitled to a lien within the terms of Rev. Stats. 1877, p. 188, § 63, to which the later statute is similar. He is part and parcel of the organization of the corporation, and as such he is an employer. The statute was not intended to give the directors and chief officers of the corporation the right to employ themselves as workmen and la-

borers, and then, in case of insolvency, to give them the statutory lien, and prefer them to all the general creditors. *England v. Beatty Organ Co.*, 41 N. J. Eq. 470, 4 Atl. 307.

<sup>12</sup> See ante, § 1217.

<sup>13</sup> *Birdseye, C. & G. Consol. Laws* 1909, p. 3160, § 6.

<sup>14</sup> Under Laws 1854, ch. 402, § 4, as amended by Laws 1870, ch. 529, § 1, laborers employed by a sub-

tents, filing and entry of a notice of a mechanic's lien, and the priority and duration thereof shall apply to such liens. A copy of the notice of such lien shall be personally served upon such corporation within ten days after the filing thereof in the manner presented by the code of civil procedure for the service of summons in actions in justices' courts against domestic railroad corporations.

§ 1663. **North Carolina.**<sup>15</sup>—As often as any contractor for the construction of any part of a railroad which is in progress of construction shall be indebted to any laborer for thirty or less number of days' labor performed in constructing said road, or is indebted for more than thirty days to any person furnishing material for the construction of said road, such laborer or material-man may give notice of such indebtedness to said company and said company shall thereupon become liable to pay such laborer or material-man the amount so

contractor can not establish a lien against the company unless they show that at the time of filing their notices the company was indebted to the principal contractor on its contract with him, and unless, moreover, they show that the principal contractor was then indebted to the subcontractor. *Sampson v. Buffalo, N. Y. & P. R. Co.*, 13 Hun (N. Y.) 280, 6 N. Y. Weekly Dig. 74. Statute 1850, ch. 140, § 12, applied to laborers employed by subcontractors. *Kent v. New York Cent. R. Co.*, 12 N. Y. 628. Under the last-named statute the word "laborer" is used in its ordinary and usual sense, and implies the personal service of the individual designed to be protected. It does not include one who contracts for and furnishes the labor and services of

others, or who furnishes teams for work, whether with or without his services. *Balch v. New York & O. M. R. Co.*, 46 N. Y. 521. See also, *Wick v. Ft. Plain & R. S. R. Co.*, 27 App. Div. (N. Y.) 577, 50 N. Y. S. 479.

<sup>15</sup> Revisal 1905, § 2018, as amended by Pub. Laws 1913, p. 240. The general mechanics' lien law does not apply to railroads. *Tommey v. Spartanburg & A. R. Co.*, 4 Hughes (U. S.) 640, 7 Fed. 429; *Whitaker v. Smith*, 81 N. Car. 340, 31 Am. Rep. 503; *Buncombe v. Tommey*, 115 U. S. 122, 29 L. ed. 308, 5 Sup. Ct. 626. The provisions of the general mechanics' law in regard to notices by subcontractors are applicable to all contracts and subcontracts made by railroad companies. Revisal 1905, § 2021.

due him for labor or material and action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days' labor for which the claim is made, and such notice shall be given by the material-man to said company within thirty days after the materials have been furnished. Such notice to be given by the laborer shall be in writing and shall state the amount and number of days labor and the time when the labor was performed for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer or his attorney, and such notice of the material-man shall be in writing and shall state the amount of material furnished and when furnished, and the name of the contractor to whom furnished and by whom due, and shall be signed by such material-man or his attorney, and shall be served on an engineer, agent or superintendent employed by said company having charge of the section of the road on which such labor was performed, or material furnished, personally or by leaving the same at the office or usual place of business of such engineer, agent or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section unless the same is commenced within thirty days after notice is given to the company by such laborer or material-man as above provided.

§ 1663a. **North Dakota.**<sup>16</sup>—Every person who furnishes any labor, skill or material for constructing, altering or repairing any line of railway or any improvement or structure appertaining to any line of railway by virtue of any contract with the owner, his agent, contractor or subcontractor shall have a lien upon such line of railway and the right of way thereof and upon all bridges, depots, offices and other structures appertaining to such line of railway and all franchises,

<sup>16</sup> Rev. Code 1905, §§ 6239, 6240.

privileges and immunities granted to the owner of such line of railway for the construction and operation thereof to secure the payment for such labor, skill and materials upon filing a statement of his demand therefor in accordance with the provisions of the next paragraph within ninety days from the last day of the month in which such labor or material was furnished; but a failure to file the same within the time aforesaid shall not defeat the lien except to the extent specified in the next paragraph.

Every person who wishes to avail himself of these provisions shall file with the clerk of the district court of the county or judicial subdivision in which the property to be charged with the lien is situated and within ninety days after all the things aforesaid shall have been furnished or the labor done a just and true account of the demand due him after allowing all credits and containing a correct description of the property to be charged with such lien and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien, except as against purchasers or incumbrancers in good faith and for value whose rights accrue after the ninety days and before any claim for the lien is filed, or as against the owner except the amount paid to the contractor after the expiration of the ninety days and before the filing of the same.

§ 1664. *Ohio.*<sup>17</sup>—Any person, association of persons, or corporation contracting for the construction of a railroad,

<sup>17</sup> Gen. Code 1910, §§ 8339, 8343-8345. For the proceedings for enforcing such lien, see Gen. Code 1910, §§ 8346-8352. A lien upon a railroad is not authorized by a general mechanics' lien law which gives a mechanic's lien on "any house, mill, manufactory, or other building, appurtenance, fixture, bridge, or other structure," and on the interest of the owner in

the lot of land on which the same shall stand or be removed to. The language of the statute points to structures having a certain locality, on which they are erected, and from which they may be removed. The provision for recording the lien in the county where the labor was performed is not applicable in case of a lien upon a railroad extending through sev-

depot buildings, water-tanks, or any part thereof, shall be liable to and pay to each person performing labor or furnishing materials stipulated for in the contract with the owner of the road, under a contract express or implied with the original contractor, or with any subcontractor, for the whole or any part of the work stipulated in the original contract with the owner of the railroad.

A railroad company shall provide, in its contract with any person, association of persons, or corporation for the construction of its road, or any part thereof, that payments thereunder shall be made in the following order of priority: First, to the persons performing labor, furnishing materials, or boarding, on the order of any contractor or subcontractor to persons employed by them, or either of them, in furnishing materials or labor for or in the construction of such railroad, without preference. Second, to any subcontractor, any balance due under his contract after payment of his or their

eral counties, for it would be necessary to record the lien in several counties. *Rutherford v. Cincinnati & P. R. Co.*, 35 Ohio St. 559. No lien can be claimed on a railroad bridge for work and labor under the general mechanic's lien, but such lien can only be asserted under the railroad lien law. *Cleveland, C. & S. R. Co. v. Knickerbocker Trust Co.*, 86 Fed. 73. See also, *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37, 52 Am. Rep. 66; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. 549. A substantial compliance with the conditions of the statute providing for the service of written notice upon the owner of the road is essential to create any obligation on the part of such owner toward the person performing labor or furnishing materials, un-

der a contractor or subcontractor, or to give to such person any right of action against such owner. *Railway Company v. Cronin*, 38 Ohio St. 122. A provision for serving notice upon the secretary or other officer or agent of a railroad company is complied with by serving notice upon a director of the company. *Railroad Co. v. McCoy*, 42 Ohio St. 251. One has no lien on a railroad for materials furnished, if no lien be taken and perfected as provided by the statute. *Pennsylvania Co. v. Mehaffey*, 75 Ohio St. 432, 80 N. E. 177, 116 Am. St. 746. The lien is not waived by accepting the note of the railroad company evidencing his account for labor and materials. *Rousculp v. Ohio Southern R. Co.*, 19 Ohio Cir. Ct. 436, 10 O. C. D. 621.

liabilities to persons performing labor or furnishing materials or boarding, under his or their contract. Third, to any contractor, or construction company, intervening between a subcontractor and the railroad company, in the order of such intervention from such subcontractor upward to the owner of the railroad, any balance due after payment by the company, of amounts found due in the order of priority above provided.

A person who performs labor or furnishes materials for or in construction of any railroad, depot buildings, water-tanks, or any part thereof, and a person who furnishes boarding on the order of any contractor or subcontractor, to persons employed by them or either of them, in furnishing materials, or performing labor for or in construction of such railroad, depot buildings, water-tanks, or any part thereof, shall have a lien for its payment upon such railroad. Such lien shall have and maintain precedence over any lien taken, or to be taken, and subsist for one year from the date of filing the attested account provided for by statute. If an action is brought to enforce the lien within that time it shall continue in force until finally adjudicated.

It is also provided that laborers and employes of any persons, association of persons or corporation, whether such employment be at agriculture, mining, manufacture or other manual labor, shall have a lien upon the real property of their employers for their wages, which is hereby declared to be superior to the following liens taken or attaching during the existence of such unpaid labor claim<sup>3</sup> liens or attachment, liens of mortgage given or taken at a time of actual insolvency of the debtor, or with a view of preferring creditors or to secure a pre-existing debt, and superior to all claims for homestead or other exemptions, except articles of personal property to the heads of families and widows. In all cases when property of an employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within the period of three months prior to the time such assignee, re-

ceiver or trustee is appointed, shall first be paid out of the trust fund, in preference to all other claims against such employer, except claims for taxes and the costs of administering the trust.

§ 1664a. **Oklahoma.**<sup>18</sup>—Every mechanic, builder, artisan, workman, laborer, or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery, fixtures or other thing towards the equipment, or to facilitate the operation of any railroad, shall have a lien therefor upon the roadbed, buildings, equipments, income, franchises, and all other appurtenances of said railroad, superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees and beneficiaries under trusts or owners.

The lien above provided for shall not be effectual unless suit shall be brought upon the claim within one year after it accrued.

§ 1664b. **Oregon.**<sup>19</sup>—Any and all person or persons who shall hereafter as subcontractor, material-man, or laborer furnish to any contractor to any railroad corporation any fuel, ties, materials, supplies, or other article or thing, or who shall do or perform any work or labor for such contractor in conformity with any terms of any contract, express or implied, which such contractor may have made with any such railroad corporation, shall have a lien upon all property, real, personal, and mixed, of said railroad corporation: provided, such subcontractor, material-man or laborer shall have complied with the provisions of the statute, but the aggregate of all liens hereby authorized shall not in any case exceed the price agreed upon

<sup>18</sup> Comp. Laws 1909, §§ 6166, 6167.

<sup>19</sup> Bellinger & Cotton's Ann. Codes & Stats. 1902, § 5653. Giant

Powder Co. v. Oregon Pac. R. Co., 42 Fed. 470, 8 L. R. A. 700; Giant Powder Co. v. Oregon Western R. Co., 59 Ore. 236, 117 Pac. 279.



in the original contract to be paid by such corporation to the original contractor. Nor shall such corporation be liable for any greater sum than the amount then actually due by such corporation to said original contractor: and provided further, that no such lien shall take priority over existing lien.

§ 1665. **Pennsylvania.**<sup>20</sup>—The legislature of this state by resolution declared that it shall not be lawful for any company of the state empowered to construct and maintain any railroad, canal, or other public improvement, while any debts and liabilities incurred by the company to contractors, laborers, and workmen employed in the construction or repair of such improvement remain unpaid, to execute any assignment, conveyance, mortgage, or other transfer of the real or personal estate of the said company, so as to defeat, postpone, endanger, or delay such creditors, without their written assent shall first be had; and any such assignment, conveyance, mortgage, or transfer shall be deemed fraudulent, null, and void, as against any such contractors, laborers, and workmen.<sup>21</sup>

<sup>20</sup> Purdon's Dig. (13th ed.), p. 5049, § 18. This act provides for the issuing of a scire facias upon a judgment for the services. The plaintiff may proceed in equity notwithstanding this statute. *Malone v. Shamokin Val. & P. R. Co.*, 34 Leg. Int. 438. The act provides a remedy for the lien, but it does not extend it. *Hart's Appeal*, 96 Pa. St. 355. See also, *Act of March 13, 1873*, P. L. 45; and *Reed's Appeal*, 122 Pa. St. 565, 16 Atl. 100, construing the same.

<sup>21</sup> The intention of the legislature by this resolution was to give to an unpaid contractor a priority of claim to the company's property over every right that

could be acquired under a mortgage made after the debt to the contractor was incurred; and that the property, into whosoever hands it might come, should remain subject to a paramount claim of the contractor so long as the debt due to him remained unpaid. The resolution substantially gave the contractor a lien of indefinite duration. Though it did not give a *jus in re* or a *jus ad rem*, it constituted a charge upon the property, a right to prevent any disposition of it by which it could be withdrawn from the creditor's reach, and therefore in a legitimate sense an equitable lien. Such lien is not merged in any judg-

ment that may be obtained for the debt. Neither is the lien divested by a foreclosure sale of the property under a mortgage so made, especially if the sale be made subject to any lawful claims which may exist prior to the mortgage. Nor is such lien divested by a statute authorizing the company to borrow money, and to pledge its income and property to secure the payment. A repeal of the resolution can not be inferred from the grant of such a power. *Fox v. Seal*, 22 Wall. (U. S.) 424, 22 L. ed. 774, followed by *Tyrone & C. R. Co. v. Jones*, 79 Pa. St. 60, 1 Weekly Notes of Cases, 571; *Reed's Appeal*, 122 Pa. St. 565, 16 Atl. 109. A lien of a mortgage is not prior to that of a contractor where the mortgage was executed more than thirteen months after the construction work was begun on account of want of notice of the claim of the contractor, since the work itself is notice of such lien. *Pittsburg Const. Co. v. West Side Belt R. Co.*, 232 Pa. 578, 81 Atl. 884. Where a construction contract for building a railroad is set aside, at the instance of a railroad company, as *ultra vires*, with an allowance of compensation to the contractor for work actually performed by him, the contractor is entitled to a lien under this statute for the sum so allowed him. *New Castle N. R. Co. v. Simpson*, 26 Fed. 133. Under these laws a sale under a mortgage executed subsequently to the making of a contract for the building of a railroad is fraudulent and void as against the contractor; and if the property has

been conveyed in pursuance of such sale to a new company, it is still liable to the claim of the contractor. *Malone v. Shamokin Val. & P. R. Co.*, 34 Leg. Int. 438, *affd.* *Shamokin Val. & P. R. Co. v. Malone*, 85 Pa. St. 25. In this case the action was brought by the contractor more than six years after the making of the contract. This statute is held not to include civil engineers, although the latter were required to render service to the company from the commencement to the completion of the work. *Pennsylvania & D. R. Co. v. Leuffer*, 84 Pa. St. 168, 24 Am. Rep. 189, 5 Cent. L. J. 74, 4 Weekly Notes Cas. 77. And see *Wentworth's Appeal*, 24 Pittsburg L. J. 95. Earlier decisions had construed statutes relating to laborers' and servants' wages as intended to secure to manual laborers the fruits of their own work, and not as intended to embrace the earnings of contractors. The intent of all such statutes is to protect a class of persons who are wholly dependent upon the toil of their hands for subsistence, and who can not protect themselves. In one sense the engineer is a laborer, but so is the lawyer and doctor, the banker, and the corporation officer, yet they can not properly be included among the laboring classes. A subcontractor is not within the protection of this act. *McBroom's Appeal*, 44 Pa. St. 92; *Hart's Appeal*, 96 Pa. St. 355. A contractor, all of whose work was done after the recording of a trust deed executed by a railroad company, is not protected by this resolution

§ 1666. **Rhode Island.**<sup>22</sup>—Under the general lien law, any building, canal, turnpike, railroad, or other improvement constructed, erected, or repaired by contract, with or at the request of the owner, is subject to a lien for the work done and the materials used.

§ 1666a. **South Dakota.**<sup>23</sup>—Whoever, by performing labor, or furnishing skill, material or machinery, contributes to the construction, alteration, or repair, of any line of railway or any structure or appurtenance of such railway, or of any telegraph, telephone, or electric light line, or of any line of pipe, conduit, or subway, or any appliance or fixture pertaining to either, shall have a lien upon the line so improved, and upon all the rights, franchises, and privileges of the owner appertaining thereto.

§ 1667. **Tennessee.**<sup>24</sup>—Where any railroad company contracts with any person or persons for the grading of its roadway, the construction or repair of its culverts and bridges, the furnishing of cross-ties, the laying of its track, the erection of its depots, platforms, wood or water stations, section houses, machine shops, or other buildings, or for the delivery of material for any of these purposes, or for engineering or superintendence, there shall be a lien

even though his work and materials have made the corporate property and franchise available as security. *Reed's Appeal*, 122 Pa. St. 565, 16 Atl. 100.

<sup>22</sup> See ante, § 1223.

<sup>23</sup> Sess. Laws 1913, p. 386, § 3. A declaration against a railroad served upon it to enforce a lien, is a sufficient notice. *Central Trust Co. v. Condon*, 67 Fed. 84, 14 C. C. A. 314. The lien against a railroad company for right of way is on the entire line of the road and not on the particular ground

taken. *Crosby v. Morristown & C. G. R. Co.*, (Tenn.) 42 S. W. 597, Rev. Code 1903, § 698. The liability of a railroad company on a lien for labor performed under a contractor or subcontractor, is not more than the amount due from the company to the contractor or subcontractor when the labor was performed. *Adams v. Grand Island & W. C. R. Co.*, 10 S. Dak. 239, 72 N. W. 577, modified, 12 S. Dak. 424, 81 N. W. 960.

<sup>24</sup> Ann. Code 1896, §§ 3570, 3571, 3580.

upon such railroad in favor of the person or persons with whom the railroad company contracts for the performance of the work or the delivery of the materials, to the amount of the debt contracted therefor.

The lien shall continue in force for six months after the performance of the work or the delivery of the material, and until the termination of any suit commenced within the time for its enforcement.

Every subcontractor, laborer, material-man, or other person who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction or repairs of its culverts and bridges, or furnishes cross-ties or masonry or bridge timbers for the same, which is used in the building and construction of such railroad, its bridges and culverts, or who lays or aids in the laying of its track, building of its bridges, the erection of its depots, platforms, wood or water stations, section houses, machine shops, or other buildings, or for the delivery of material for any of these purposes, or for any engineering or superintendence, or who performs any valuable service, manual or professional, by which any such railroad company receives a benefit, all and every such person or persons shall have a lien on such railroad, its franchise and property, for the value of such work and labor done or materials furnished or services rendered as hereinbefore set out and specified, in as full and ample a manner as is provided by law for persons contracting directly with such railroad company for any such work and labor done or for materials furnished.

§ 1668. **Texas.**<sup>25</sup>—All mechanics, laborers and operatives who may have performed labor, or worked with tools, teams

<sup>25</sup> Rev. Civ. Stats. 1911, Arts. 5640, 5643. A foreman or superintendent of a company of laborers is a laborer, and is entitled to the lien. *Texas & St. L. R. Co. v.*

*Allen*, 1 White & W. Tex. App. Civ. Cas. § 568. The statute does not give a lien to persons who furnish material for such construction or repairs. The word

or otherwise, in the construction operation or repair of any railroad, locomotive, car or other equipment of a railroad, and to whom wages are due or owing for such work, or for

"laborer" means one who performs manual services in construction, repair or operation contemplated by the statute, and does not embrace one who may work in preparing materials to be used in the construction of the road. *St. Louis A. & T. R. Co. v. Matthews*, 75 Tex. 92, 12 S. W. 976. One who hires teams to a contractor to use in the construction of a railroad, to pay indebtedness he owes the contractor, is not entitled to a lien. *Eastern Texas R. Co. v. Foley*, 30 Tex. Civ. App. 129, 69 S. W. 1030. A bookkeeper for a railroad company is not entitled to a lien for his wages. *Miligan v. San Antonio & G. S. R. Co.*, (Tex. Civ. App.) 46 S. W. 918. The lien is confined to the road-bed and equipments. *Texas & St. L. R. Co. v. Allen*, 1 White & W. Tex. App. Civ. Cas. § 568. The lien being a creature of the statute, any allegation as to an agreement between the railroad company and its contractors, that a laborer's lien should exist in favor of the latter for board or any other account, is irrelevant. *Texas & St. L. R. Co. v. McCaughey*, 62 Tex. 271. The lien is assignable, and passes with an assignment of the account for services. *Austin & N. W. R. Co. v. Daniels*, 62 Tex. 70. And see *Texas & St. L. R. Co. v. McCaughey*, 62 Tex. 271; *Texas & St. L. R. Co. v. Allen*, 1 White & W. Tex. App. Civ. Cas. § 568. The statute creates such

privity between mechanics, laborers, and operatives on the one part, and the railroad company on the other, as entitles the former to maintain an action directly against the company to enforce the lien. *Austin & N. W. R. Co. v. Daniels*, 62 Tex. 70. The statute does not give a lien to contractors, builders, or materialmen, but only to mechanics, laborers, and operatives. Work done under an agreement by a subcontractor to cut cross-ties at a designated price is not the work of a contractor, but the work of those performing the labor under the subcontractor, and they are entitled to the lien. They must show that the work was done at the instance of the subcontractor, and that the wages are due. *Austin & N. W. R. Co. v. Daniels*, 62 Tex. 70. A lien claimant for wages for work on railroad construction must show the amount of each item for which he claims a lien. *Ft. Worth & D. C. R. Co. v. Read*, (Tex. Civ. App.) 140 S. W. 111. The furnishing of tools, coal and oil to a railroad company does not entitle the furnisher to a lien. *Waters-Pierce Oil Co. v. United States &c. Trust Co.*, 44 Tex. Civ. App. 397, 99 S. W. 212. This statute does not declare who shall be made defendants in suits brought to foreclose such liens, but it would seem that the contractor and subcontractor are necessary parties. If they are

the work of tools or teams thus employed, or for work otherwise performed, shall hereafter have a lien prior to all others upon such railroad and its equipments for the amount due him for personal services, or for the use of tools or teams.

The lien created by this act shall cease to be operative in twelve months after the creation of the lien, if no steps be sooner taken to enforce it.

§ 1669. **Utah.**<sup>26</sup>—The general mechanics' lien law includes a lien upon a railroad for labor done, or materials used in its construction, alteration, addition to, or repair.

§ 1670. **Vermont.**<sup>27</sup>—A railroad corporation shall require sufficient security from the contractor for the payment of labor performed in constructing the road by persons in their

not made parties, a judgment rendered against the company would be no bar to a subsequent suit by the subcontractor against the contractor or the railway company. In all such actions the judgment rendered should be binding upon the company, the contractor, the subcontractor, and the laborer alike. *Austin & N. W. R. Co. v. Rucker*, 59 Tex. 587. A constitutional requirement that the legislature shall pass laws to protect laborers on railroads and other public works does not of itself, without legislation, impose a lien for work done and materials furnished, nor does it require the legislature to do so. *Tyler Tap R. Co. v. Driscoll*, 52 Tex. 13; *Central and Montgomery R. Co. v. Henning*, 52 Tex. 466.

<sup>26</sup> See ante, § 1227. A laborer who has performed work or one who has furnished materials to a railroad company just before the

company executed a trust deed is entitled to a lien, where the earnings thereafter were used by the road to pay for permanent improvements, which sums so paid out together with the money on hand exceeds the lienor's claims. *Central Trust Co. v. Utah Cent. R. Co.*, 16 Utah 12, 50 Pac. 813.

<sup>27</sup> Pub. Stats. 1906, § 4411. This provision has been declared constitutional as applied to corporations previously chartered. *Brannin v. Connecticut & P. R. R. Co.*, 31 Vt. 214, citing and relying upon *Kent v. New York Cent. R. Co.*, 12 N. Y. 628; *Peters v. St. Louis & I. M. R. Co.*, 23 Mo. 107. Under this statute the liability of the corporation is not limited to laborers employed by persons contracting directly with the corporation, but extends to persons employed by subcontractors. *Brannin v. Connecticut & P. R. R. Co.*, 31 Vt. 214; *Kent v. New York Cent.*

employ; and such company shall be liable to the day-laborers employed by the contractors for labor actually performed on its road; the person having such a claim shall, in writing, within forty days after performance of the labor, notify the engineer in charge of the section on which the labor was performed that he has not been paid by the contractors.

§ 1671. *Virginia.*<sup>28</sup>—All conductors, brakemen, engine drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics, traveling representatives, or laborers, and all persons furnishing railroad iron, engines, cars, fuel, and all other supplies necessary to the operation of any railway, canal, or other transportation company, and all clerks, mechanics, traveling representatives, and laborers who furnish their services or labor to any mining or manufacturing company, whether such railway, canal, or other transportation or mining or manufacturing company be chartered under or by the laws of this state, or be chartered elsewhere, and be doing business within the limits of this state, shall have a prior lien on the franchises, gross earnings, and on all the real and personal property of said company which is used in operating the same to the extent of the moneys due them by said company for such wages or supplies; and no mortgage, deed of trust, sale, hypothecation, or conveyance executed since the twenty-first day of March, eighteen hundred and seventy-seven, shall defeat or take precedence over said lien: provided, however, that the lien secured by this provision to parties furnishing supplies shall be subsequent to that due to clerks, mechanics, and laborers,

R. Co., 12 N. Y. 628. The statute secures to the laborer not only his personal services, but payment for the use of his horse and cart, which he has used in the construction of the road *Branin v. Connecticut & P. R. R. Co.*, 31 Vt. 214.

<sup>28</sup> Code 1904, §§ 2485, 2486. A telegraph company under a contract to furnish service to a railroad company at stated rates, is entitled to a lien under the law giving laborers a lien. *Newgass v. Atlantic & D. R. Co.*, 72 Fed. 712.

for services furnished as aforesaid: and provided, that if any person entitled to a lien as well under the general mechanics' lien law, as under this section, shall perfect his lien given by either act, he shall not be entitled to the benefit of the other: and provided, also, that no right to or remedy upon a lien which has already accrued to any person shall be extended, abridged, or otherwise affected hereby.

No person shall be entitled to the lien given by the preceding paragraph unless he shall, within ninety days after the last item of his bill becomes due and payable for which such supplies are furnished or service rendered, file in the clerk's office of the court of the county or corporation in which is located the chief office in this state of the company against which the claim is, or in the clerk's office of the chancery court of the city of Richmond, when such office is in said city, a memorandum of the amount and consideration of his claim, verified by affidavit, which memorandum the said clerk shall forthwith record in the deed-book, and index the same in the name of the said claimant and also in the name of the company against which the claim is. Any such lien may be enforced in a court of equity.

§ 1672. **Washington.**<sup>29</sup>—The mechanics' lien law includes a lien upon a railroad for labor done or material furnished in its construction, alteration, or repair.

§ 1673. **Wisconsin.**<sup>30</sup>—As often as any contractor for the construction of any railroad or part thereof in progress of

<sup>29</sup> See ante, § 1230. One who furnishes the materials for the conduit and track of a railway has no lien on the power house or the land on which it is built. *Pacific Rolling Mills Co. v. James Street Const. Co.*, 68 Fed. 966, 16 C. C. A. 68.

<sup>30</sup> Stats. 1898, § 815. As to liens for work, labor and materials for any building, bridge, or road-bed, see the general lien law, § 1232. "Any bridge" applies to railroad bridges. *Purtell v. Chicago Forge &c. Co.*, 74 Wis. 132, 42 N. W. 265.



construction or repair, shall be indebted to any laborer for thirty days' labor or less, either manual or team labor, or both, including team and driver, performed in constructing or repairing such road such laborer may, within thirty days after his claim or demand shall have accrued, serve notice in writing, signed by him, his agent or attorney, on the corporation either owning or constructing or repairing such road that he claims such indebtedness, stating the amount thereof, the number of days labor, and the time when performed, and the name of the contractor from whom due, and thereupon such corporation shall be directly liable to such laborer for the amount so due him, provided he bring his action therefor within sixty days after the service of such notice. Such notice shall be served by delivering a copy thereof to an engineer, agent or superintendent in the employment of the corporation having charge of the part of the road on which such labor was performed, personally, or by leaving the same at his office or usual place of business with some person of suitable age therein.

**§ 1674. Vendor's lien on railroad company's land.**—Vendors of land to a railroad company have a lien for the purchase-money under the same circumstances that they would have a lien against other purchasers; <sup>31</sup> and as in other cases, they may have the lien enforced by a sale of the land.<sup>32</sup> Under some circumstances a vendor may have an injunction restraining the company from continuing in the possession and use of the land, and may have a receiver appointed to

<sup>31</sup> Winchester v. Mid-Hants R. Co., L. R. 5 Eq. 17; Wing v. Tottenham & H. J. R. Co., L. R. 3 Ch. 740; Allgood v. Merrybent & D. R. Co., 33 Ch. Div. 571; State v. Anderson, 91 U. S. 667, 23 L. ed. 290; Anderson v. Jacksonville, P. & M. R. Co., 2 Woods (U. S.) 628, Fed. Cas. No. 358.

<sup>32</sup> Munns v. Isle of Wight R. Co., L. R. 5 Ch. 414, L. R. 8 Eq. 653; St. Germans v. Crystal Palace R. Co., L. R. 11 Eq. 568, 19 W. R. 584; Keane v. Athenry & E. R. Co., 19 W. R. 43, 318; Walker v. Ware, H. & B. R. Co., 12 Jur. (N. S.) 18, pt. 1.

enforce the lien.<sup>33</sup> But ordinarily an injunction will not be granted to restrain the company from using the land, or from running trains or engines over it, until a sale, inasmuch as the land would thus be rendered useless to both parties.<sup>34</sup> Even after an unsuccessful attempt by the vendor to enforce his lien by sale, the court will not restrain the company from continuing in possession of the land, but will rather direct another attempt to sell.<sup>35</sup>

A mortgage, so far as it covers after-acquired property, is an equitable lien only, and the record of it prior to the acquisition of the property may not be constructive notice of the existence of the mortgage, or of the purpose for which it was made. But as against an agent of a railroad company, who has been employed in securing the necessary lands for its right of way, such record is presumptive evidence of actual knowledge on his part that bona fide bondholders had advanced, or would advance, their money upon the faith of the mortgage, and upon the faith of the public records as to the title and incumbrance. Therefore, when such an agent of the Canandaigua and Niagara Falls Railroad Company himself sold and conveyed land to the company, he was deemed to have waived any claim to a vendor's lien for the price, as against bondholders secured by a mortgage of the road and the real estate then owned by the company, or which might afterwards be acquired.<sup>36</sup> It was regarded as inconsistent with good faith on his part that he should retain a secret lien.

Moreover, the legal title to the land in question, which was conveyed to the railroad company, vested immediately in the latter. At the same instant the lien of the mortgage,

<sup>33</sup> *Winchester v. Mid-Hants R. Co.*, L. R. 5 Eq. 17.

<sup>34</sup> *Munns v. Isle of Wight R. Co.*, L. R. 5 Ch. 414, L. R. 8 Eq. 653; *Lycett v. Stafford & U. R. Co.*, L. R. 13 Eq. 261, 41 L. J. Ch. 474.

<sup>35</sup> *Williams v. Aylesbury & B. R. Co.*, 21 W. R. 819.

<sup>36</sup> *Fisk v. Potter*, 2 Abb. Dec. (N. Y.) 138. And see *Carpenter v. Black Hawk G. M. Co.*, 65 N. Y. 43.

which had before that been given by the railroad company, and which, before that time, remained but an equitable claim upon rights to be acquired, became a vested legal right upon the premises in question. "Assuming now," said Potter, J., delivering the judgment of the Court of Appeals of New York,<sup>37</sup> "for the purpose of the argument, the position urged by the plaintiff, that he did not intend to waive his equitable lien for the purchase-money, all that he can then claim is, that his equitable lien attached at the same instant of time with the mortgage lien. Here, then, are two liens, accruing at the same instant, the one a secret equitable one, the other a legal, written, recorded, public one. The question would then seem to be, which of these liens has priority?" This question is answered by the decision, that the lien of the recorded mortgage became a legal mortgage as soon as the land was acquired, and that this lien was superior to the equity of the vendor.

As against a mortgage which in terms conveys all the property a railway company may afterwards acquire for the use of its road, a person who afterwards sells to it land for its road-bed can not set up a vendor's lien for purchase-money. The mortgage becomes a lien upon such land from the moment the company acquires the title.<sup>38</sup> After such a mortgage has been foreclosed, and the road has passed into the hands of innocent purchasers, there is an additional reason why such a lien can not be enforced.<sup>39</sup>

A sale under a vendor's lien necessarily cuts off all incumbrances made by the company, and gives the purchaser a title freed from all claims on the part of the company itself, and from all claims on the part of the public.<sup>40</sup>

<sup>37</sup> *Fisk v. Potter*, 2 Abb. Dec. 138.

<sup>38</sup> *Pierce v. Milwaukee & St. P. R. Co.*, 24 Wis. 551, 1 Am. Rep. 203.

<sup>39</sup> *Pierce v. Milwaukee & St. P.*

*R. Co.*, 24 Wis. 551, 1 Am. Rep. 203.

<sup>40</sup> *Munns v. Isle of Wight R. Co.*, L. R. 5 Ch. App. 414; *Walker v. Ware, H. & B. R. Co.*, 35 Beav. 52, 14 W. R. 158.

**§ 1675. Priority of Mortgage Over Subsequent Judgment.**

—A mortgage of corporate property or of the corporate undertaking has priority over a subsequent judgment creditor of the company, and it does not vary the rule that the judgment is obtained before the mortgagee has entered into possession himself, or through a receiver.<sup>41</sup> If such judgment creditor has obtained the appointment of a receiver, the mortgagee may have a receiver appointed who will supersede the receiver already in possession.<sup>42</sup> The judgment creditor may also be restrained at the suit of a prior mortgagee from levying upon any of the property included in terms or by inference in the mortgage.<sup>43</sup>

A mortgage of which a judgment creditor has actual notice at the time of his recovery of judgment, though not recorded till afterwards, has priority of the judgment lien. If such judgment be afterwards assigned, the assignee takes it subject to all the equities affecting the original plaintiff in the judgment.<sup>44</sup>

Under a mortgage comprising the real and personal property of a railway company, a subsequent judgment creditor of the company may be enjoined from levying his execution upon any part of the property, although the mortgage be not due. Whenever the mortgagee's security is in danger of being impaired by the acts of a junior creditor, he may file his bill in chancery to protect his security and restrain the threatened injury.<sup>45</sup>

<sup>41</sup> *Legg v. Mathieson*, 2 Giff. 71; *Farmers' L. & T. Co. v. Longworth*, 83 Fed. 336, 27 C. C. A. 541; *Farmers' L. & T. Co. v. Detroit B. C. & A. R. Co.*, 71 Fed. 29.

<sup>42</sup> *Ames v. Birkenhead Docks*, 20 Beav. 332, 352.

<sup>43</sup> *Legg v. Mathieson*, 2 Giff. 71; *Gardner v. London, C. & D. R. Co.*, L. R. 2 Ch. 201, per Cairns, L. J.

<sup>44</sup> *Butler v. Rahm*, 46 Md. 541; *Foreman v. Central Trust Co.*, 71 Fed. 776, 18 C. C. A. 321.

<sup>45</sup> *Wildy v. Mid-Hants R. Co.*, 16 W. R. 409, 18 L. T. (N. S.) 73; *Legg v. Mathieson*, 2 Giff. 71, 29 L. J. Ch. 385; *Southern R. Co. v. Bouknight*, 70 Fed. 442, 17 C. C. A. 181, 30 L. R. A. 823. See also, *State v. Port Royal & A. R. Co.*, 84 Fed. 67.

Under a statute which provides that mortgages of railroad companies shall be subject to the lien of judgment recovered against them for labor performed, or for materials or supplies furnished, or for damages for losses or injuries suffered or sustained by the misconduct of their agents, or on any action founded on the liability of a common carrier, a judgment rendered after a railroad has been sold under a mortgage foreclosure, and the sale confirmed, does not become a lien at law against such railroad, nor in equity against the fund arising from such sale, when there is no surplus of proceeds after satisfying the mortgage debt.<sup>46</sup>

<sup>46</sup> *Jeffroy v. Moran*, 101 U. S. 285. 1 L. ed. 785.

## CHAPTER XLI.

### MARITIME LIENS.

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§ 1676. **Lien defined.**—A maritime lien differs essentially from a common-law lien, for it exists without possession.<sup>1</sup> It differs from an equitable lien, for it is something more than a charge or duty the performance of which is enforced by a court of equity. It is a right of property which may be enforced directly against a vessel by a libel in rem, and it is

<sup>1</sup> *Vandewater v. Mills*, 19 How. (U. S.) 82, 15 L. ed. 554, per Greer, J.; *The Rock Island Bridge*, 6 Wall. (U. S.) 213, 18 L. ed. 753; *Ward v. Chamberlain*, 2 Black (U. S.) 430, 17 L. ed. 319; *The Lotta-*

*wanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654; *The J. W. Tucker*, 20 Fed. 129, per Brown, J.; *The Fanny*, 2 Low. (U. S.) 508, Fed. Cas. No. 4638; *The Arcturus*, 18 Fed. 743; *The Menominie*, 36 Fed. 197.

immaterial in whose possession the vessel may be, or to whom the title may be transferred. In the case of *The Young Mechanic*,<sup>2</sup> upon appeal, Judge Curtis discussed the nature of a maritime lien, and said: "In my opinion the definition given by Pothier of any hypothecation is an accurate description of a maritime lien under our law. 'The right which a creditor has in a thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price. This is a right in the thing, a *jus in re*.' \* \* \* A right which enables a creditor to institute a suit, to take a thing from any one who may possess it, and subject it, by a sale, to the payment of his debt; which so inheres in the thing as to accompany it into whosoever hands it may pass by a sale; which is not divested by a forfeiture or mortgage, or other incumbrance created by the debtor,—can only be a *jus in re*, in contradistinction to a *jus ad rem*; or in contradistinction to a mere personal right or privilege. Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing as the right of a pledgee, or the lien of a bailee for work. The distinction between a *jus in re* and a *jus ad rem* was familiar to lawyers of the middle ages, and is said then to have first come into practical use, as the basis of the division of rights into real and personal. \* \* \* A *jus in re* is a right, or property in a thing, valid as against all mankind. A *jus ad rem* is a valid claim on one or more persons to do something, by force of which a *jus in re* will be acquired. \* \* \* The lawyers of the middle ages, who gave form to the customs of the seas, and arranged judicial proceedings to carry them into effect, certainly did not rank a lien or privilege among the *jura ad rem*. For it has been settled so long, that we know not its beginning, that a suit in the admiralty to enforce

<sup>2</sup> *Curtis (U. S.)* 404, 410, 411. See *The Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. 498, per Gray, J.

and execute a lien, is not an action against any particular person to compel him to do or forbear anything; but a claim against all mankind; a suit in rem, asserting the claim of the libellant to the thing, as against all the world. It is a real action to enforce a real right."

A different view of the nature of a maritime lien prevailed at one time. It was regarded as a matter of procedure, instead of a right of property. The lien constituted no incumbrance on the vessel, but became an incumbrance only by virtue of an actual attachment.<sup>3</sup> This view of the nature of a maritime lien has been discarded in the latter case already referred to.

§ 1677. **Characteristics of Maritime Liens.**—Some of the characteristics of a maritime lien are, that it attaches to a vessel or its appurtenances; that it arises from a contract or from a service which is in its nature maritime; that it exists without possession; and that it is enforced in admiralty by proceedings in rem. Whether a lien exists depends chiefly upon the service rendered. If this be strictly maritime, the vessel that is aided by the service is tacitly hypothecated to secure the debt for such service. The lien exists for the benefit of the vessel rather than for the security of the creditor. The vessel must continue its voyage, and for this purpose the master may pledge the credit of the vessel whenever necessary.

It matters not what the vessel may be, or what may be its size or form, or how propelled, or how employed. It does not matter that the vessel is without masts or sails or other motive power of her own,<sup>4</sup> as for instance a pleasure barge having no independent means of propulsion, but intended to be towed by a tow-boat, and to be used in the transportation

<sup>3</sup> The *Globe*, 2 Blatchf. (U. S.) 427, 433, Fed. Cas. No. 5483; The *Triumph*, 2 Blatchf. (U. S.) 433, Fed. Cas. No. 14182.

<sup>4</sup> *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373; *Disbrow v. The Walsh Brothers*, 36 Fed. 607.

of excursion parties in the neighborhood of a city, and having cabins fitted up and used as dancing halls.<sup>5</sup> Such a vessel is intended for the transportation of passengers, and is a vessel within the maritime law. A floating elevator is a vessel and a subject of maritime lien.<sup>6</sup> So is a scow carrying ballast to and from vessels in a harbor.<sup>7</sup> So is a steam-dredge, which is a floating scow fitted with appliances for deepening channels of navigation.<sup>8</sup> It is a vessel, and as such is subject to a maritime lien for supplies.<sup>9</sup> So is a lighter.<sup>10</sup> So is a dismantled steamboat moored on a navigable river, and used as a wharf-boat, because she is used in navigation and is movable, floating on the water.<sup>11</sup> A light-boat built and adapted to be used as a floating light is a vessel upon which a lien for materials furnished may attach under a state statute.<sup>12</sup>

But a dry-dock is not a vessel under the maritime law, because it is a fixed structure and is not used for the purpose of navigation.<sup>13</sup> Neither is a steamboat dismantled, stripped of boilers, engines, and paddle-wheels, moored upon the shore, the tide rising and falling in her, and used as a hotel or saloon.<sup>14</sup> A wrecking outfit leased to the owner of a tug, not as a part of its general equipment but for a special purpose, though attached to the hull and deck of the tug by timbers and bolts, does not become a part of it so as to be liable to the lien of a material-man.<sup>15</sup>

<sup>5</sup> *The City of Pittsburgh*, 45 Fed. 699.

<sup>6</sup> *The Hezekiah Baldwin*, 8 Ben. (U. S.) 55, Fed. Cas. No. 6449.

<sup>7</sup> *Endner v. Greco*, 3 Fed. 411.

<sup>8</sup> *Aitcheson v. Endless Chain Dredge*, 40 Fed. 253; *The Hezekiah Baldwin*, 8 Ben. (U. S.) 556, Fed. Cas. No. 6449; *The Alabama*, 19 Fed. 544, 22 Fed. 449; *The Pioneer*, 30 Fed. 206; *Woodruff v. One Scow*, 30 Fed. 269; *The Mac*, L. R. 7 Prob. Div. 126.

<sup>9</sup> *The Pioneer*, 30 Fed. 206; *The*

*Alabama*, 19 Fed. 544, 22 Fed. 449; *The Atlantic*, 53 Fed. 607.

<sup>10</sup> *The General Cass*, 1 Brown Adm. (U. S.) 334.

<sup>11</sup> *The Old Natchez*, 9 Fed. 476.

<sup>12</sup> *Briggs v. A Light Boat*, 7 Allen (Mass.) 287.

<sup>13</sup> *Cope v. Vallette Dock Co.*, 119 U. S. 625, 30 L. ed. 501, 7 Sup. Ct. 336.

<sup>14</sup> *The Hendrick Hudson*, 3 Ben. (U. S.) 419, Fed. Cas. No. 6355.

<sup>15</sup> *The Mildred*, 43 Fed. 393. See *The Edwin Post*, 11 Fed. 602.

§ 1678. **A Maritime Lien a strict right.**—A maritime lien is a strict right, and can not be extended by construction, analogy, or inference.<sup>16</sup> It is a secret lien, and may operate to the prejudice of general creditors and purchasers without notice. It moreover contravenes the general rule that all creditors have equal rights in their debtors' property. The lien does not arise on all contracts made for the benefit of the ship. Whether a contract is maritime or not depends upon the subject-matter of it, whether it provides for maritime services or maritime transactions. The subject-matter must be maritime, and not the mere object,—the ship.<sup>17</sup>

§ 1679. **Lien for repairs and supplies.**—A maritime lien for repairs and supplies arises only in cases of necessity, or apparent necessity, for the master to procure them on the credit of the vessel.<sup>18</sup> If the master has funds of the owner's which he ought to apply for these purposes, or if he has funds of his own which under his contract with the owners he ought so to apply, then no necessity exists for procuring supplies on the credit of the vessel; and if one knowing these facts, or having the means of knowing them, furnishes the supplies, or lends money to the master with which to pay for them, he can have no lien therefor upon the vessel.<sup>19</sup> In such case neither the master nor any one else has any authority to bind the vessel for supplies.

<sup>16</sup> *Vandewater v. Mills*, 19 How. (U. S.) 82, 15 L. ed. 554.

<sup>17</sup> *The Paola R.*, 32 Fed. 174.

<sup>18</sup> *Pratt v. Reed*, 19 How. (U. S.) 359, 15 L. ed. 660; *Thomas v. Osborn*, 19 How. (U. S.) 22, 15 L. ed. 532; *The Aurora*, 1 Wheat. (U. S.) 96; *The Grapeshot*, 9 Wall. (U. S.) 129, 141, 19 L. ed. 651; *The Never-sink*, 5 Blatchf. (U. S.) 539, 541, Fed. Cas. No. 10133; *The Charles E. Falk*, 157 Fed. 780; *The Clara A. McIntyre*, 94 Fed. 552.

<sup>19</sup> *The Lulu*, 10 Wall. (U. S.) 192, 19 L. ed. 906; *Stephenson v. The Francis*, 21 Fed. 715, 720, Insurance Co. v. Baring, 20 Wall. (U. S.) 159, 163, 22 L. ed. 250; *The J. F. Spencer*, 5 Ben. (U. S.) 151, 153, Fed. Cas. No. 7316; *The Eleodona*, 2 Ben. (U. S.) 31, 37, Fed. Cas. No. 4340; *The Suliote*, 23 Fed. 919; *The Alcalde*, 132 Fed. 576.

Thus the master of a vessel, on her arrival at her port of destination in a foreign country, appointed a firm of ship-brokers as her collecting and disbursing agents, and they collected the freights and held a large balance for the vessel. It then appearing that the vessel needed remetaling, these agents ordered the necessary metal from parties who understood that the bill should be paid by the agents in cash. The ship remained in the port or its vicinity for four months, and no demand was ever made upon the captain for payment of the bill; but it was audited by the captain and rendered to the agents. The latter, on settling with the captain, included the bill as if paid by them. After the ship had sailed the bill was demanded of the agents, who shortly afterwards failed. Upon a subsequent libel of the vessel for these supplies, it was held that there was no necessity for using the credit of the ship to obtain them; and as the libelants knew, or could have known upon inquiry, that the agents held ample funds of the ship and that there was no necessity for credit, no lien attached for the supplies.<sup>20</sup>

§ 1680. Demand for supplies and repairs be made by the master.—To constitute demands for maritime liens for supplies and repairs, they must have been furnished or made upon the master's order, on the credit of the ship, in some other than her home port.<sup>21</sup> The master of a vessel, being in a foreign port, has power to create a lien upon the vessel for repairs and supplies, in cases of necessity; and the lien is implied, without any express hypothecation, when the master obtains them on the credit of the vessel.<sup>22</sup> This is the estab-

<sup>20</sup> The *Suliste*, 23 Fed. 919.

<sup>21</sup> The *Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654; The *General Smith*, 4 Wheat. (U. S.) 438, 4 L. ed. 609; *Stephenson v. The Francis*, 21 Fed. 715; The *Thomas Fletcher*, 24 Fed. 375; The *Chelmsford*, 34 Fed. 399; *Parker v. The Little*

*Acme*, 43 Fed. 925; The *Samuel Marshall*, 49 Fed. 754; *Warren v. Kelley*, 80 Maine, 512, 15 Atl. 49; The *Colfax*, 179 Fed. 975.

<sup>22</sup> The *Regulator*, 1 Hask. (U. S.) 17, Fed. Cas. No. 11665. The master has a lien on the ships cargo for expenditures by him in

lished maritime law of the United States, and is in accordance with the ancient and general maritime law of the commercial world, though by the British law the master can create such a lien only by a bottomry bond.<sup>23</sup>

As a general rule, moreover, it is only the contracts which the master enters into in his character of master that bind the ship by a lien.<sup>24</sup> If the master is also the owner, it may be that the contract was made with him solely with reference to his character as master, and in that case a lien may arise.<sup>25</sup> If the master is also the charterer, and supplies and materials are furnished the vessel by material-men who are not shown to have knowledge of the charter, there is a lien for the supplies so long as he is master; but for such as are furnished after he has appointed another master, there is no lien; for, not being the master, he could only procure them as charterer.<sup>26</sup>

**§ 1681. Home port of vessel.**—The home port of a vessel “shall be deemed to be that at or nearest to which the owner, if there be one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides.”<sup>27</sup> The

taking measures to preserve the cargo such as a reasonably prudent man would deem necessary. *Wellman v. Morse*, 76 Fed. 573, 22 C. C. A. 318. The master can only pledge the credit of a vessel for money borrowed when an actual necessity exists for the money to keep the vessel employed. *The Alcalde*, 132 Fed. 576. See also, *Henderson v. Kanawha Dock Co.*, 185 Fed. 781, 107 C. C. A. 651.

<sup>23</sup> *Northcote v. The Henrich Bjorn*, 11 App. Cas. (D. C.) 270.

<sup>24</sup> *The St. Jago de Cuba*, 9 Wheat. (U. S.) 409, 417, 6 L. ed. 122; *The Norman*, 28 Fed. 383.

<sup>25</sup> *The Mary Bell*, 1 Sawy. (U.

S.) 135, Fed. Cas. No. 9199; *The New Champion*, 17 Fed. 816.

<sup>26</sup> *The Cumberland*, 30 Fed. 449; *The William and Emmeline*, 1 Blatchf. & H. (U. S.) 66, Fed. Cas. No. 17687. See also, *The Solweig*, 103 Fed. 322, 43 C. C. A. 250.

<sup>27</sup> U. S. Comp. Stat. 1901, § 4141, being Act of 1792; *Morgan v. Parham*, 16 Wall. (U. S.) 471, 21 L. ed. 303; *St. Louis v. The Ferry Co.*, 11 Wall. (U. S.) 423, 20 L. ed. 192; *White's Bank v. Smith*, 7 Wall. (U. S.) 646, 19 L. ed. 211. Liens for supplies to a vessel in her home port must depend on the laws of the state. *Learned v. Brown*, 94 Fed. 876, 36 C. C. A. 524.

place of the enrolment of a vessel is *prima facie* her home port.<sup>28</sup> But it may be shown that the place of enrolment is not the port nearest to the usual residence. The residence which determines the home port of a vessel and her proper place of enrolment is the owner's usual residence. He can have but one usual residence, though he may reside at many different places. His usual place of business, which for some commercial purposes may be taken as his place of residence, can not be considered in determining a vessel's home port.<sup>29</sup> The ship's home port, or in other words the place of residence of the managing owner, is a matter of fact to be determined by the evidence.<sup>30</sup> One furnishing supplies to a vessel at the port of her owner's residence has no lien therefore though the vessel has a foreign register, and sails under a foreign flag, the material-man knowing the fact of the owner's residence there.<sup>31</sup>

The different states of the United States are regarded as foreign to each other as respects the ownership of a vessel.<sup>32</sup>

<sup>28</sup> *Blanchard v. The Martha Washington*, 1 Cliff. (U. S.) 463, Fed. Cas. No. 1513; *The Superior*, Newb. (U. S.) 176; *The Jennie B. Gilkey*, 19 Fed. 127; *The Sarah Starr*, 1 Sprague (U. S.) 453, Fed. Cas. No. 12354. This presumption is a very weak one, because the nearest port may very often be in another state than the residence. *The Rapid Transit*, 11 Fed. 322, 329.

<sup>29</sup> *The Thomas Fletcher*, 24 Fed. 375; *The Rapid Transit*, 11 Fed. 322, 329.

<sup>30</sup> *The E. A. Barnard*, 2 Fed. 712; *The Mary Chilton*, 4 Fed. 847; *The Chelmsford*, 34 Fed. 399.

<sup>31</sup> *The Chelmsford*, 34 Fed. 399. Repairs to a vessel made in a foreign port under contract with the owner have no maritime lien in

the absence of a contract for a lien but the contract may be implied. *The Clinton*, 160 Fed. 421, 87 C. C. A. 373. See also, *The Cimbria*, 156 Fed. 378; *The Havana*, 92 Fed. 1007, 35 C. C. A. 148.

<sup>32</sup> *The Nestor*, 1 Sumner (U. S.) 73, Fed. Cas. No. 10126; *The Lulu*, 10 Wall. (U. S.) 192, 19 L. ed. 906; *The Kalorama*, 10 Wall. (U. S.) 204, 19 L. ed. 941; *The Patapsco*, 13 Wall. (U. S.) 329, 20 L. ed. 696; *The Belfast*, 7 Wall. (U. S.) 624, 19 L. ed. 266; *The Sultana*, 19 How. (U. S.) 362; *The Guy*, 9 Wall. (U. S.) 758, 19 L. ed. 710; *The Chusan*, 2 Story (U. S.) 455, Fed. Cas. No. 2717; *The Rich*, 1 Cliff. (U. S.) 308, Fed. Cas. No. 2161; *The Sarah J. Weed*, 2 Low. (U. S.) 555, Fed. Cas. No. 12350;



§ 1682. Supplies and repairs presumed to be furnished on owner's credit.—Supplies and repairs furnished to a vessel in her home port are conclusively presumed to have been furnished on the owner's personal credit, and no lien for them is created unless it be given by the local law of the state.<sup>33</sup>

There can be no lien for supplies or repairs furnished a vessel at the port of her owner's residence, although she be registered as of a foreign port,<sup>34</sup> unless the person furnishing the supplies or repairs has been misled by the foreign registration into giving credit to the vessel as a foreign one.<sup>35</sup> Nor is there ordinarily any lien when the owner or the managing owner is present in a foreign port, and there

The *James Guy*, 5 Blatchf. (U. S.) 496, Fed. Cas. No. 7196; The *Plymouth Rock*, 13 Blatchf. (U. S.) 503, Fed. Cas. No. 11237; The *Regulator*, 1 Hask. (U. S.) 17, Fed. Cas. No. 11665; The *Neversink*, 5 Blatchf. (U. S.) 539, Fed. Cas. No. 10133; The *General Burnside*, 3 Fed. 228; The *Cumberland*, 30 Fed. 449, 451, per Leake, J.; The *Canada*, 7 Fed. 119; *Black Diamond Coal Min. Co. v. The H. C. Grady*, 87 Fed. 232. Hoboken, N. J., is a foreign port of a vessel whose owner resides in New York. The *Golden Rod*, 151 Fed. 6, 80 C. C. A. 246. One in possession of a vessel under contract of purchase is regarded as her owner and the port of his residence is the vessel's home port. *Eley v. The Shrewbury*, 69 Fed. 1017.

<sup>33</sup> *Stephenson v. The Francis*, 21 Fed. 715; *The Queen of St. John*, 31 Fed. 24; *Buddington v. Stewart*, 14 Conn. 404, 409; *Warren v. Kelley*, 80 Maine 512, 15 Atl. 49.

It has been held, however, that in a case of pressing necessity, when the master can not well communicate with the owner, he may bind the ship for necessities supplied at a home port. *Fox v. Holt*, 30 Conn. 558, 560, 571; *The Strohn*, 191 Fed. 213; *The Iola*, 189 Fed. 972; *The F. A. Kilburn*, 129 Fed. 107, 103 C. C. A. 252.

<sup>34</sup> *The E. A. Barnard*, 2 Fed. 712; *The Mary Chilton*, 4 Fed. 847; *Beinecke v. The Secret*, 3 Fed. 665; *The Norman*, 6 Fed. 406; *The Albany*, 4 Dill. (U. S.) 439, Fed. Cas. No. 131; *Hill v. The Golden Gate*, 1 Newb. (U. S.) 308, Fed. Cas. No. 6492; *The Alice Tainter*, 5 Ben. (U. S.) 391, 14 Blatchf. (U. S.) 41, Fed. Cas. No. 194; *The Plymouth Rock*, 13 Blatchf. (U. S.) 505, Fed. Cas. No. 11237.

<sup>35</sup> *The E. A. Barnard*, 2 Fed. 712, per Butler, J.; *The Walkyrien*, 11 Blatchf. (U. S.) 241, Fed. Cas. No. 17092; *The St. Jago de Cuba*, 9 Wheat. (U. S.) 409, 6 L. ed. 132.

takes general charge of the vessel and orders materials for her without acting in the capacity of master.<sup>36</sup>

It is only the contract of the master, as a general rule, that creates a lien upon the vessel; but from all of his contracts made in a foreign port for necessary supplies or repairs to the ship, there results an implied hypothecation of the ship for the payment.

§ 1683. Lien for supplies where there are several owners.—Where there are several part owners, general or special, residing in different states, no lien arises for supplies furnished in the state of the known residence of either.<sup>37</sup>

Where there are two part owners who reside in different states, and the residence of both is known to those who furnish supplies in either state, the presumption of personal credit applies within one state as much as within the other; and consequently no lien could arise within either state.<sup>38</sup> Though the registration is usually but not necessarily in either one or the other state, the place of registration is immaterial where the actual residence of the owner is known. The nearest port may often be in another state than the residence of the owner or any part owner. The lien depends upon the residence of the owner or owners; and while a vessel can not, perhaps, in a strict sense, have two home

<sup>36</sup> *The Regulator*, 1 Hask. (U. S.) 17, Fed. Cas. No. 11665; *The George T. Kemp*, 2 Low. (U. S.) 477, Fed. Cas. No. 5341; *The Cimbria*, 156 Fed. 378; *Moore v. Lincoln Park & Steamboat Consol. Co.*, 196 Pa. St. 519, 46 Atl. 857; *The Jennie Middleton*, 94 Fed. 683. The presumption that repairs made in a foreign port, pursuant to the order of the owner who is present, were furnished on the owner's credit may be rebutted by showing facts from which an implied agreement for a lien may

be inferred. *The Ella*, 84 Fed. 471.

<sup>37</sup> *Stephenson v. The Francis*, 21 Fed. 715; *The Rapid Transit*, 11 Fed. 322, 328; *The Indiana*, *Crabbe* (U. S.) 470, Fed. Cas. No. 14165; *The Samuel Marshall*, 49 Fed. 754; *The Glenmont*, 34 Fed. 402.

<sup>38</sup> *Stephenson v. The Francis*, 21 Fed. 715, per Brown, J.; *The E. A. Barnard*, 2 Fed. 712; *The Mary Chilton*, 4 Fed. 847; *Hill v. The Golden Gate*, 1 Newb. (U. S.) 308, Fed. Cas. No. 6492.

ports, she may be a domestic vessel in two or more states. No lien can arise for material-men in any state where an owner or part owner resides.<sup>39</sup>

Repairs were furnished in Philadelphia to a vessel wholly owned and registered in New Jersey. One sixth of the vessel was sold to a resident of Philadelphia, who was thereupon made managing owner, and a new registry was taken out in Philadelphia; and the repairs were continued under his direction. It was held that a lien accrued for the repairs prior to the sale of the one sixth, but that there was no lien for those made afterwards.<sup>40</sup>

**§ 1684. No lien for supplies sent to vessel's home port.**—No maritime lien exists for supplies sent from one state to a vessel then lying at her home port within an adjoining state which is the state of the owner's residence. In such case the supplies are not furnished in a foreign port, but in the vessel's home port. Thus, if a vessel is owned in New Jersey, and while she is lying at a wharf at Keyport in that state, across the bay of New York, supplies are furnished from New York, they are furnished in the vessel's home port, and no maritime lien exists therefor.<sup>41</sup>

**§ 1685. Lien where owners hold the vessel out as foreign vessel.**—But if the owners of a domestic vessel hold her out as a foreign ship, supplies furnished upon the faith of the foreign ownership are a lien upon her, the owners being estopped from taking advantage of their own misrepresentation.<sup>42</sup> The fact that the name of a foreign port is painted

<sup>39</sup> *The Rapid Transit*, 11 Fed. 322; *The Glenmont*, 34 Fed. 402.

<sup>40</sup> *Tree v. The Indiana*, Crabbe, (U. S.) 479, Fed. Cas. No. 14165.

<sup>41</sup> *The Mary McCabe*, 22 Fed. 750; *The Eliza Jane*, 1 Sprague (U. S.) 152, Fed. Cas. No. 4353; *The John S. Parsons*, 110 Fed. 994.

<sup>42</sup> *The St. Jago de Cuba*, 9 Wheat. (U. S.) 409, 416, 6 L. ed. 122; *The Nestor*, 1 Summer (U. S.) 73, 75, Fed. Cas. No. 10126; *The Mary Chilton*, 4 Fed. 847; *Stephenson v. The Francis*, 21 Fed. 715; *The E. A. Barnard*, 2 Fed. 712, 716.

on the stern of the vessel is no representation of the foreign character of the vessel; nor is the statement by the owner that the vessel is registered in a foreign port any representation that she is a foreign vessel.<sup>43</sup>

§ 1686. **Presumption that repairs are furnished on credit of the vessel.**—There is a presumption that repairs or supplies furnished to the master in a foreign port were furnished on the credit of the vessel.<sup>44</sup> This presumption is strengthened by showing that the repairs or supplies were charged to the vessel at the time they were made,<sup>45</sup> and it is not overthrown by the fact that the libelants, when they undertook the repairs, did not know where the owner resided; nor by the fact that they were made at the request of the owner's agent at the port where the repairs were made; nor by the fact that ninety days were given the owner in which to pay for the repairs; nor by the fact that the libelants asked the agent to give his note for the debt.<sup>46</sup> The master, when in a foreign port, in the absence of the owner, is presumably without other means than the credit of the ship to obtain necessary supplies or repairs.

An agreement between the owners and the captain, that the latter should for a certain sum find the crew and supply provisions, does not affect the lien of one who furnished provisions in a foreign port without knowledge of the agreement.<sup>47</sup>

<sup>43</sup> *The Mary Chilton*, 4 Fed. 847.

<sup>44</sup> *The Belfast*, 7 Wall. (U. S.) 624, 643, 19 L. ed. 266; *The Emily Souder*, 17 Wall. (U. S.) 666, 670, 21 L. ed. 683; *The Lulu*, 10 Wall. (U. S.) 192, 19 L. ed. 906; *The Eliza Jane*, 1 Sprague (U. S.) 152, Fed. Cas. No. 4363; *The Patapsco*, 13 Wall. (U. S.) 329, 20 L. ed. 696; *The Comfort*, 25 Fed. 158; *The Charlotte Vanderbilt*, 19 Fed. 219; *The New Champion*, 17 Fed. 816; *The Secret*, 15 Fed. 480; *The E. A. Bais-*

*ley*, 13 Fed. 703; *The Easteban de Antunano*, 31 Fed. 920, per Pardee, J.; *Randall v. Roche*, 30 N. J. L. 220, 82 Am. Dec. 233; *The Now Then*, 50 Fed. 944, 32 Am. L. Reg. 162; *The Marion S. Harris*, 85 Fed. 798, 29 C. C. A. 428.

<sup>45</sup> *The Comfort*, 25 Fed. 158. See § 1689, post.

<sup>46</sup> *The Comfort*, 25 Fed. 158.

<sup>47</sup> *The New Champion*, 17 Fed. 816.

The circumstances must be such as to show that the supplies were furnished or the repairs made upon the credit of the vessel, and not on the personal credit of the owner or of any one else.<sup>48</sup>

§ 1687. **Lien for supplies furnished to vessel in foreign port by home citizen.**—A lien exists for supplies furnished to a vessel in a foreign port by a citizen of the vessel's home port.<sup>49</sup> Newport is a foreign port to Boston, the home port of a vessel. Therefore one who furnishes supplies to a yacht at Newport is entitled to a lien under the general admiralty law, although the person who supplied them resided at the port of Boston, and furnished the supplies upon an order received at Boston from Newport, and these were sent to the yacht at Newport by express.<sup>50</sup>

§ 1688. **Rule where supplies or repairs are obtained by owner and not master.**—Supplies or repairs obtained by an owner in person, not being the master, in a foreign port, are presumed to be furnished on his personal credit only, unless it be shown that in the negotiations there was some reference made to the ship as a source of credit, or that some

<sup>48</sup> The *F. E. Spinner*, 48 Fed. 577; The *James Farrell*, 36 Fed. 500. In the latter case a shipwright at Jersey City solicited work at the office of the owner's representative in New York. The boat was sent to him in Jersey City, in charge of the master, to be repaired. "The further circumstances \* \* \* that the bill was rendered there (in New York); that a note was there twice taken for payment; that the vessel was frequently present and subject to suit; and that, nevertheless, no libel was filed, nor any lien upon the ship claimed, until between

eight and nine months after the work was done, and after the vessel had virtually passed into bona fide hands—seem to me to require that the work should be held intended to be done on personal credit only, and not on the credit of the boat." Per Brown, J. The *Golden Rod*, 151 Fed. 8. 80 C. C. A. 248.

<sup>49</sup> The *Sarah J. Weed*, 2 Low. (U. S.) 555, Fed. Cas. No. 12350; The *Agnes Barton*, 26 Fed. 542; The *Huron*, 29 Fed. 183; The *Chelmsford*, 34 Fed. 399; The *James Farrell*, 36 Fed. 500.

<sup>50</sup> The *Huron*, 29 Fed. 183.

other circumstance clearly indicates the intention of the parties to bind the ship.<sup>51</sup> The intention of the parties, to be gathered from all the circumstances of the transaction, determines the question of the credit and the existence of the lien.<sup>52</sup> This subject is ably examined, and the law clearly stated, by Judge Brown, of the southern district court of New York.<sup>53</sup> "There is no presumption of law," he says, "that an owner, because he is in a foreign port, including in that designation the different states of this country, is without means, reputation or credit, and has no other resource but the ship to obtain needed supplies. The reason for the prima facie presumption in the case of supplies ordered by the master in a foreign port does not apply, therefore, where the owner is present and orders the supplies in person; and hence no such prima facie presumption in the latter case has ever been recognized. Maritime liens for repairs and supplies, being secret incumbrances, are not favored. They are allowed only upon grounds of commercial convenience and necessity. In the state of the owner's residence, where he is presumptively present, or within easy communication, no mere maritime lien for repairs and supplies there furnished is by our law in any case allowed. In that case the presump-

<sup>51</sup> The *St. Jago de Cuba*, 9 Wheat. (U. S.) 409, 6 L. ed. 122; *Thomas v. Osborn*, 19 How. (U. S.) 22, 15 L. ed. 534, per Taney, C. J.; *The Grapeshot*, 9 Wall. (U. S.) 129, 19 L. ed. 651; *The Lulu*, 10 Wall. (U. S.) 192, 19 L. ed. 906; *The Emily Souder*, 17 Wall. (U. S.) 666, 21 L. ed. 684; *The Mary Chilton*, 14 Fed. 847; *Stephenson v. The Francis*, 21 Fed. 715, 719, per Brown, J.; *The Mary Morgan*, 28 Fed. 196; *The Regulator*, 1 Hask. (U. S.) 17, Fed. Cas. No. 11665; *Sarchet v. The Davis*, Crabbe (U. S.) 185, 196, Fed. Cas. No. 12357; *The Kingston*, 23 Fed. 200; *The*

*Now Then*, 50 Fed. 944; *The Ella*, 84 Fed. 471; *The Venezuela*, 173 Fed. 834; *The Charles Spear*, 143 Fed. 185.

<sup>52</sup> *The Rapid Transit*, 11 Fed. 322, 329; *The Jeanie Landles*, 17 Fed. 91; *The Gracie Kent*, 169 Fed. 893. When repairs are furnished to a vessel in a foreign port on order of the owner, the burden is on claimant seeking to establish a lien to show a contract or mutual understanding that he was to have a lien. *Woodall v. The Havana*, 87 Fed. 487.

<sup>53</sup> *Stephenson v. The Francis*, 21 Fed. 715.

tion of law is conclusive, that the owner or his representative is within reach; that he is able to supply his ship upon his ordinary responsibility; and that he intends to do so without burdening her with secret liens. In a foreign port, when the owner is present and procures the supplies in person, not being master, in the absence of any express reference to the ship as a source of credit, the same presumption as to the owner's means and as to his intention exists *prima facie*; but this presumption is not conclusive, as in the home port, and may be repelled by proof drawn either from the express language of the parties, or from any other circumstances satisfactorily showing that a credit of the ship was within the common intention; and when this intention appears, the lien will be sustained. This is allowed because even an owner in a foreign port may be without means, reputation, or credit, and hence may be under the same necessity as the master for making use of the credit of the ship."

Hence an exception to the rule is established, that supplies ordered by the owner in person in a foreign port may be made a charge on the ship by agreement or understanding of the parties.<sup>54</sup> It is always possible for the owner to bind the vessel by an express lien, but there can be no implied lien when the contract is made by a known owner.<sup>55</sup>

**§ 1689. Supplies charged to vessel when ordered by owner.**—The fact that a material-man has charged to the ship on his books supplies ordered by the owner in person

<sup>54</sup> *The Kalorama*, 10 Wall. (U. S.) 204, 19 L. ed. 941; *The James Guy*, 1 Ben. (U. S.) 112. Fed. Cas. No. 7195; *The Union Express*, 1 Brown Adm. (U. S.) 537; *The Sarah Harris*, 7 Ben. (U. S.) 177. Fed. Cas. No. 12346; *Stephenson v. The Francis*, 21 Fed. 715, 722, per Brown, J. And see *The George*

*T. Kemp*, 2 Low. (U. S.) 477, Fed. Cas. No. 5341, and *The Mary Morgan*, 28 Fed. 196, where the cases are examined by Butler, J. *The Ella*, 84 Fed. 471; *Woodall v. The Havana*, 87 Fed. 487.

<sup>55</sup> *The Mary Morgan*, 28 Fed. 196.

is of very little weight even as showing his own intention to charge the ship with their price.<sup>56</sup> "The usual practice of merchants to make such charges against the vessel indifferently, whether the vessel be in her home port or not, shows that such a charge is very slight, if any, evidence of an actual reliance on the ship. In practice it is scarcely more than a habit adopted by merchants in order that their books may not tell against them, if, in fact, they would be entitled to hold the ship. But when nothing on that subject is spoken of between the parties, a mere secret intention of the material-man to charge the ship, in no way communicated to the owner at the time, can have no weight as evidence of the common intent. The question is, what did the conversation of the parties or the circumstances of the transaction authorize the libelants to understand as the basis of furnishing the supplies? In some cases a few words or slight circumstances may clearly indicate the common intention. If an owner seeks supplies of an entire stranger in a foreign port, something will almost necessarily occur in the ordinary course of business to indicate whether the intention is to rely on his personal credit or on that of the ship also."<sup>57</sup>

§ 1690. Rule where dealing is with charterer.—In case the dealing is with one known to be a charterer, the presumption is stronger that the dealing is upon his personal credit only, if the supplies be such as are required in the ordinary course of the ship's business, and are not obtained in a port of distress, for it is well known that the charterer is bound to pay for such supplies himself, and has no power to charge them to the ship.<sup>58</sup> There may be exceptional

<sup>56</sup> *Beinecke v. The Secret*, 3 Fed. 665, 667; *Stephenson v. The Francis*, 21 Fed. 715.

<sup>57</sup> *Stephenson v. The Francis*, 21 Fed. 715, 722, per Brown, J.

<sup>58</sup> *Gracie v. Palmer*, 8 Wheat. (U. S.) 605, 639, 5 L. ed. 696; *The Freeman v. Buckingham*, 18 How. (U. S.) 182, 15 L. ed. 341; *The Columbus*, 5 Sawy. (U. S.) 487, Fed.



cases in which a charterer may bind the ship for ordinary supplies; as where the charterer is a distant foreign corporation, known to be insolvent,<sup>59</sup> or where the vessel is in a port of distress, on an unfinished voyage, and the interests of the general owners require that she should be made liable, if necessary, for repairs or supplies, in order to complete her voyage;<sup>60</sup> or where the charter party provides that, for supplies furnished on the order of the master, there may be a lien therefor on the vessel.<sup>61</sup> And so, if an owner allows a charterer to have full possession and management of a vessel, and thus to become the owner for the voyage, *pro hac vice*, he must be presumed to consent that the vessel shall be liable for all repairs made in a foreign port necessary to enable her to pursue the voyage, and that the special owner may bind the vessel for this purpose.<sup>62</sup> But ordinarily the mere fact that the material-man knew that the person ordering the supplies was a charterer, implies that the material-man knew that the charterer, and not the owner, or the vessel, was bound to pay for her necessary

Cas. No. 3044; *The William Cook*, 12 Fed. 919; *Stephenson v. The Francis*, 21 Fed. 715, per Brown, J.; *Neill v. The Francis*, 21 Fed. 921; *Beinecke v. The Secret*, 3 Fed. 665, 15 Fed. 480; *The Norman*, 6 Fed. 406, 28 Fed. 383; *The Aero-naut*, 36 Fed. 497; *Post Steamboat Co. v. Loughran*, 12 App. D. C. 430.

<sup>59</sup> *The Patapasco*, 13 Wall. (U. S.) 329, 20 L. ed. 696; *The Monsoon*, 1 Sprague (U. S.) 37, Fed. Cas. No. 9716.

<sup>60</sup> *The City of New York*, 3 Blatchf. (U. S.) 187, 189; *Stephenson v. The Francis*, 21 Fed. 715; *The Sydney L. Wright*, 5 Hughes (U. S.) 474; *The India*, 14 Fed. 476, 16 Fed. 262; *The Bombay*, 38 Fed.

512, 853; *The Seaboard*, 119 Fed. 375; *The George Dumois*, 68 Fed. 926, 15 C. C. A. 675.

<sup>61</sup> *Moore v. The Robilant*, 42 Fed. 162.

<sup>62</sup> *The Lime Rock*, 49 Fed. 383. Green, J., said: "Repairs put upon a vessel under the circumstances that the repairs were put upon this vessel, raise a strong presumption that they were put there upon the credit of the vessel, and not upon the credit of the owner; and it is incumbent upon the claimant to show by weight of evidence that the lien was actually given up, in order to rebut that presumption. The burden is upon him." See also, *The O. H. Vessels*, 183 Fed. 561, 106 C. C. A. 107.

supplies.<sup>63</sup> "In the case of a foreign owner *pro hac vice*, who has agreed with the general owner that he will pay for the supplies, and whose relations to the vessel and to the general owner are known to the person who furnishes supplies, the presumption is that credit is given to him personally, unless some facts or circumstances repel and overcome that presumption. In almost all cases where a stranger and foreigner seeks for credit, something will be said or done in the course of the negotiations to show that personal credit alone is not offered, or is not esteemed sufficient. If both parties indicate, in their dealings with each other, that personal credit is not questioned, the mere charge upon the books to the vessel is not adequate to create a lien."<sup>64</sup>

**§ 1691. No lien for supplies obtained by charterer at the place of his residence.**—There is no lien for supplies obtained by a charterer at the place of his residence, though the general owners reside elsewhere, so that as to them the port where the supplies are furnished is a foreign port.<sup>65</sup> A

<sup>63</sup> *Stephenson v. The Francis*, 21 Fed. 715. "Where material-men furnish ordinary supplies to a known charterer in person, who is running a vessel upon short trips, and they know, or are chargeable with knowledge of, his obligations to the general owner to pay for the supplies himself and not to charge the ship therefor, it seems to me but reasonable to require that the material-men, if they do not mean to furnish supplies except on the credit of the ship, should, at least, make that fact known, unless other circumstances make the common intent so clear as to dispense with the need of any express mention of this source of credit." Per Brown, J. See, also, *The Stroma*, 41 Fed. 599, *affd.* 53 Fed. 281, 3 C. C. A. 530; *The*

*Gen. J. A. Dumont*, 158 Fed. 312; *The Mt. Desert*, 158 Fed. 217; *Valverde v. Spottswood*, 77 Miss. 912, 28 So. 720.

<sup>64</sup> *The Stroma*, 53 Fed. 281, 3 C. C. A. 530, per Shipman, J., *affg.* 41 Fed. 599; *The City of New York*, 3 Blatchf. (U. S.) 187, Fed. Cas. No. 2758, and *The India*, 16 Fed. 262, *limited*.

<sup>65</sup> *The Pirate*, 32 Fed. 486; *Beinecke v. The Secret*, 3 Fed. 665; *The Norman*, 6 Fed. 406; *Stephenson v. The Francis*, 21 Fed. 715; *The Cumberland*, 30 Fed. 449; *Hill v. The Golden Gate*, 1 Newb. (U. S.) 308; *The Aeronaut*, 36 Fed. 497; *The Secret*, 15 Fed. 480; *The Samuel Marshall*, 49 Fed. 754; *The Mary Morgan*, 28 Fed. 196; *The Glenmont*, 34 Fed. 402, 404; *The Kingston*, 23 Fed. 200.

charterer having control of a vessel is regarded as the owner *pro hac vice*, and his residence alone is looked to in determining the home or foreign character of the vessel. Supplies furnished in the state of the residence of the charterer are presumed to have been furnished on his personal credit only.

But the charterer is the owner only in a very modified sense. "He can neither sell nor mortgage the vessel, nor use her for a different purpose from that specified. He can not, like the owner, complete an hypothecation by a mortgage at his residence, no matter how much he may need 'wings and legs to the forfeited hull to get back, for the benefit of all concerned.' The presumption is against the tacit hypothecation in the home port, for it is always within the owner's power to make an express hypothecation or mortgage, if deemed necessary; but this the charterer is unable to do, and the object for which maritime liens and priority of payment is recognized is defeated. The doctrine of the residence of the charterers being accepted as the home port of the vessel is a fiction of the law for equitable purposes, which will, I am satisfied, be set aside whenever the peculiar circumstances of a case demand. In every case, the decision seems to have been based upon the knowledge of the charter, and the duties of the charterer under it, and the unwillingness of the courts to aid the material-men in obtaining from the owner compensation for that which he had furnished at the request and for the benefit of the charterer, knowing at the time that the charterer had promised to pay. This knowledge has been presumed from the fact of dealing with the charterer and not the master; from public notice of the charter by the re-enrolment or registry of the vessel; or from direct information."<sup>66</sup> Though the

<sup>66</sup> *The Cumberland*, 30 Fed. 449, 715; *The Secret*, 15 Fed. 480; *The per Locke, J., citing The Norman*, William Cook, 12 Fed. 919, 6 Fed. 406; *The Francis*, 21 Fed.

vessel is foreign in respect to original owners, it is not foreign in respect to the charterer, who is the owner *pro hac vice*. In such case, when the charterer who is bound to supply these necessities is present at the place of his residence, and himself contracts for the supplies, there is no implication that the ship's necessities could not be relieved except by pledging her credit.

No lien exists for materials furnished to the charterer in the home port of a vessel, under an agreement to accept in part payment the note of the freighter, if from the evidence it appears that the material-man was aware of the terms of the charter party, and did not suppose or believe, at the time the work and materials were contracted for, that they were to be supplied on the credit of the boat or its owners.<sup>67</sup>

It is even held that it is immaterial that the person who furnished the supplies trusted the ship, and had no knowledge that the person who ordered the supplies was the charterer of the vessel.<sup>68</sup>

The charterer of a steamer for the season, not being the master, applied in person to coal dealers in Philadelphia for coal, upon her first trip thither from Bridgeport, Connecticut, stating that he had a charter for the season, and directed the coal to be billed to him, and gave in payment his check on a Bridgeport bank, stating that it was not then good, but he thought it would be when presented. No reference was made to the vessel as a source of credit, and there was no inquiry made of the master and no dealing with him, or with any other officer or agent of the ship, and the charterer had, by the terms of the charter party, agreed to pay for all such supplies. It was held that the circumstances indicated to the libelants that the application for coal was upon the charterer's credit only, and that, in furnishing the coal thereupon without any dissent or reference to the credit of the

<sup>67</sup> *The Howard*, 29 Fed. 604.

<sup>68</sup> *The Norman*, 6 Fed. 406.

ship, or inquiry of the master, the libelants must be held to have acquiesced in trusting to the charterer only, and that the ship was not bound.<sup>69</sup>

§ 1692. **Character of vessel determined by place of owner's residence.**—Where, however, the general owner retains possession and immediate control of the vessel, the charter party being merely a contract of affreightment, the character of the vessel, whether foreign or not, is determined by the place of residence of the owner, rather than that of the charterer.<sup>70</sup>

And so, where the master himself is the charterer, a material-man who deals with him in a foreign port in his character as master, without knowledge of the charter, is held to be entitled to a lien, although the master is a resident of the port. A creditor is not affected by the residence or nonresidence of the master, and dealing with him as master

<sup>69</sup> Neill v. The Francis, 21 Fed. 921, 924, per Brown, J. "In dealing, not with the master, who in a foreign port represents by the marine law the interests of all parties, and presumptively knows the needs of the ship, and its limitations, but with a known charterer only, not being an officer of the ship, and for mere ordinary supplies, there is no sound legal or commercial reason why such dealings, not being a case of actual necessity or distress, should not be held subject to the precise limitations of the charterer's powers as specified by the charter, of which the material-man has, or is affected with knowledge." Libellant rendered towage service to a vessel without express employment by her master, or agreement

to pay. Libellant was afterwards informed that the charterer was to pay for the towage, and thereafter, for the above and subsequent towage services, rendered bills to the charterer, which were paid in part. No notice was given to the vessel-owner that the ship was expected to pay for the towage until the failure of the charterer, six months after the first voyage. It was held that the service was not rendered on the credit of the vessel, but on the credit of the charterer. The Sarah Cullen, 49 Fed. 166, 1 C. C. A. 218, affg. 45 Fed. 511.

<sup>70</sup> Certain Logs of Mahogany, 2 Sunn. (U. S.) 589, Fed. Cas. No. 2559; Marcadier v. The Chesapeake Ins. Co., 8 Cranch (U. S.) 39, 3 L. ed. 481.

is not affected by other relations which he may have with the owner, unless notified of them.<sup>71</sup>

§ 1693. **Lien only for necessary repairs and supplies.**—It is only for necessary supplies and repairs that a lien is implied, even when furnished in a foreign port upon the order of the master. The fact that the master orders the supplies or repairs is ordinarily sufficient proof that they are necessary, unless the material-man is affected with knowledge that they are not necessary. But much depends upon the nature of the articles ordered. Some things are in their nature necessary, while others are not necessary. Thus, a ship's chronometer is a necessity, and therefore a lien arises for one obtained by the master in a foreign port upon the credit of the vessel.<sup>72</sup>

Rope for the use of a ship in discharging her cargo comes under the head of necessary supplies for which the vessel is bound. A private arrangement with a stevedore that he shall furnish his own rope does not change the nature of the service to the vessel, nor prevent a lien therefor attaching in favor of the material-man who furnished the rope on the vessel's account without knowledge of such agreement.<sup>73</sup>

§ 1694. **No lien for family supplies.**—There is no lien for family supplies and hay and oats furnished on board a canal-boat laid up at Buffalo for the winter, without the order of the captain or owner of the boat, where it appears that the articles were purchased for men and horses employed at work upon the streets of Buffalo. Such supplies are not maritime; they do not enable the boat to earn freight.<sup>74</sup> There is no maritime lien for clothing furnished

<sup>71</sup> *The Cumberland*, 30 Fed. 449.

<sup>72</sup> *The Georgia*, 32 Fed. 637. Repairs to a vessel are necessary where such as would be ordered by any prudent shipowner for fitting and equipping her for efficient service. *The Ella*, 84 Fed. 471.

See also, to the same effect, *The Bertha M. Miller*, 79 Fed. 365, 24 C. C. A. 641; *The George W. Anderson*, 161 Fed. 760.

<sup>73</sup> *The Ludgate Hill*, 21 Fed. 431.

<sup>74</sup> *The T. L. Wadsworth*, 13 Fed. 46.

to seamen, unless it is so needed that it is essential to the prosecution of the voyage.<sup>75</sup>

But expenses for provisions provided for the passengers and crew on board a vessel seized by the officers of government for piracy, after her arrival at port, and before the service of an attachment under libel for forfeiture, may be allowed against the vessel.<sup>76</sup>

**§ 1695. No lien for purchase-money of cargo.**—The master can not bind the vessel by a lien for the purchase-money of a cargo,<sup>77</sup> nor can he pledge the credit of the vessel for advances obtained for the purchase of a cargo.<sup>78</sup> He can only pledge the credit of the vessel in cases of necessity for the purpose of repairs, and other things indispensable to the prosecution of the voyage.

**§ 1696. Lien arising from actual furnishing of repairs or supplies.**—The liability of a vessel for supplies or repairs arises from the actual furnishing of the supplies, or the making of the repairs. There is no maritime lien for damages arising from a breach of contract to accept supplies ordered, or to allow repairs contracted for to be made. For such damages the party aggrieved must look to the master or the owner personally.<sup>79</sup> But if materials are contracted for, furnished, and actually paid for in part, and the delivery of the remaining materials is not made owing to a sale of the vessel, without any provision the acceptance of the materials or for making payment for the same, a lien will attach to the

<sup>75</sup> *Rosenthal v. The Die Gartenlaube*, 5 Fed. 827.

<sup>76</sup> *The City of Mexico*, 28 Fed. 239.

<sup>77</sup> *The Ole Oleson*, 20 Fed. 384; *The Wyoming*, 36 Fed. 493.

<sup>78</sup> *The Mary*, 1 Paine (U. S.)

671, 674, Fed. Cas. No. 9167; *The Josephine Spangler*, 9 Fed. 773.

<sup>79</sup> *The Pacific*, 1 Blatchf. (U. S.) 569, Fed. Cas. No. 10543; *The Carbarga*, 3 Blatchf. (U. S.) 75, Fed. Cas. No. 2276; *Dalzell v. The Daniel Kaine*, 31 Fed. 746.

same for the materials although they have not been delivered.<sup>80</sup>

Under statutes giving liens for materials furnished, if they are prepared and furnished for a particular vessel, a lien attaches for them although they are not actually used in the construction or repair of the vessel, unless the statute in terms provides that they shall be used as well as furnished.<sup>81</sup>

The lien will attach for the items of a running account.<sup>82</sup> Supplies obtained by the steward of a vessel, with the knowledge and consent of the master, bind the vessel equally with supplies furnished to the master, and the owners can not escape liability on the ground that they had a contract with a firm of caterers to feed the passengers, the vendor having no notice thereof.<sup>83</sup>

§ 1697. **No lien for general balance of account.**—A court of admiralty will not take jurisdiction of a libel for a general balance of account where some of the items only are a lien upon the vessel and many of them are not.<sup>84</sup> A libel for a balance of account can be sustained only in case all the items are a lien upon the vessel, and the credits can be treated as so much payment upon account. Judge Ware thus states

<sup>80</sup> *Mitcheson v. The Endless Chain Dredge*, 40 Fed. 253.

<sup>81</sup> *Barstow v. Robinson*, 2 Allen (Mass.) 605; *The Kearsarge*, 1 Ware (U. S.) 546, 554, Fed. Cas. No. 7634. In the latter case, Ware, J., said: "The lien is given where the materials are furnished for, and on account of the vessel. Undoubtedly it may be necessary for the material-men to show that they were such as are suitable to the object, and of such an amount as might be supposed to be required for that purpose. But the act does not

go on to add, used for, and in the construction of the vessel. All that the words of the statute require is, that they should be furnished for and on account of the vessel."

<sup>82</sup> *The Sylvan Stream*, 35 Fed. 314; *The Grapeshot*, 22 Fed. 123.

<sup>83</sup> *The Sylvan Stream*, 35 Fed. 314.

<sup>84</sup> *The Saginaw*, 32 Fed. 176; *Minturn v. Maynard*, 17 How. (U. S.) 477, 15 L. ed. 235; *The Larch*, 3 Ware (U. S.) 28, 34, Fed. Cas. No. 8086, per Ware, J.



the admiralty jurisdiction of accounts:<sup>85</sup> "When it is said that the admiralty has no jurisdiction over matters of account, the meaning I understand to be,—First, if the settlement of the account is the sole object of the suit, it is clear that the court has not jurisdiction, although it might have over each particular item. Secondly. When it is not the sole object, if it is apparent from the pleadings that this is one principal object, though not the sole one, and the accounts are long and intricate and multifarious, the court will decline to take jurisdiction. It will not, as observed by Lord Stowell, allow its jurisdiction to be used as a peg to hang a case upon which properly belongs to another forum. When the account arises incidentally it has been pointedly said, that the court holds itself bound to move within restricted limits. But it is very clear that the jurisdiction is not included by the simple fact of there being cross demands. In all cases where there are such incidentally arising in a case, it is a question addressed to the sound discretion of the court, whether it will take cognizance of the case or not, and to be determined by the general principles before stated."

But, as since observed by Judge Lowell,<sup>86</sup> and declared by Mr. Justice Gray,<sup>87</sup> that the account might be a very simple one is not the test of the jurisdiction; the subject-matter is not within the cognizance of the court. There is no lien for the enforcement of an executory contract for the purchase of a vessel, or to recover damages for the breach of such contract, or for an accounting between owners, and the division of the proceeds of a subsequent sale. A libel

<sup>85</sup> *The Larch*, 3 Ware (U. S.) 28, Fed. Cas. No. 8086. Judge Ware entertained jurisdiction in this case, but his decree was reversed in the circuit court by Mr. Justice Curtis, 2 Curt. (U. S.) 427. Judge Ware's overruled decision

was followed by Judge Hughes in *The Charles Hemje*, 5 Hughes (U. S.) 359, Fed. Cas. No. 11047a.

<sup>86</sup> *The Marengo*, 1 Low. (U. S.) 52, 56, Fed. Cas. No. 9065.

<sup>87</sup> *The H. E. Willard*, 52 Fed. 387.

set forth a contract between the libellant and others, owners of a vessel, by which it was agreed that the vessel was to engage in certain employment, and be commanded by the libellant, and that upon certain terms and conditions he was to acquire a part ownership of the vessel, and alleged performance on libellant's part of his contract, and, subsequently thereto, a sale of the vessel for a definite price. The object of the suit was to recover a portion of said purchase-price. It was held that no cause for a lien was shown, and hence a libel in rem could not be maintained.<sup>88</sup>

**§ 1697a. No lien in favor of part owner for advances or supplies.**—There is no maritime lien in favor of one part owner of a vessel for supplies, advances, or disbursements made on her account. Mr. Justice Gray, so ruling in a case in the circuit court, said:<sup>89</sup> "Nothing is better settled than that matters of account between part owners properly belong to a court of equity, and are not within the general jurisdiction in admiralty. The admiralty has no jurisdiction of matters of account, even when relating to maritime affairs, except as incidental to a subject of which it has jurisdiction; and accounts between part owners are not made maritime affairs by the fact that the property owned in common is a seagoing vessel."<sup>90</sup> \* \* \* Such was always the

<sup>88</sup> *The Henry Dennis*, 47 Fed. 918.

<sup>89</sup> *The H. E. Willard*, 52 Fed. 387. Also *The Daniel Kaine*, 35 Fed. 785; *The Randolph, Gilp.* (U. S.) 457, Fed. Cas. No. 10837; *Macy v. De Wolf*, 3 Woodb. & M. (U. S.) 193, 205, Fed. Cas. No. 8933; *Merrill v. Bartlett*, 6 Pick. (Mass.) 40.

<sup>90</sup> *The Orleans*, 11 Pet. (U. S.) 175, 182, 9 L. ed. 677; *Grant v. Poillon*, 20 How. (U. S.) 162, 15 L. ed. 871; *Ward v. Thompson*,

22 How. (U. S.) 330, 16 L. ed. 249; *Kollum v. Emerson*, 2 Curt. (U. S.) 79, Fed. Cas. No. 7669; *The Larch*, 2 Curt. (U. S.) 427, Fed. Cas. No. 8085; *Davis v. Child*, 2 Ware (U. S.) 78, 82, Fed. Cas. No. 3628; *Hall v. Hudson*, 2 Spr. (U. S.) 65, Fed. Cas. No. 5935; *Hazard v. Howland*, 2 Spr. (U. S.) 68, 71, Fed. Cas. No. 6280; *The Marengo*, 1 Low. (U. S.) 52, 56, Fed. Cas. No. 9065; *The Charles E. Falk*, 157 Fed. 780.

law of England, until Parliament, about 30 years ago, expressly conferred on the court of admiralty jurisdiction to decide all questions arising between part owners of English ships, touching the ownership, possession, employment, and earnings, and to settle all accounts between them in relation thereto."<sup>91</sup> Though the part owner making the advances is the ship's husband, the rule is the same.<sup>92</sup>

Though such a lien is conferred by a state statute, the courts of the United States have no admiralty jurisdiction to enforce it. The right given by such a statute, to a person furnishing supplies to a vessel in which he is not a part owner, might be enforced in the admiralty courts, because such a contract is strictly maritime. Upon this point Mr. Justice Gray further observed: "But the right and lien which the statute undertakes to give to a part owner is quite different in its nature. His claim for supplies furnished to a vessel owned by himself in common with others is not against the whole vessel, nor wholly against the other owners; for he himself owns part of the vessel, and is himself liable for a part of the claim, in proportion to his share in the common property, modified by the state of accounts between himself and his associates. In order to ascertain the amount of the claim for supplies, which he is entitled to enforce against the vessel, an account must first be taken of the mutual affairs of all the part owners. The taking of the entire account is the primary and principal thing, to which the amount of his claim for supplies is necessarily secondary and incidental. It was therefore rightly held by the district court that here was no independent or original cause of action, maritime in its nature, of which that court

<sup>91</sup> St. 24 Vict. ch. 10, § 8; The Apollo, 1 Hagg. Adm. (U. S.) 306, 313; The Idas, Brown. & L. 65; The Lady of the Lake, L. R. 3 Adm. & Ecc. 29.

<sup>92</sup> White v. Americus, 19 Fed. 848; The Daniel Kaine, 35 Fed. 785.

could take jurisdiction in admiralty, either by the general law or because of the local statute."

§ 1697b. **Husband's lien for supplies furnished where wife is owner.**—A husband may have a lien for supplies and advances made for a vessel owned wholly or in part by his wife, in case she is permitted by the law of the place of her residence to hold property in her separate right, free from the control and obligations of her husband.<sup>93</sup>

§ 1698. **No maritime lien in favor of underwriters for unpaid premiums of insurance.**<sup>94</sup>—Insurance is not a marine contract, because it does not aid the vessel. It inures solely to the personal interest of the owner. It contributes to no fund for the general use of those having claims against the vessel. The contract is peculiarly distinguishable from the class of maritime engagements which import a lien. "One reason why the master of a vessel, clothed as he is with almost plenary powers to represent the owner, extending even to the authority to sell the ship, when necessity justifies a sale, can not enter into a contract for insurance, is because such a contract does not aid the vessel. It inures solely to the personal interest of the owner."<sup>95</sup> There is an earlier case, however, which holds that there is a lien for premiums against a ship in favor of an underwriter.<sup>96</sup> After considerable doubt and conflict of authority, it has been settled

<sup>93</sup> The D. B. Steelman, 48 Fed. 580.

<sup>94</sup> The John T. Moore, 3 Woods (U. S.) 61, 68; Insurance Co. v. Proceeds of Sale, &c., 23 Blatchf. (U. S.) 292, 24 Fed. 559, 22 Fed. 109; The Jennie B. Gilkey, 19 Fed. 127; The Paola R., 32 Fed. 174. Note to The Dolphin, 1 Flipp. (U. S.) 580, 592, Fed. Cas. No. 3973; The Wanbanshene, 22 Fed. 169; The Hope, 49 Fed. 279;

The Guiding Star, 9 Fed. 521; The Daisy Day, 40 Fed. 538, 603; Learned v. Brown, 94 Fed. 876, 56 C. C. A. 524; The Maine, 184 Fed. 968; The City of Camden, 147 Fed. 847.

<sup>95</sup> Insurance Co. v. Proceeds of Sale, &c., 23 Blatchf. (U. S.) 292, 24 Fed. 559, 22 Fed. 109, per Wallace, J.

<sup>96</sup> The Dolphin, 1 Flipp. (U. S.) 580, Fed. Cas. No. 3973.

that a policy of insurance is a marine contract of which a court of admiralty has jurisdiction, and a libel may be maintained upon a policy in case of loss against the underwriter.<sup>97</sup> Starting with this proposition, it was contended and held in the case of *The Dolphin*<sup>98</sup> that it followed as a necessary corollary that the underwriter might maintain a suit in admiralty for the premium, for if the maritime character of the contract could be invoked by one party it could be by the other. In the opinion of the learned judge, he concedes that the general sentiment of the profession is adverse to the existence of such a lien. The court, referring to this concession, say that the lien should not be extended to a contract to which it has not generally been supposed to adhere, even if the analogies should justify recognizing it.<sup>99</sup>

**§ 1699. Lien of one advancing money to pay off lien.—**One who advances money upon the credit of a vessel to pay claims of a maritime nature has a lien of the same rank as the claims which were paid with the money advanced.<sup>1</sup> A

<sup>97</sup> *De Lovio v. Boit*, 2 Gall. (U. S.) 398, Fed. Cas. No. 3776, where Judge Story delivered an elaborate and learned opinion, sustaining jurisdiction of a libel upon a policy of insurance. *Gloucester Ins. Co. v. Younger*, 2 Curt. (U. S.) 322, Fed. Cas. No. 5487; *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, 20 L. ed. 90.

<sup>98</sup> 1 Flip. (U. S.) 580, 592, Fed. Cas. No. 3973. Prior to this case as stated by Brown, J., in his opinion, it is believed that no direct adjudication upon this point is to be found either in this country or England. *The Illinois*, 2 Flip. (U. S.) 383, Fed. Cas. No. 7005; *The Guiding Star*, 9 Fed. 521, *affd.* 18 Fed. 263.

<sup>99</sup> *Insurance Co. v. Proceeds of Sale*, 24 Fed. 559.

<sup>1</sup> *Dalzell v. The Daniel Kaine*, 31 Fed. 746; *The Isaac May*, 21 Fed. 687; *The Augustine Kobbe*, 37 Fed. 702; *The Lime Rock*, 49 Fed. 383; *The Guiding Star*, 9 Fed. 521; *The Emily Souder*, 17 Wall. (U. S.) 666, 21 L. ed. 683; *Thomas v. Osborn*, 19 How. (U. S.) 22, 15 L. ed. 534; *The Lulu*, 10 Wall. (U. S.) 192, 19 L. ed. 906; *The Grapeshot*, 9 Wall. (U. S.) 129, 19 L. ed. 651; *Insurance Co. v. Baring*, 20 Wall. (U. S.) 159, 22 L. ed. 250; *The Cumberland*, 30 Fed. 449; *The Dora*, 34 Fed. 348; *The Wyoming*, 36 Fed. 493; *Nippert v. The Williams*, 39 Fed. 823; *Cornwall v.*

second lender, who advances money to pay money first obtained of another for such purpose, occupies the same place as the first lender and is entitled to the lien.<sup>2</sup> These rules apply as well to advances to pay lien claims under state statutes.<sup>3</sup>

An advance of money, to relieve a vessel from attachment for a debt which is a maritime lien upon the vessel, entitles the lender to a lien of the same rank as that from which he relieved the vessel.<sup>4</sup> But if the debt be a general debt of the owner, which is not a lien upon the vessel, the lender obtains no lien upon the vessel by relieving it from attachment for such debt; and the master can impose no lien for such purpose upon the vessel by express agreement.<sup>5</sup> Advances for the following charges are a lien on the ship, namely, hospital charges for attending the sick of the crew while the vessel is in port; surveys to ascertain the ship's condition; expenses of cabling owners; consulage; and services attending the entry of the vessel at the custom house.<sup>6</sup>

But if advances be made to meet general expenses, a lien can be maintained only so far as it can be shown that these expenses were maritime. If it appears that the party making the advances knew that they were to be applied to miscellaneous claims, and the master is unable to show how much was applied to pay maritime claims, and how much to pay nonmaritime claims, no lien can be declared in favor of the advances.<sup>7</sup> A bank discounting a note for a steam-

*The Arctic*, 75 Fed. 601; *The City of Camden*, 147 Fed. 847; *The Worthington*, 133 Fed. 725, 66 C. C. A. 555; *The Evangel*, 94 Fed. 680.

<sup>2</sup> *The Thomas Sherlock*, 22 Fed. 253; *The Tangier*, 2 Low. (U. S.) 7, Fed. Cas. No. 13744; *The Guiding Star*, 9 Fed. 521.

<sup>3</sup> *The General Tompkins*, 9 Fed. 620. See, however, *The City*

of *Salem*, 31 Fed. 616, 13 Sawy. (U. S.) 607, 4 L. R. A. 125.

<sup>4</sup> *The Menominie*, 36 Fed. 197; *The Dredge No. 1*, 137 Fed. 110.

<sup>5</sup> *The A. R. Dunlap*, 1 Low. (U. S.) 350, Fed. Cas. No. 513.

<sup>6</sup> *The Aina*, 40 Fed. 269; *The Emily Souder*, 17 Wall. (U. S.) 666, 21 L. ed. 683.

<sup>7</sup> *The Guiding Star*, 9 Fed. 521.

boat, or making her a general loan at her home port, has no lien against her;<sup>8</sup> and even if the discount be made at a foreign port, the draft does not bind the vessel unless discounted on the credit of the vessel to pay lien debts. A master has no lien for advances made by him to pay claims which are not a lien upon the vessel.<sup>9</sup> It is incumbent upon one who makes advances to the master of a vessel in a foreign port to ascertain for what purposes the money is needed; and although advances are made upon drafts against the owners which bear upon their faces the words, "charge to wages and supply account," there is no lien except for the amounts actually used in discharging claims which constitute a lien against her. A draft drawn in a foreign port by the master upon the owners, and there discounted, does not in itself create a lien on the vessel; and, even if the draft on its face declares that it is a lien upon the vessel, it does not bind the vessel unless the debts for which the money was obtained bound the vessel.<sup>10</sup> If such a draft be made to the order of a firm accustomed to furnish the vessel with supplies, and such firm obtains a discount at a bank, the firm is an accommodation indorser only; and though the firm has been obliged to take up the draft, it can not assert a lien against the vessel in case the bank did not discount the draft upon the credit of the vessel, and the firm through whose indorsement the bank obtained the draft had no lien upon the vessel.<sup>11</sup>

**§ 1700. Seamen's liens upon vessel and its proceeds for payment of their wages.**—This right extends to all persons whose work tends to further the object of the enterprise.<sup>11a</sup>

<sup>8</sup> *Dalzell v. The Daniel Kaine*, 31 Fed. 746.

<sup>9</sup> *Gillingham v. Charleston Tow Boat Co.*, 40 Fed. 649.

<sup>10</sup> *The Woodland*, 104 U. S. 180, 26 L. ed. 705; *The Solis*, 35 Fed. 545.

<sup>11</sup> *Nippert v. The J. B. Will-*

*iams*, 42 Fed. 533, revg. 39 Fed. 823.

<sup>11a</sup> *McRae v. Bowers Dredging Co.*, 86 Fed. 344. Liens for seaman wages have priority over mortgage liens. *The Conveyor*, 147 Fed. 586.

Even a vessel under charter is liable for the wages of seamen hired by the charterer, although the owner may not be personally liable therefor.<sup>12</sup> But a seaman must perform the duties of a seaman to be entitled to the lien. Thus, if a seaman performs the work of a mechanic, before or after the season of navigation upon a lake or river, he is a mechanic and not a seaman, and his services are not maritime.<sup>13</sup>

A seaman who has been ready and willing to perform the duties for which he was engaged is entitled to his lien, although (in consequence of the idleness of the vessel) he did not actually render the services.<sup>14</sup> And so, if a seaman who has been hired for a voyage presents himself at the wharf where the vessel lies and offers his services, and without any good reason is refused admission to the boat, he has a lien for his stipulated wages.<sup>15</sup>

If, after the voyage has been begun, it is lost or abandoned by the wrongful act of the owner or master, a seaman is entitled to his full wages, and may recover them by suit in rem in admiralty.<sup>16</sup> A seaman has a lien for his wages though he serves only in the home port,<sup>17</sup> and has never left port.<sup>18</sup>

§ 1701. **Seamen's liens on freight for their wages.**—Seamen have a lien on the freight for their wages which may be

<sup>12</sup> *The Samuel Ober*, 15 Fed. 621; *Flaherty v. Doane*, 1 Low. (U. S.) 148, Fed. Cas. No. 4849. And see § 1704, post.

<sup>13</sup> *The Alanson Sumner*, 28 Fed. 670.

<sup>14</sup> *The Alanson Sumner*, 28 Fed. 670.

<sup>15</sup> *The Acorn*, 32 Fed. 638. And see *The City of London*, 1 W. Rob. (U. S.) 88; *The Dolphin*, 6

Ben. (U. S.) 402, Fed. Cas. No. 3972.

<sup>16</sup> *The Acorn*, 32 Fed. 638.

<sup>17</sup> *Levering v. Bank*, 1 Cranch (U. S.) 152.

<sup>18</sup> *The Blohm*, 1 Ben. (U. S.) 228, Fed. Cas. No. 1556. And see *The Minna*, 11 Fed. 759; *Disbrow v. The Walsh Brothers*, 36 Fed. 607; *The Sarah Jane*, 1 Low. (U. S.) 203, Fed. Cas. No. 12349; *The Atlantic*, 53 Fed. 607.



enforced by a libel in admiralty. It is not usual to resort to this fund for the payment of seamen's wages, because it is usually an easier and simpler method to proceed against the master of the ship. But the freight is the proper and appropriate fund out of which wages are to be paid.<sup>19</sup>

Seamen also have a lien on the cargo for their wages.<sup>20</sup> If the charterers, by the terms of the charter party, become the owners for the voyage and assume full control of the vessel, the seamen have a lien for their wages on the cargo shipped on account of the charterers, for a charge in the nature of freight.<sup>21</sup>

§ 1702. **Seaman's lien enforced by proceeding in admiralty.**— A seaman may enforce his claim for wages by proceedings in admiralty, or by action at common law, whenever the wages are due and payable, notwithstanding the statute of the United States<sup>22</sup> affording a remedy by application to a district judge or commissioner to summon the master to show cause why process should not issue against the vessel, if not paid within ten days after the time they ought to be paid, or if any dispute has arisen touching the wages before the expiration of ten days.<sup>23</sup>

A sailor's lien for wages may be reduced by proper offsets; but a court of admiralty will not sanction a settlement

<sup>19</sup> *Poland v. The Spartan*, 1 Ware (U. S.) 134, 145, Fed. Cas. No. 11426; *Sheppard v. Taylor*, 5 Pet. (U. S.) 675, 8 L. ed. 269. The codes of California, North Dakota, and South Dakota provide that the mate and seamen of a ship have a general lien, independent of possession, upon the ship and freightage, for their wages, which is superior to every other lien. California: Civ. Code 1906, § 3056; North Dakota: Rev.

Code 1905, § 6290; South Dakota: Rev. Code (Civ.) 1903, § 2157.

<sup>20</sup> *Poland v. The Spartan*, 1 Ware (U. S.) 134, 145, Fed. Cas. No. 11426; *Contra*, *Sheppard v. Taylor*, 5 Pet. (U. S.) 675, 8 L. ed. 269.

<sup>21</sup> *Poland v. The Spartan*, 1 Ware (U. S.) 134, 145, Fed. Cas. No. 11426.

<sup>22</sup> *Pierce's U. S. Code* 1910, § 2496.

<sup>23</sup> *The Shelbourne*, 30 Fed. 510.

made by the master with one of the crew in which excessive charges were made for whiskey and tobacco.<sup>24</sup>

§ 1703. **Landsmen assisting in loading vessel not entitled to lien.**—Mere landsmen who assist in loading a vessel do not perform a maritime service, and are not entitled to a lien for seamen's wages, though while engaged in performing the service they live and sleep on board the vessel as she lies off shore.<sup>25</sup> But where men were employed not merely to load a vessel with stone, but to navigate her from Quincy to Boston and there to unload her, it was held that they participated in the navigation of the vessel and were entitled to a lien as seamen.<sup>26</sup>

There is no lien for the wages of any person who may be employed on board canal-boats in navigating them.<sup>27</sup> A person employed to work upon canal-boats did some slight work upon a tug-boat which was employed to tow the canal-boats, though his services on the tug-boat were too insignificant to be taken into account. Upon a libel brought by him against the tug-boat, it was held that the relation between the canal-boats and the tug-boat was not such as to make the canal-boats a part of the tug-boat, and to charge this with a lien for labor performed upon the canal-boats.<sup>28</sup> A person employed to run a tug-boat, not in any particular

<sup>24</sup> *The Rob Roy*, 30 Fed. 696. *Per Hammond, J.*: "This man was under the protection of the master, and his wages can not be paid in chips and whetstones."

<sup>25</sup> *The Ole Oleson*, 29 Fed. 384; *The Sarah E. Kennedy*, 29 Fed. 264; *Black Diamond Coal Min. Co. v. The H. C. Grady*, 87 Fed. 232; *Grannen v. The Humboldt*, 86 Fed. 351; *The Arthur B.*, 1 Alaska 353, 493; *Bouker Contracting Co. v. Proceeds of Sale &c.*, 168 Fed. 428; *Williams v. The Sirius*,

65 Fed. 226; *Keating v. The John Shay*, 81 Fed. 216.

<sup>26</sup> *The Canton*, 1 Spr. (U. S.) 437, Fed. Cas. No. 2388. "The persons engaged on board," said *Sprague, J.*, "must have been possessed of some skill in navigation. They must have been able to 'hand, reef, and steer,' the ordinary test of seamanship."

<sup>27</sup> *Pierce's U. S. Code* 1910, § 2017.

<sup>28</sup> *The Ida Meyer*, 31 Fed. 89.

capacity, but to perform all kinds of services, sometimes hunting up business for the owner and doing work not connected with the management of the boat, has no lien on the boat for his services.<sup>29</sup>

§ 1704. **Seaman's lien against chartered vessel.**—A seaman's lien on the ship for his wages is an incident to his employment on board; and therefore his lien attaches although he is employed by a charterer who runs the vessel on his own account.<sup>30</sup> "Our maritime law, as respects wages, conforms to the general law of the seas, which gives a seaman a lien upon the ship for his wages, as Cleirac says, 'so long as a nail remains.' His service is rendered primarily to the ship; and, in the view of the maritime law, the ship is primarily liable. The lien arises, therefore, as the legal incident of his service. It does not depend upon contract,<sup>31</sup> \* \* \* but is given by the general maritime law whenever he is lawfully employed on board."<sup>32</sup>

Although the seaman fully understands that the charterer and not the owner is to be his paymaster, he still has his lien for his wages, though, of course, he can not hold the owner personally for them.<sup>33</sup> Even an express contract on the part of the sailor waiving his lien would be void in a court of admiralty, unless made upon some corresponding benefit to him; because, otherwise, it is a stipulation highly injurious and contrary to statute.<sup>34</sup>

<sup>29</sup> *White v. The Emma*, 37 Fed. 703.

<sup>30</sup> *The L. L. Lamb*, 31 Fed. 29; *The International*, 30 Fed. 375; *The Samuel Ober*, 15 Fed. 621; *The Montauk*, 10 Ben. (U. S.) 455, Fed. Cas. No. 9717; *The Artisan*, 9 Ben. (U. S.) 106, Fed. Cas. No. 568; *The Canton*, 1 Spr. (U. S.) 437, Fed. Cas. No. 2388; *Flaherty v. Doane*, 1 Low. (U. S.) 148, Fed. Cas. No. 4849; *The G. C. Mor-*

*ris*, 2 Abb. Adm. (U. S.) 164, 168, Fed. Cas. No. 5204.

<sup>31</sup> *The Minerva*, 1 Hagg. Adm. 347.

<sup>32</sup> *The International*, 30 Fed. 375, per Brown, J. And see *The Sirocco*, 7 Fed. 599, per Benedict, J.

<sup>33</sup> *The Atlantic*, 53 Fed. 607; *The International*, 30 Fed. 375.

<sup>34</sup> U. S. Comp. Stat. 1901, § 4535.

If the master and owner know that the charterers are insolvent, and do not disclose that fact to the seamen at the time of engaging them for the charterers, the concealment is a fraud upon them, and any agreement on their part to release their lien on the ship would be disregarded by the court.<sup>35</sup>

This rule as respects the lien for seamen's wages stands on the same footing, as respects a chartered vessel, as the lien of salvors, or of freighters, who have the same lien on a chartered ship as on one run by her owner, and whether they know of the charter or not.<sup>36</sup>

The fact that the master is sailing the vessel upon shares, and the seamen have knowledge of such fact, does not impair their lien. They have the vessel as their security, and are not bound to heed any arrangements the owners make with other parties about the sailing of the vessel.<sup>37</sup>

Where laborers were hired by a charterer of a vessel to go with a ship from Baltimore to an island in the Gulf of Mexico for a cargo of guano, and to return with the cargo, and the service required of the men was to gather and load the cargo and to excavate the same at the port of destination, it was held that the circumstance that during the passage they of their own motion rendered occasional slight assistance in working the ship could not be used as pretext for claiming a lien as seamen, especially as it appeared that

<sup>35</sup> *The L. L. Lamb*, 31 Fed. 29.

<sup>36</sup> *The International*, 30 Fed. 375, per Brown, J. See, also, *The Canton*, 1 Spr. (U. S.) 437, Fed. Cas. No. 2388; *Skolfield v. Potter*, 2 Ware (U. S.) 394, Fed. Cas. No. 12925; *Flaherty v. Doane*, 1 Low. (U. S.) 148, Fed. Cas. No. 4849; *The Highlander*, 1 Spr. (U. S.) 510, Fed. Cas. No. 6476; *The Erie*, 3 Ware (U. S.) 225, 330, Fed.

Cas. No. 4512; *The Artisan*, 9 Ben. (U. S.) 106, Fed. Cas. No. 568; *The Clayton*, 5 Biss. (U. S.) 162, Fed. Cas. No. 2870; *The Samuel Ober*, 15 Fed. 621; *The L. L. Lamb*, 31 Fed. 29.

<sup>37</sup> *The Canton*, 1 Sprague (U. S.) 437, Fed. Cas. No. 2388; *The Montauk*, 10 Ben. (U. S.) 455, Fed. Cas. No. 9717.

the vessel was supplied with a full compliment of officers and men.<sup>38</sup>

In a libel by such laborers claiming a lien upon a vessel for wages, if the libelants claim as mariners they can only recover in that capacity, and a claim against the vessel as salvors or lighter-men can not be considered.<sup>39</sup>

§ 1705. Fishermen's liens for services on board vessel.—Fishermen who are employed to go out from port every day to the fishing grounds, and there to set and lift the nets, clean the fish, discharge the catch, and reel the nets on shore, were held to be entitled to a lien, though they took no part in the navigation of the vessel. Their services were performed on board the vessel, and were in furtherance of the main object of the enterprise in which the vessel was engaged. They were, therefore, maritime in their character,<sup>40</sup> though they shared in the result.<sup>41</sup>

Where men were shipped as sealers upon a vessel bound upon a voyage for seal, and their shipping agreement bound them "to lend a hand on board whenever they were wanted," and they helped to make and reef sail, heave the anchor, and clear decks, but not to stand watch, it was held that they aided in the navigation of the vessel, and were entitled to liens as seamen. They were considered mariners upon the same principle that surgeons, stewards, cooks, and cabin boys are so considered. They were colaborers in the leading purpose of the voyage.<sup>42</sup>

Where a whaling vessel had been wrecked, and certain oil from the vessel had been sent home, the crew brought a libel against the oil for services as salvors and for their lays. Judge Lowell expressed the opinion that, until a sale was made, the seamen had a lien on the oil for their wages, and

<sup>38</sup> The Sarah E. Kennedy, 29 Fed. 264.

<sup>39</sup> The Sarah E. Kennedy, 29 Fed. 264.

<sup>40</sup> The Minna, 11 Fed. 759.

<sup>41</sup> The Sirocco, 7 Fed. 599.

<sup>42</sup> The Ocean Spray, 4 Sawy. (U. S.) 105, Fed. Cas. No. 10412.

that it might be worked out by analogy to the lien of a seaman in the merchant service on the freight.<sup>43</sup> But whatever may be the law as to a lien in the case of contracts relating to whaling voyages, there is no such remedy under the statutes of the United States<sup>44</sup> relating to the lays of fishermen employed in the cod and mackerel fisheries. This statute neither gives them a lien for wages on the fish caught and the proceeds thereof, nor recognizes the existence of such a lien.<sup>45</sup>

**§ 1706. Master of ship not entitled to lien for his wages.**—The master of a ship is not entitled to a lien on the ship for his wages.<sup>46</sup> It is said that the master, when he con-

<sup>43</sup> *The Antelope*, 1 Low. (U. S.) 130, Fed. Cas. No. 484. See, also *Hussey v. Fields*, 1 Spr. (U. S.) 394, Fed. Cas. No. 6947; *In re Low*, 2 Low. (U. S.) 264, Fed. Cas. No. 8558.

<sup>44</sup> *Pierce's U. S. Code* 1910, §§ 4045-4048. This statute provides that the master of a vessel employed in cod or mackerel fisheries shall agree in writing with the fishermen employed, that the fish caught which belong to the fishermen shall be divided among them in proportion to the quantities they have respectively caught; and that when any of the fish are delivered to the owner for cure, and are sold by him, the vessel shall be liable for the fishermen's share of the fish, but that any fisherman may also have his common-law remedy for the fish, or the proceeds of their sale.

<sup>45</sup> *Story v. Russell*, 157 Mass. 152, 31 N. E. 753, 46 Alb. L. J. 309.

<sup>46</sup> *The Orleans v. Phoebus*, 11 Pet. (U. S.) 175, 9 L. ed. 677; *The Grand Turk*, 1 Paine (U. S.) 73,

Fed. Cas. No. 5683; *The Imogene M. Terry*, 19 Fed. 463; *Fisher v. Willing*, 8 Serg. & R. (Pa.) 118; *The M. Vandercook*, 24 Fed. 472; *The Wyoming*, 36 Fed. 493. In California, North Dakota and South Dakota the master of a ship has a general lien, independent of possession, upon the ship and freightage, for advances necessarily made or liabilities necessarily incurred by him for the benefit of the ship, but has no lien for his wages. California: *Civ. Code* 1906, § 3055. North Dakota: *Rev. Code* 1905, § 6289. South Dakota: *Rev. Code (Civ.)* 1903, § 1526. See *The Louis Olsen*, 52 Fed. 652. Alabama: *The Code* 1907, § 4790, gives a master a lien on his vessel for wages, but it is held that the lien will fail of enforcement in a Federal Court when the master is part owner of the ship or in case he performs the services upon the credit of the owner and not on the credit of the vessel. *McDowell v. The Lena Mowbray*, 71 Fed. 720.

tracts, is supposed to trust to the personal credit of the owner.<sup>47</sup> A further reason for not allowing the master a lien for his wages is said to be on account of the inconvenience and expense to which the owners might be subjected if, in every dispute with the master, he could take the vessel out of their hands, and thus compel them to submit to improper charges.<sup>48</sup>

Neither has the master any lien on the cargo of a vessel beyond the amount of the freight thereof; and where, for any reason, he does not unload the cargo, his lien extends only to so much of the freight as the vessel has actually earned.<sup>49</sup>

One who contracted in this country with the owner of a vessel, also a citizen, to serve as master of the vessel, not knowing at the time that she was a British vessel, and was registered in the name of a British subject, acquired no lien for wages under the British Merchant Shipping Act. The contract has only those incidents which exist by the general maritime law as recognized in this country, and not those created by the law of Great Britain.<sup>50</sup> The master of an Italian ship has a lien thereon for his wages under the Italian law, and upon proof of this law the lien may be enforced in an admiralty court of the United States. This lien takes precedence of the lien of a bottomry bond, on which the master is not personally liable.<sup>51</sup>

<sup>47</sup> *The Favourite*, 2 C. Rob. 232, per Sir William Scott; *Wilkins v. Carmichael*, 1 Douglass 101; *Willard v. Dorr*, 3 Mas. (U. S.) 91, Fed. Cas. No. 17679, per Story, J.; *The Orleans v. Phoebus*, 11 Pet. (U. S.) 175, 9 L. ed. 677; *The Havana*, 1 Spr. (U. S.) 402, Fed. Cas. No. 6226; *The Island City*, 1 Low. (U. S.) 375, Fed. Cas. No. 7019. Such a lien was given to masters of British vessels by statutes 17 & 18 Vict. ch. 104, § 191; and the

lien so given may be enforced in the admiralty courts of the United States. *The Havana*, 1 Sprague (U. S.) 402, Fed. Cas. No. 6226.

<sup>48</sup> *The Grand Turk*, 1 Paine (U. S.) 73, Fed. Cas. No. 5683, per Livingston, J.

<sup>49</sup> *The Arcturus*, 17 Fed. 95.

<sup>50</sup> *Chisholm v. The J. L. Pengdergast*, 32 Fed. 415, revg. 29 Fed. 127.

<sup>51</sup> *The Felice B.*, 40 Fed. 653.

The master of a tug-boat is not exempt from the general rule on the ground that the reasons for the general rule do not apply, and that the course of business with such boats is peculiar, inasmuch as the master makes no contracts, has no voice in procuring business or freights, receives no money for towage service or for freights, but is in all these respects subject to the control of the owner.<sup>52</sup>

The master of a vessel will not be permitted to avail himself of such a lien through a pretence that he was an ordinary seaman, when in fact he was the master. The fact that he was actually the master may be shown, although the owner's application for a license was made in the name of another person.<sup>53</sup> But one who is engaged and ships as pilot of the vessel upon which another is the registered master has a lien for his wages although he has entire charge of her navigation.<sup>54</sup> It is the registered master who is deprived of a lien.<sup>55</sup> An engineer on a steam-dredge, though the highest officer on the dredge and directing the others on board, but having no authority to engage or dismiss them, or to purchase supplies, is not a master of the dredge within the rule denying a lien to masters.<sup>56</sup>

If a master employs his minor son as mate on board a vessel, which the father has agreed to run on shares and to pay all expenses, neither the son, who was a member of the father's family, nor the father, could acquire a lien upon the vessel for the son's services.<sup>57</sup>

**§ 1706a. Master as against owner not entitled to payment out of surplus proceeds of sale of vessel.**—The master as against the owner is not entitled to payment out of sur-

<sup>52</sup> *The M. Vandercreek*, 24 Fed. 472.

<sup>53</sup> *The John A. Morgan*, 28 Fed. 895.

<sup>54</sup> *The Atlas*, 42 Fed. 793. See *The Peterson v. The Nellie and Annie*, 37 Fed. 217.

<sup>55</sup> *The Dubuque*, 2 Abb. (U. S.) 20, Fed. Cas. No. 4110; *The Peterson v. The Nellie and Annie*, 37 Fed. 217.

<sup>56</sup> *The Atlantic*, 53 Fed. 607.

<sup>57</sup> *The Hattie Low*, 14 Fed. 880.



plus proceeds remaining in court from the sale of a vessel.<sup>58</sup> The surplus proceeds must be paid to the owner, unless claimed by a creditor having a specific lien thereon either by contract or statute. The district court has no jurisdiction in admiralty to create liens on the surplus as against the former owner. The Supreme Court of the United States say: "The proceeds arising from such a sale, if the title of the owner is unincumbered and not subject to any maritime lien of any kind, belong to the owner, as the admiralty courts are not courts of bankruptcy or insolvency, nor are they invested with any jurisdiction to distribute such property of the owner, any more than any other property belonging to him, among his creditors."<sup>59</sup>

**§ 1707. Ship's husband not entitled to lien for advancements made to satisfy ship's bill.**—A ship's husband or general agent ordinarily has no lien upon the ship for advances made by him in satisfaction of the ship's bills.<sup>60</sup> He is employed to pay demands against the ship and receives compensation therefor, and on principle he should not be allowed a lien. He represents the owners in advancing money or in paying charges. His act is their act, and ordinarily advances or payments by him must be presumed to be designed to discharge the ship from burdens, and not to create charges upon her through any equitable subrogation.<sup>61</sup> If, however, it be shown that the ship's husband was also a mortgagee of the vessel, and his agency was for the purpose of affording him further security, his advances in the manage-

<sup>58</sup> *The Balize*, 52 Fed. 414.

<sup>59</sup> *The Lottawanna*, 20 Wall. (U. S.) 201, 221, 22 L. ed. 259, 21 Wall. (U. S.) 558, 22 L. ed. 654. The case of *The Santa Anna*, Blatchf. & H. (U. S.) 79, Fed. Cas. No. 12325, was practically overruled.

<sup>60</sup> *The Larch*, 2 Curt. (U. S.) 427, Fed. Cas. No. 8085; *The Sarah J. Weed*, 2 Low. (U. S.) 555, Fed.

Cas. No. 12350; *The J. C. Williams*, 15 Fed. 558; *White v. Americus*, 19 Fed. 848; *The Esteban de Antunano*, 31 Fed. 920; *The Raleigh*, 32 Fed. 633; *Minturn v. Maynard*, 17 How. (U. S.) 477, 15 L. ed. 235.

<sup>61</sup> *The J. C. Williams*, 15 Fed. 558, per Brown, J.

ment of the ship's business should be held to be made, not upon the personal credit of the mortgagor, but upon the credit of the vessel; and for necessary payments and supplies, which would be liens in favor of other persons, he should be deemed to be equitably subrogated to the liens paid by him.<sup>62</sup>

**§ 1708. Services of freight agent not maritime in character.**—The services of a freight agent are not distinctly maritime, and do not give rise to a lien. The soliciting of freight is not directly connected with the navigation of a vessel, and this does not, like the services of a stevedore, aid in discharging any maritime obligation. All the maritime duties and obligations of the vessel begin after the goods which the agent has solicited have been sent to the ship, and after the agent's services have ended. His services are not essentially different from those of other agents or clerks employed in a permanent freight office on shore.<sup>63</sup> So, also, it is held that a shipping broker has no lien for services in obtaining a crew.<sup>64</sup>

**§ 1709. Shipping broker not entitled to lien on vessel for services in obtaining charter-party.**<sup>65</sup>—In admiralty the distinction between preliminary service leading to maritime

<sup>62</sup> *The Tangier*, 2 Low. (U. S.) 7, Fed. Cas. No. 13744; *The Sarah J. Weed*, 2 Low. (U. S.) 555, 562, Fed. Cas. No. 12350; *The J. C. Williams*, 15 Fed. 558; *The Cabot*, Abb. Adm. (U. S.) 150, Fed. Cas. No. 2277.

<sup>63</sup> *The Crystal Stream*, 25 Fed. 575; *The J. C. Williams*, 15 Fed. 558.

<sup>64</sup> *Ferris v. The E. D. Jewett*, 2 Fed. 111.

<sup>65</sup> *The Thames*, 10 Fed. 848; *The Paola R.*, 32 Fed. 174; *Leland v. The Medora*, 2 Woodb.

& M. (U. S.) 92, 109, Fed. Cas. No. 8237; *The Retriever*, 93 Fed. 480. See also, *The Humboldt*, 86 Fed. 351. *The Crystal Stream*, 25 Fed. 575. In *The Thames*, 10 Fed. 848, Brown, J., speaking of this distinction, said: "If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker

contracts and such contracts themselves has not been departed from. The responsibilities of the ship must be confined to the transportation and safe delivery of the goods at the port of delivery, and to the performance of such maritime services as are incidental to this duty.

The services of a broker in procuring a charter for a ship are not maritime, but of that preliminary character which does not raise a lien upon the vessel. His services are no part of the obligation of the ship to the cargo, and are not rendered in the discharge of any maritime obligation.<sup>66</sup>

**§ 1710. Chief engineer of an annual salary not entitled to lien.**—A person employed as the chief engineer of a line of vessels at an annual salary has no lien upon any vessel of the line for his compensation.<sup>67</sup> “While courts in recent years have been very liberal in sustaining them, liens, for maritime services, the work done for such vessels must be capable of definite ascertainment and apportionment. We have no right to adjust a demand for work done for the benefit of several vessels, and to charge each with its proportion upon an equitable basis.”<sup>68</sup>

But a person employed as a driver and engineer of a steam-pump upon a wrecking-tug has a lien upon the tug for his services; and although he contracts to render services upon any of several tugs belonging to the same company to which he may be ordered, and his engagement is for a per diem compensation, he is entitled to a lien upon each of such tugs for the time he is actually employed upon her.<sup>69</sup>

must follow,—the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed.”

<sup>66</sup> *The Thames*, 10 Fed. 848; *The Hattie M. Bain*, 20 Fed. 389, per Brown, J.

<sup>67</sup> *The Murphy Tugs*, 28 Fed.

429. An inspector hired at a regular salary by a contractor who is engaged in dredging is not entitled to a maritime lien. *The Saratoga*, 100 Fed. 480.

<sup>68</sup> *The Murphy Tugs*, 28 Fed. 429, per Brown, J.

<sup>69</sup> *The Murphy Tugs*, 28 Fed. 429.

§ 1711. **Quarantine commissioners entitled to liens.**—The services of quarantine commissioners in the care and treatment of sick seamen in a quarantine hospital are maritime in character, and a lien therefor may be enforced by a proceeding in admiralty. Such services are maritime because they are rendered in the care and medical treatment of seamen attached to the vessel, whose sickness was incurred in the course of the voyage; and such care and treatment devolved on the vessel by the maritime law. Inasmuch, also, as these services were required by the laws of the state to be rendered before the vessel could be allowed to complete her voyage, the charges might well be regarded as port charges, necessarily incurred by the vessel in the course of her voyage, and for that reason also maritime in character.<sup>70</sup>

§ 1712. **Pilots entitled to liens where their services are required.**—Pilots rendering services to vessels on their inward and outward voyages are entitled to a lien where state statutes require their employment; and they are entitled to the lien whether their services are accepted or not, inasmuch as they are entitled to the same charges in either case. The statutes, moreover, generally take no account of the residence or nonresidence of the owners or charterers, or their credit.<sup>71</sup> Such a lien was formerly refused where there was no statute creating it.<sup>72</sup> But the later cases sustain such a lien, though it is not directly conferred by statute.<sup>73</sup>

§ 1713. **Stevedore entitled to lien.**—A stevedore is entitled to a lien for his services in loading or discharging a foreign vessel, because he assists the ship in fulfilling a mari-

<sup>70</sup> *Platt v. The Georgia*, 34 Fed. 79.

<sup>71</sup> *The Pirate*, 32 Fed. 486.

<sup>72</sup> *The Robert J. Mercer*, 1 Spr. (U. S.) 284, Fed. Cas. No. 11891.

<sup>73</sup> *The William Law*, 14 Fed.

792; *The Clymene*, 12 Fed. 346; *The George S. Wright*, 1 Deady (U. S.) 591, Fed. Cas. No. 5340; *The California*, 1 Sawy. (U. S.) 463, Fed. Cas. No. 2310.

time obligation.<sup>74</sup> "There does not seem to be any difference in principle between that service and the service performed by the sailor, the lighter-man, the man who sets the rigging, who scrapes the bottom or paints the side of the vessel, or by him who furnishes supplies, or tows the vessel out or into the port. They are all necessary to the general business of the transportation of the cargo, and contribute to the reward of capital employed in maritime service, and alike should be regarded as maritime service, and furnish a

<sup>74</sup> The Emily Souder, 17 Wall. (U. S.) 666, 21 L. ed. 683; The George T. Kemp, 2 Low. (U. S.) 477, Fed. Cas. No. 5341; The Circassian, 1 Ben. (U. S.) 209, Fed. Cas. No. 2722; The Kate Tremaine, 5 Ben. (U. S.) 60, Fed. Cas. No. 7622; The Hattie M. Bain, 20 Fed. 389; The Velox, 21 Fed. 479; The Canada, 7 Fed. 119, 7 Sawy. (U. S.) 173; Roberts v. The Windermere, 2 Fed. 722; The Senator, 21 Fed. 191; The Main, 51 Fed. 954; The Gilbert Knapp, 37 Fed. 209; The Scotia, 35 Fed. 916; The Mattie May, 45 Fed. 899. See, for cases to the contrary, The Amstel, Blatchf. & H. (U. S.) 215, Fed. Cas. No. 339; The Joseph Cunard, Olcott (U. S.) 120, Fed. Cas. No. 2535; Cox v. Murray, 1 Abb. Adm. (U. S.) 340; Fed. Cas. No. 3304; The S. G. Owens, 1 Wall. Jr. 370, Fed. Cas. No. 17310; The A. R. Dunlap, 1 Low. (U. S.) 350, Fed. Cas. No. 513. The Augustine Kobbe, 37 Fed. 696. But these decisions are now generally repudiated. The cases are fully reviewed in Roberts v. The Windermere, 2 Fed. 722. This repudiated rule was followed in the fifth cir-

cuit until it was reversed in The Main, 51 Fed. 954, where Pardee, J., said: "The services of a stevedore in loading and stowing cargo on board of a ship, and in unloading a cargo from a ship, are largely employed on board the vessel itself, and generally he uses the ship's tackle and machinery in performing the work. It is difficult to see why hoisting and lowering a cargo on a vessel is not as much a maritime service as hoisting and lowering yards and sails. A vessel, in taking on and unloading cargo, is earning freight; for, in loading and unloading, services are rendered, the expense of which necessarily enters into the affreightment contract. It may be true that stevedores, when employed by the owner or consignee, or employed on personal credit; but it is not true, that when stevedores are employed by a master in a foreign port, they are employed on the personal credit of the master." The Hex, 2 Woods (U. S.) 229, Fed. Cas. No. 10842, is overruled. Keating v. The John Shay, 81 Fed. 216.

remedy against the vessel.<sup>75</sup> But, of course, there is no lien for a stevedore's services rendered in the home port, in the absence of a statute conferring such lien.<sup>76</sup>

The services of a stevedore in discharging a vessel are rendered both to the vessel and the cargo, and therefore he has a lien on both.<sup>77</sup> As between the vessel and the cargo, the vessel may be primarily liable, as where the services are rendered in discharging an unseaworthy vessel before the voyage commenced;<sup>78</sup> though a claim for services rendered during the voyage might be the subject of average between the vessel and the cargo.

Laborers employed by the head stevedore to discharge a cargo under contract with the master of a vessel have no lien upon the vessel.<sup>79</sup> They are presumed to know that they must look to the contractor alone for their pay. When, however, they work either upon the direct employment of

<sup>75</sup> *The Senator*, 21 Fed. 191. It has been held, however, that stevedores have no lien for services in loading and stowing a cargo before the vessel commences her voyage. *Paul v. Bark Illex*, 2 Woods (U. S.) 229, Fed. Cas. No. 10842; *The Ole Oleson*, 20 Fed. 384, per Dwyer, J.; *The Esteban de Antunano*, 31 Fed. 920. But this view is not supported by the authorities generally. *The Canada*, 7 Fed. 119. Judge Deady says: "To my mind it is very plain that the services of the stevedore are maritime in their nature. A voyage can not be begun or ended without the stowing or discharge of cargo. To receive and deliver the cargo are as much a part of the undertaking of the ship as its transportation from one port to another. In-

deed, it is an essential part of such transportation. Freight is not due or earned until the cargo is, at least, placed on the wharf at the end of the ship's tackle. To say that the final delivery or discharge of the cargo is not a maritime service, because it is, or may be, performed partly on shore, is simply begging the question, as it is the nature of the service, and not the place where rendered, that determines its character in this respect."

<sup>76</sup> *The Wyoming*, 36 Fed. 493; *The Gilbert Knapp*, 37 Fed. 209.

<sup>77</sup> *The Director*, 34 Fed. 57, 13 Sawy. (U. S.) 172; *The Canada*, 7 Fed. 119.

<sup>78</sup> *The Director*, 34 Fed. 57, 13 Sawy. (U. S.) 172.

<sup>79</sup> *The Mark Lane*, 13 Fed. 800.

the master, or upon the faith of his promise that he will see them paid, they are entitled to a lien.<sup>80</sup>

**§ 1714. Workmen removing ballast from vessel in port entitled to liens.**—The removal of ballast from a foreign vessel while in port, for the purpose of putting her in condition to receive cargo for an intended voyage, constitutes a maritime service. There is a strong resemblance between the services rendered in removing ballast and those rendered by a stevedore.<sup>81</sup> “In the one case it is work done in removing the cargo from the ship; in the other, it is work done in removing the ballast. This distinction is enough, however, to take the case out of the rule applicable to stevedores. The ballast is not cargo. It is rather a part of the ship, like the boats, the sails, the anchors, the stores, and many other things that go to the full equipment of the vessel. The ballast is necessary to the complete and seaworthy ship, though unlike them it is so only under certain circumstances. While it is in its place in the ship it is to be regarded as a part of the ship and of her equipment. The service of removing it when she is to take on board her cargo is of the same character as would be the removal of the anchors or stores, or part of the cargo, if required, for the purpose of lightening her, that she might cross a bar, or come up at the wharf at which she is to discharge her cargo. The facts that the service is rendered wholly in port, that the vessel is not actually on a voyage, that it may be partly rendered on the land, do not make it otherwise than a maritime service on the foregoing authorities.”<sup>82</sup>

**§ 1715. Watchman in port not entitled to lien.**—The wages of a watchman employed on a vessel while laid up in

<sup>80</sup> *The Hattie M. Bain*, 20 Fed. 389; *The Mattie May*, 47 Fed. 69.

<sup>81</sup> *Roberts v. The Bark Windermere*, 2 Fed. 722, 729.

<sup>82</sup> *Roberts v. The Bark Windermere*, 2 Fed. 722, 729, per Choate,

J.

port are not a maritime lien,<sup>83</sup> because his services do not assist a ship in discharging a maritime obligation. But the services of a watchman upon a foreign vessel detained at quarantine create a lien.<sup>84</sup> The lien of a watchman after the vessel has been seized by the marshal under process is not allowed.<sup>85</sup> The test whether there is a lien is to be found in the inquiry whether the services were maritime in their nature. If the vessel was laid up and not employed on any voyage, or in the performance of any contract of affreightment, the services are not maritime, and do not create a lien. But if the services were rendered in connection with any voyage performed or to be performed, they are maritime, and entitle the watchman to a lien.

But where a watchman or ship-keeper was employed upon a steamboat laid up at St. Louis, and a part of his duty was to move the steamer from place to place as circumstances might require, and he did in fact on several occasions procure a tug to move her from one anchorage to another, in order to insure her safety, it was held that his claim for wages grew out of a maritime contract which entitled him to a lien.<sup>86</sup>

§ 1716. **Cooper entitled to lien in putting cargo into good condition.**—A cooper is entitled to a lien for services in putting the cargo into a deliverable condition, because it is

<sup>83</sup> *The John T. Moore*, 3 Woods (U. S.) 61, Fed. Cas. No. 7430; *Phillips v. The Thomas Scattergood*, 1 Gilpin (U. S.) 1; *Gurney v. Crockett*, Abb. Adm. (U. S.) 490, Fed. Cas. No. 5874; *The Harriet*, Olcott (U. S.) 229, Fed. Cas. No. 6097; *McGinnis v. The Grand Turk*, 2 Pitts. (U. S.) 326, Fed. Cas. No. 8800; *The E. A. Barnard*, 2 Fed. 712.

<sup>84</sup> *The Island City*, 1 Low. (U. S.) 375, Fed. Cas. No. 7109; *The John T. Moore*, 3 Woods (U. S.)

61, Fed. Cas. No. 7430; *The Erinagh*, 7 Fed. 231.

<sup>85</sup> *The Erinagh*, 7 Fed. 231; *The Northern Light*, 106 Fed. 748.

<sup>86</sup> *The Maggie P.*, 32 Fed. 300. Thayer, J., said that the later cases have established a more liberal interpretation of the term "maritime contract" than was adopted in the early cases. For a similar case, see *Wishart v. The Jos. Nixon*, 43 Fed. 926, where the services were rendered at the home port.



the duty of the ship to deliver the cargo in good order.<sup>87</sup> The weighing, inspecting, and measuring of a cargo of a vessel constitutes a maritime service.<sup>88</sup>

### § 1717. Towage services presumptively a lien on vessel.

—It is for the claimant to prove a personal credit only, or to show circumstances that negative a credit to the vessel.<sup>89</sup> The owner of a tug-boat is entitled to a lien, equally at least with a pilot, for towage services rendered to a vessel in her home port.<sup>90</sup> Sailing vessels are largely dependent upon tugs and towing vessels for taking them into and out of harbors. The tug thus becomes a substitute for both seamen and pilot. The owner of a steamer in like manner has a lien upon a tug-boat for services rendered in assisting the tug in rescuing a wrecked vessel. The steamer not being employed by the wrecked vessel, it has no lien upon that for

<sup>87</sup> *The Onore*, 6 Ben. (U. S.) 564, Fed. Cas. No. 10538. Judge Benedict said: "Many maritime contracts are performed on land, and by persons having no immediate connection with the sea. The services in question are maritime, because they are a necessary part of the maritime service which the ship renders to the cargo, and without which the object of the voyage would not be accomplished."

<sup>88</sup> *Constantine v. The River Queen*, 2 Fed. 731.

<sup>89</sup> *The Erastina*, 50 Fed. 126; *Mack S. S. Co. v. Thompson*, 176 Fed. 499, 100 C. C. A. 57. Where towage services are rendered at the request of the owner and not on the credit of the vessel and there is no state statute giving a lien therefor, there is no lien for such services. *The Mame*, 189

Fed. 419. See also, *The Saratoga*, 100 Fed. 480, where it is held that there is a lien for towage when the service is rendered for those in charge of those operating a dredge, and the services are not rendered for a monthly stipend. See also, *In re Alaska Fishing & Development Co.*, 167 Fed. 875. Whether there is any lien for towage services depends on the kind of services rendered and under what circumstances they are rendered. *The Alligator*, 153 Fed. 216, *affd.* 161 Fed. 37, 88 C. C. A. 201.

<sup>90</sup> *The Mystic*, 30 Fed. 73; *The John Cutrell*, 9 Fed. 777. *Contra*, *Dalzell v. The Daniel Kaine*, 31 Fed. 746; *The Bob Connell*, 1 Fed. 218. There is no lien for towage services under the statute of Pennsylvania. *Dalzell v. The Daniel Kaine*, 31 Fed. 746.

salvage; but rendering the service under a contract with the tug-boat, the lien is against that boat.<sup>91</sup>

§ 1718. **Maritime lien for salvage services.**<sup>92</sup>—It is impracticable to consider at length what services amount to salvage services. The necessary elements of such service are a threatened peril to a vessel, and services rendered in rescuing her from such peril. There are different grades of such service, depending upon the peril threatened and the service rendered. According to the circumstances of the case, the allowance for such services may be very large, or they may be very small, amounting to scarcely more than a charge for towage.<sup>93</sup> An agreement to pay a salvor a specified sum if he succeeds in raising a vessel within a specified time, and a larger sum if it requires a longer time, does not deprive the salvor of his lien. "Nothing short of a distinct agreement to pay the stipulated sum, whether the service be successful or not, will change the character of a salvage service into a mere ordinary contract of employment, or deprive it of its maritime lien."<sup>94</sup>

<sup>91</sup> *The Murphy Tugs*, 28 Fed. 429.

<sup>92</sup> In Arkansas a lien is given upon any boat, vessel, raft, or other property wrecked or lost for salvage of same. Dig. of Stats. 1904, § 7472. In California, North Dakota and South Dakota, any person other than the master, mate, or a seaman thereof, who rescues a ship, her appurtenances, or cargo from danger, is entitled to a reasonable compensation therefor, to be paid out of the property saved. He has a lien for such claim, which is regulated by

the statute on liens. California: Civ. Code 1906, § 2079. North Dakota: Rev. Code 1905, § 5621. South Dakota: Rev. Code (Civ.) 1903, § 1526.

<sup>93</sup> *The M. Vandercook*, 24 Fed. 472.

<sup>94</sup> *Chapman v. The Engines of the Greenpoint*, 38 Fed. 671, per Brown, J.; *The Camanche*, 8 Wall. (U. S.) 448, 477, 19 L. ed. 397; *Adams v. Island City*, 1 Cliff. (U. S.) 210, Fed. Cas. No. 55; *The Louisa Jane*, 2 Low. (U. S.) 295, Fed. Cas. No. 8532.

§ 1719. **Lien for wharfage arising against foreign vessel.**<sup>95</sup>—This is a maritime contract; and if the lien is given by statute against a domestic vessel, it may be enforced in the admiralty.<sup>96</sup>

There is no maritime lien for the storage of sails,<sup>97</sup> nor for lockage in a public navigable river if the services were rendered to a vessel in her home port.<sup>98</sup> There is no lien for services rendered in navigating a raft of logs.<sup>99</sup>

§ 1720. **Lien in admiralty in favor of vessel on cargo for freight.**<sup>1</sup>—"Such a lien is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usages of commerce, independently of the agreement of the parties, and not from any statutory regulations. Legal effect of such a lien is, that the shipowner, as carrier by water, may retain the goods until the freight is paid, or he may enforce the same by a proceeding in rem in the district court. But it is not the same as the privileged claim of the civil law, nor is it an hypothecation of the cargo which will remain a charge upon the goods after the shipowner has parted unconditionally with the possession. Although the lien is maritime and cognizable in the admiralty, yet it stands upon the same ground with the lien of the carrier on land, and arises from the right of the shipowner to retain the possession of the goods until the freight is paid, and is lost by an unconditional delivery to the consignee."<sup>2</sup>

<sup>95</sup> *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373; *Ex parte Lewis*, 2 Gall. (U. S.) 483, Fed. Cas. No. 8310.

<sup>96</sup> *The Virginia Rulon*, 13 Blatchf. (U. S.) 519, Fed. Cas. No. 16974. And see *The John M. Welch*, 18 Blatchf. (U. S.) 54, 2 Fed. 364.

<sup>97</sup> *Hubbard v. Roach*, 2 Fed. 393, 9 Biss. (U. S.) 275.

<sup>98</sup> *Monongahela Nav. Co. v. The Bob Connell*, 1 Fed. 218.

<sup>99</sup> *A Raft of Cypress Logs*, 9 Chic. L. N. 26.

<sup>1</sup> *The Bird of Paradise*, 5 Wall. (U. S.) 545, 555, 18 L. ed. 662; *Bags of Linseed*, 1 Black (U. S.) 108; *The Ira B. Ellems*, 48 Fed. 591; *Miners' Co-op. Assn. v. The Monarch*, 2 Alaska 383; *Warehouse & Builders' Supply Co. v. Galvin*, 19 Wis. 523, 71 N. W. 804.

<sup>2</sup> *The Bird of Paradise*, 5 Wall. (U. S.) 545, 18 L. ed. 662, per Clifford, J. See ante, § 270.

There is also a maritime lien for demurrage.<sup>3</sup>

§ 1720a. **Lien in contract of affreightment.**—There is also another lien in a contract of affreightment, that is, a lien of the freight on the vessel. This is a lien for the safe custody and due transportation of the goods shipped, and it attaches at the time of the delivery of the goods to the agents or owners of the vessel.<sup>4</sup>

§ 1721. **Lien for labor and materials in construction of vessel under general maritime law.**—The general maritime law of the world gives a lien for labor and materials supplied in the construction of a vessel, though in the United States there is no admiralty jurisdiction of such a lien. In most of the states such a lien has been created by statute. One chief purpose of the state statutes relating to liens upon vessels is to effectually secure payment for the labor and materials expended in the building and equipping of vessels in domestic ports, thus in effect restoring the privilege given by the general maritime law as it exists in other commercial countries;<sup>5</sup> and the other chief purpose is to give a lien for supplies furnished in domestic ports similar in effect to a maritime lien for supplies furnished in a foreign port.

§ 1722. **No lien in United States for work done and materials furnished in constructing vessel.**—In the United States there is no maritime lien for work done and materials furnished towards the original construction of a vessel, and a lien therefor created by a state statute is not enforceable in

<sup>3</sup> The *Hyperion's Cargo*, 2 Low. (U. S.) 93, Fed. Cas. No. 6987; *Donaldson v. McDowell*, 1 Holmes (U. S.) 290, Fed. Cas. No. 3985; *Two Hundred and Seventy-five Tons of Mineral Phosphates*, 9 Fed. 209.

<sup>4</sup> The *Maggie Hammond*, 9 Wall.

(U. S.) 435, 17 L. ed. 772; *Pearce v. The Thomas Newton*, 41 Fed. 106; *Miners' Co-op. Assn. v. The Monarch*, 2 Alaska 383.

<sup>5</sup> *Randall v. Roche*, 30 N. J. L. 220, 82 Am. Dec. 233; *Merrick v. Avery*, 14 Ark. 370, 378.

admiralty.<sup>6</sup> No lien exists for materials furnished for the equipment of a new vessel, which were necessary to fit it for use, and were contemplated from the beginning as a part of its construction, though not included in the original contract, and even if furnished a month after the hull was launched, but before any voyage.<sup>7</sup> Where a floating scow was constructed in New Jersey and towed to Pennsylvania, where machinery was furnished under contract with the builders, who had undertaken to construct the scow with such machinery, it was held that the machinery was furnished in the original construction of the vessel.<sup>8</sup>

The reason given for the rule that a contract for building a ship is not maritime, is that the contract is made on land, to be performed on land, and has no reference to a voyage to be performed.<sup>9</sup> As the decisions now stand, there is no lien for the building of a vessel, nor for fitting her with

<sup>6</sup> *People's Ferry Co. v. Beers*, 20 How. (U. S.) 393, 15 L. ed. 961; *Roach v. Chapman*, 22 How. (U. S.) 129, 16 L. ed. 291; *Morewood v. Enequist*, 23 How. (U. S.) 491, 494, 16 L. ed. 516; *Edwards v. Elliott*, 21 Wall. (U. S.) 532, 22 L. ed. 487; *The St. Lawrence*, 1 Black (U. S.) 522, 531, 17 L. ed. 180; *The Norway*, 3 Ben. (U. S.) 163, Fed. Cas. No. 10359; *The Eliza Ladd*, 3 Sawy. (U. S.) 519, Fed. Cas. No. 4364, 7 Leg. Gaz. 414; *The Count de Lesseps*, 17 Fed. 460; *The Pacific*, 9 Fed. 120; *The Guiding Star*, 9 Fed. 521; *Scully v. Shakespear*, 75 Pa. St. 297; *Sinton v. Steamboat Roberts*, 34 Ind. 448, 46 Ind. 476, 7 Am. Rep. 229; *Coryell v. Perine*, 6 Rob. (N. Y.) 23; *The Orpheus*, 2 Cliff. (U. S.) 29, Fed. Cas. No. 18169; *The Royal George*, 1 Woods (U. S.) 290, Fed. Cas. No. 13102; *The Manhattan*, 46 Fed.

797; *The Madrid*, 40 Fed. 677; *The J. C. Rich*, 46 Fed. 136; *Baizley v. The Odorilla*, 121 Pa. St. 231, 15 Atl. 521, 1 L. R. A. 505. It is declared in the later case of *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, 28, 15 L. ed. 961, that the effect of the decisions in *People's Ferry Co. v. Beers*, 20 How. (U. S.) 393, 15 L. ed. 961, and *Roach v. Chapman*, 22 How. (U. S.) 129, 16 L. ed. 291, is not to be extended by implication to other cases.

<sup>7</sup> *In re Glenmont*, 32 Fed. 703, affd. 34 Fed. 402. There can be no lien except by statute for spars furnished to a vessel for its original outfit. *The Maud Carter*, 29 Fed. 156, per Nelson, J.

<sup>8</sup> *The Count de Lesseps*, 17 Fed. 460. And see *Waddell v. The Daisy*, 2 Wash. T. 76, 3 Pac. 616.

<sup>9</sup> *People's Ferry Co. v. Beers*, 20 How. (U. S.) 393, 15 L. ed. 901.

engines, boilers, or other machinery which enter into her construction when she is built; nor is there any lien for sails made for and fitted to a ship when she is built, or for anchors and chains furnished her at that time. Such things constitute a part of the ship, and without them she could perform no voyage at all.<sup>10</sup>

But not everything furnished a ship when she is built goes into her construction. For instance, it is held that a contract to furnish nets to a fishing vessel is a maritime contract, in view of the subject-matter, though the contract be made upon the land and the nets be delivered upon the land; and if they are furnished in a foreign port, a lien for their price is created on the vessel.<sup>11</sup>

§ 1722a. **Liens for repairing vessels.**—But contracts for equipping a new vessel left incomplete by the builders are maritime, if they are entered into after the vessel has been launched and named and has become capable of identification as a vessel. It makes no difference in principle whether a vessel may have been once complete, and afterwards disabled and stripped, or whether the things necessary to render her complete and seaworthy are lacking simply because they have never been supplied.<sup>12</sup> Yet in a Pennsylvania

<sup>10</sup> The *Hiram R. Dixon*, 33 Fed. 297, per Benedict, J. In the case of *In re Glenmont*, 32 Fed. 703, affg. 34 Fed. 402, it appeared that, a month after the hull of a steamboat was built, and the propelling power put in, the libellant furnished her with stores, fuel, tiller-line, check-line, copper wire, packing for machinery, pails for roof, beds and bedding, etc. On the day this outfit was received, the boat made her first trip. Although it did not appear that the original contract included these materials, it was held that the original con-

struction of the boat contemplated all the materials furnished to make the vessel serviceable from the beginning, and that no maritime lien existed.

<sup>11</sup> The *Hiram R. Dixon*, 33 Fed. 297.

<sup>12</sup> The *Manhattan*, 46 Fed. 797, per Hanford, J.; The *Eliza Ladd*, 3 Sawy. (U. S.) 519, Fed. Cas. No. 4364, 7 Leg. Gaz. 414; The *Revenue Cutter No. 2*, 4 Sawy. (U. S.) 143, Fed. Cas. No. 11714; The *Iris*, 100 Fed. 104, 40 C. C. A. 301; The *O. H. Vessels*, 177 Fed. 589.

case, where the new hull of a vessel built in Delaware was brought by the builders to Philadelphia, where the work could be more conveniently completed, it was held that a lien for the work done in Philadelphia was not within the exclusive jurisdiction of the admiralty courts, but might be enforced in the courts of the state.<sup>13</sup>

§ 1723. **Lien on vessels at common law.**—There is a lien upon vessels at common law for work done upon them, if possession is taken and retained until the claim is paid, whether it be done in the construction or repair of them, and whether they be in their home ports or not. Thus, a shipwright has such a lien.<sup>14</sup> The nature of the possession can not be just the same as that which a mechanic has of an ordinary article made or repaired. If a shipwright receives a ship into his dock for repairs, and the actual custody is surrendered to him, and he is made responsible for her care and safety, he has a common-law lien for work done upon the vessel, although the master remains by her most of the time, and retains the mate and cook to help in the repairs, and not with the intent to retain the custody of the vessel.<sup>15</sup> Such common-law liens may be enforced in admiralty when the lien arises out of a maritime contract or service, such, for instance, as the repairing of a domestic vessel.<sup>16</sup>

Where only a common-law remedy is sought, and the cause of action is also cognizable in admiralty, the state courts have concurrent jurisdiction.<sup>17</sup> A common-law remedy is not always the same thing as a remedy in the common-

<sup>13</sup> *Baizley v. The Odorilla*, 121 Pa. St. 231, 15 Atl. 521, 1 L. R. A. 505.

<sup>14</sup> *The Marion*, 1 Story (U. S.) 68, Fed. Cas. No. 9087; *The B. F. Woolsey*, 7 Fed. 108; *The Two Marys*, 10 Fed. 919; *American Trust Co. v. W. & A. Fletcher Co.*, 173 Fed. 471, 97 C. C. A. 477.

<sup>15</sup> *The B. F. Woolsey*, 7 Fed. 108.

<sup>16</sup> *The Marion*, 1 Story (U. S.) 68, Fed. Cas. No. 9087; *The B. F. Woolsey*, 7 Fed. 108.

<sup>17</sup> *Bohannon v. Hammond*, 42 Cal. 227.

law courts; but a common-law remedy in maritime matters which the states may enforce must be such a remedy as the common law itself was competent to give, not such as a legislature might confer on a common-law court.<sup>18</sup>

§ 1724. **Competent for state to create lien by statute.**—It is competent for any state to create a lien by statute for labor done and materials furnished for building a ship, and it may enact reasonable rules and regulations prescribing the mode of enforcing such liens, if they are not inconsistent with the exclusive jurisdiction of the admiralty courts.<sup>19</sup> The state laws can only authorize the enforcement of such lien by common-law remedies in the state which enacted the statute creating the lien. The state statutes can confer no jurisdiction upon the courts of the United States. A local statute can neither enlarge nor diminish the admiralty jurisdiction.<sup>20</sup> The only effect of a state statute giving a lien for building a vessel is to attach a lien to a contract originally maritime in nature, but not to make a contract maritime which was not so originally.

§ 1725. **Admiralty courts no jurisdiction to enforce liens for construction of vessel.**—The admiralty courts of the United States have no jurisdiction to enforce liens for labor and materials furnished in the construction of vessels. A

<sup>18</sup> Hayford v. Cunningham, 72 Maine 128, 133, per Peters, J.

<sup>19</sup> Edwards v. Elliott, 21 Wall. (U. S.) 532, 22 L. ed. 487; The Belfast, 7 Wall. (U. S.) 624, 645, 19 L. ed. 266; Sheppard v. Steele, 43 N. Y. 52, 55, 3 Am. Rep. 660; Ferran v. Hosford, 54 Barb. (N. Y.) 200, 208; Sinton v. Steamboat Roberts, 46 Ind. 476; Baizley v. The Odorilla, 121 Pa. St. 231, 15 Atl. 521, 1 L. R. A. 505.

<sup>20</sup> Roach v. Chapman, 22 How. (U. S.) 129, 16 L. ed. 291; The Pa-

cific, 9 Fed. 120; The Winnebago, 141 Fed. 945, 73 C. C. A. 295; Muellerweisse v. Pile Driver E. O. A., 69 Fed. 1005; The Iris, 100 Fed. 104, 40 C. C. A. 301. The case of The People's Ferry Co. v. Beers, 20 How. (U. S.) 393, 15 L. ed. 961, put an end to the practice which once obtained of allowing admiralty jurisdiction in the federal courts to enforce statutory liens arising in the original construction of vessels.



contract to construct a vessel is not a maritime contract; and the lien for construction is not a maritime lien. A state statute giving a lien for work done and material furnished in the original construction of a vessel does not give rise to a maritime contract.<sup>21</sup> The law upon this point is forcibly stated by Mr. Justice Gray:<sup>22</sup> "The admiralty jurisdiction is conferred on the courts of the United States by the constitution, and can not be enlarged or restricted by the legislature of a state. When a right maritime in its nature has been created by the local law, the admiralty courts of the United States may doubtless enforce that right, according to their own rules of procedure."<sup>23</sup> \* \* \* But no state legislation can bring within the jurisdiction of those courts a subject not maritime in its nature."<sup>24</sup>

The federal courts sitting in admiralty may enforce, according to their own rules of procedure, a right created by a state statute, which right is maritime in its nature, but not a right which is not of a maritime nature. The state statutes can not create an admiralty lien, or ingraft any new provision upon the admiralty laws.<sup>25</sup> A libel which claims a lien under the general maritime law may be amended so as to assert a lien under the law of the state.<sup>26</sup>

<sup>21</sup> The *J. C. Rich*, 46 Fed. 136.

<sup>22</sup> The *H. E. Willard*, 52 Fed. 387.

<sup>23</sup> Citing *The General Smith*, 4 Wheat. (U. S.) 438, 443, 4 L. ed. 609; *The Planter*, 7 Pet. (U. S.) 324, 341, 8 L. ed. 700; *The St. Lawrence*, 1 Black (U. S.) 522, 526, 527, 17 L. ed. 180; *Ex parte McNiel*, 13 Wall. (U. S.) 236, 20 L. ed. 624; *The Lottawanna*, 21 Wall. (U. S.) 558, 575, 576, 580, 22 L. ed. 654; *The Corsair*, 145 U. S. 335, 347, 36 L. ed. 727, 12 Sup. Ct. 949; *The Pearl*, 189 Fed. 540.

<sup>24</sup> Citing *The Orleans*, 11 Pet.

(U. S.) 175, 184, 9 L. ed. 677; *The Jefferson*, 20 How. (U. S.) 393, 15 L. ed. 961; *The Capitol*, 22 How. (U. S.) 129, 26 L. ed. 291; *The St. Lawrence*, 1 Black (U. S.) 522, 17 L. ed. 180; *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654.

<sup>25</sup> *Welsh v. The North Cambria*, 40 Fed. 655; *The Manhasset*, 18 Fed. 918; *The Sylvan Glen*, 9 Fed. 335. These were actions by administrators for damages resulting in the death of their intestates.

<sup>26</sup> *The Samuel Marshall*, 49 Fed. 754.

State statutes which attempt to confer jurisdiction upon the courts of the states to enforce maritime contracts by proceedings in rem are in contravention of the constitution and laws of the United States.<sup>27</sup> Consequently the admiralty court has no jurisdiction to enforce a construction given by a state statute. The jurisdiction is in the state courts.<sup>28</sup>

As to claims not in their nature maritime, the state jurisdiction is not impaired, and there are no restrictions upon the power of the states to prescribe such forms of procedure for their collection as may be deemed appropriate and necessary.<sup>29</sup>

**§ 1725a. What included in statutory liens.**—A statutory lien for construction includes materials necessary to the rig-

<sup>27</sup> *The Sylvan Stream*, 35 Fed. 314; *The Moses Taylor*, 4 Wall. (U. S.) 411, 18 L. ed. 397, 32 How. Pr. (U. S.) 460; *The Hine v. Trevor*, 4 Wall. (U. S.) 555, 18 L. ed. 451; *Warren v. Kelley*, 80 Maine 512, 15 Atl. 49.

<sup>28</sup> *Roach v. Chapman*, 22 How. (U. S.) 129, 16 L. ed. 291; *Edwards v. Elliott*, 21 Wall. (U. S.) 532, 22 L. ed. 487; *Young v. The Orpheus*, 2 Cliff. (U. S.) 29, Fed. Cas. No. 18169; *McDonald v. The Nimbus*, 137 Mass. 360; *Foster v. The Richard Busteed*, 100 Mass. 409, 1 Am. Rep. 125; *Wilson v. Lawrence*, 82 N. Y. 409; *Coryell v. Perine*, 6 Rob. (N. Y.) 23; *King v. Greenway*, 71 N. Y. 413; *Poole v. Kermit*, 59 N. Y. 554; *Sinton v. The Roberts*, 34 Ind. 448, 7 Am. Rep. 229; *Wyatt v. Stuckley*, 29 Ind. 279; *Thorsen v. The J. B. Martin*, 26 Wis. 488, 7 Am. Rep. 91; *Muel-lerweisse v. Pile Driver E. O. A.* 69 Fed. 1005.

<sup>29</sup> *Brookman v. Hamill*, 43 N. Y. 554, 557, 3 Am. Rep. 731; *Stapp v. The Clyde*, 43 Minn. 192, 45 N. W. 430; *The Belfast*, 7 Wall. (U. S.) 624, 645, 19 L. ed. 266. In the latter case, Justice Clifford says: "Authority does not exist in the state courts to hear and determine a suit in rem in admiralty, to enforce a maritime lien. Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and, in respect to such contracts, it is competent for the states, under the decisions of this court, to create such lien as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement." See also, *The Winnebago*, 141 Fed. 945, 73 C. C. A. 295; *The Iris*, 100 Fed. 104, 40 C. C. A. 301.

ging and equipment of a vessel;<sup>30</sup> and the lien for such materials attaches though they are furnished at another port to which she had been brought after the hull and spars of the vessel had been completed at a port of another state, where sufficient rigging was put upon her, and a sufficient cargo for the necessary ballast was taken to enable her to go to the port where she received her final equipment.

There is no lien for materials furnished toward building a vessel unless the contract was made and the materials furnished within the state whose statute is relied upon for the lien.<sup>31</sup> Materials furnished within the state, for the building of a vessel in another state, create no lien.<sup>32</sup>

**§ 1726. Contract of owner.**—In order to create a lien upon a vessel for her construction or repair under a state statute, the labor must have been performed or the materials furnished by virtue of the contract, expressed or implied, with the owners, or with the agents, contractors, or subcontractors of such owners, or some one of them, or with some person having been employed to construct, repair or launch such vessel, or to assist them.<sup>33</sup> Therefore, where the builder of a vessel made an agreement with another to furnish sails which were to remain the property of the latter, and the vessel was to be sailed upon shares, and the person who agreed to furnish the sails made a contract with the sailmaker under which the sails were furnished, it was held that the sailmaker could not maintain a lien against the vessel.<sup>34</sup>

<sup>30</sup> *Wilson v. Lawrence*, 18 Hun (N. Y.) 56, affd 82 N. Y. 409; *McDonald v. The Nimbus*, 137 Mass. 360.

<sup>31</sup> *Phillips v. Myers*, 30 How. Pr. (N. Y.) 184.

<sup>32</sup> *Moore v. Lunt*, 1 Hun (N. Y.) 650, 4 T. & C. (N. Y.) 154, revg. 13 Abb. Pr. (N. S.) (N. Y.) 166, and affd. 60 N. Y. 649.

<sup>33</sup> *The John Farron*, 14 Blatchf.

(U. S.) 24, Fed. Cas. No. 7341; *The Sea Witch*, 34 Fed. 654; *The Odorilla v. Baizley*, 128 Pa. St. 283, 18 Atl. 511; *Delaney Forge & Co. Iron Co. v. Iroquois Transp. Co.*, 142 Mich. 84, 105 N. W. 527, 113 Am. St. 566, 12 Detroit Leg. N. 691, affd. 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. 509.

<sup>34</sup> *Bates v. Emery*, 134 Mass. 186.

Neither the fact that materials are furnished for the construction of a vessel on credit, nor the fact that they are delivered primarily on the credit of the builder of the vessel, defeats a lien, if no note or security is taken, and exclusive credit is not given to the builder.<sup>35</sup>

§ 1727. **Materials for two vessels.** A statutory lien for materials furnished for the construction or repair of a vessel can be enforced only against that vessel. There can be no lien on one vessel for materials supplied for another. Where materials are furnished for two vessels, the material-man may elect to which of the two vessels he will appropriate them, and he may proceed against that one for such part of the materials as were used in that vessel, for there is no reason why it may not be said with truth that they were furnished for and on account of that vessel.<sup>36</sup>

A person who performs labor on two vessels, under an entire contract for a round sum, can not maintain a lien on one of the vessels for the work done on that vessel, whether he has performed his contract, or has been prevented from finishing his work by the failure of the owner of the vessel to complete the vessel sufficiently for him to perform it.<sup>37</sup>

But upon a general contract to furnish material or labor for two or more vessels, no entire sum for the whole being stipulated, but the same to be furnished at certain rates or without any rate being named, then the amount furnished on each particular vessel may be estimated, and a lien will attach for the same.<sup>38</sup>

§ 1728. **Lien only for materials actually used in construction.**—To create a lien for construction materials, they must

<sup>35</sup> *Young v. The Orpheus*, 119 Mass. 179.

<sup>36</sup> *The Kiersage*, 2 Curtis (U. S.) 421, Fed. Cas. No. 7761; *The Wyoming*, 36 Fed. 493.

<sup>37</sup> *Jones v. Keen*, 115 Mass. 170, 183.

<sup>38</sup> *Rogers v. Currier*, 13 Gray (Mass.) 129; *Briggs v. A Light-Boat*, 7 Allen (Mass.) 287; *The Kiersage*, 2 Curt. (U. S.) 421, Fed. Cas. 7761; *Jones v. Keen*, 115 Mass.

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be actually used, or furnished for use, in the building of the vessel; and the burden of proving that they were so used or furnished, or what portion of them was so used or furnished, rests with the material-man.<sup>39</sup> The materials must either actually or constructively form a part of the vessel.<sup>40</sup> But there may be a lien for materials, such, for instance, as spars, wrought and furnished for a particular vessel in process of construction, although the same were never attached to the vessel, or removed from the premises of those by whom they were wrought and furnished. Unless the statute provides for the use of the material, as does the mechanics' lien law of some of the states, it is sufficient that the materials be prepared and furnished for a particular vessel.<sup>41</sup>

It is sufficient to show that the materials were ordered for and delivered to or near the vessel, and the lien is not lost though part of the materials are subsequently diverted and used for other vessels.<sup>42</sup> But no lien arises from the breach of an executory contract, such as a refusal to accept materials ordered.<sup>43</sup>

A construction lien attaches to the structure as soon as it assumes the form or shape of a vessel, though it is still on the stocks.<sup>44</sup>

<sup>39</sup> *Phoenix Iron Co. v. Vessels*, 43 Hun (N. Y.) 429; *Phillips v. Wright*, 5 Sandf. (N. Y.) 342; *Hiscox v. Harbeck*, 2 Bosw. (N. Y.) 506; *Veltman v. Thompson*, 3 N. Y. 438, 440; *The Pacific*, 1 Blatchf. (U. S.) 569, 573, Fed. Cas. No. 10643.

<sup>40</sup> *Young v. The Orpheus*, 119 Mass. 179.

<sup>41</sup> *Barstow v. Robinson*, 2 Allen (Mass.) 605.

<sup>42</sup> *The James H. Prentice*, 36 Fed. 777.

<sup>43</sup> *The Pacific*, 1 Blatchf. (U. S.)

569, 588, Fed. Cas. 10643; *The Cabarga*, 3 Blatchf. (U. S.) 75, Fed. Cas. No. 2276; *The Daniel Kaine*, 31 Fed. 746, 748; *The Alida*, Abb. Adm. (U. S.) 173, Fed. Cas. No. 199; *The Muskegan v. Moss*, 7 Ohio St. 377; *Veltman v. Thompson*, 3 N. Y. 438; *Clark v. Smith*, 14 Ill. 361; *Stout v. Sawyer*, 37 Mich. 313; *Williams v. Chapman*, 17 Ill. 423, 65 Am. Dec. 669; *The James H. Prentice*, 36 Fed. 777, 781.

<sup>44</sup> *Phillips v. Wright*, 5 Sandf. (N. Y.) 342.

§ 1729. **Statutory liens enforced in what courts.**—A lien maritime in its nature given by a state statute for domestic repairs and supplies must be enforced in the courts of admiralty of the United States. Claims against vessels for domestic supplies, materials or repairs are maritime in their nature, and can not be enforced under the state statutes, and these statutes, so far as they provide a remedy in rem, are in conflict with the laws and constitution of the United States.<sup>45</sup> The admiralty courts have exclusive jurisdiction over contracts purely maritime. The present policy of the Supreme Court of the United States upon this matter was definitely established by the 12th Rule adopted in May, 1872, which is as follows: "In all suits by material-men for supplies or repairs or other necessities, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam."<sup>46</sup> Since this rule went into

<sup>45</sup> *The Moses Taylor*, 4 Wall. (U. S.) 411, 18 L. ed. 397, 32 How. Pr. (N. Y.) 460; *The Hine v. Trevor*, 4 Wall. (U. S.) 555, 18 L. ed. 451; *The Edith*, 94 U. S. 518, 24 L. ed. 167; *The Sylvan Stream*, 35 Fed. 314; *Crawford v. The Caroline Reed*, 42 Cal. 469; *Brookman v. Hamill*, 43 N. Y. 554, 3 Am. Rep. 731; *In re The Josephine*, 39 N. Y. 19; *Poole v. Kermit*, 59 N. Y. 554; *Vose v. Cockcroft*, 44 N. Y. 415; *Hayford v. Cunningham*, 72 Maine 128; *Warren v. Kelley*, 80 Maine 512, 15 Atl. 49; *The Guiding Star*, 18 Fed. 263, 267; *The Petrel v. Dumont*, 28 Ohio St. 602, 22 Am. St. 397; *Dever v. The Hope*, 42 Miss. 715, 2 Am. Rep. 643; *Shepard v. Steele*, 43 N. Y. 52, 3 Am. Rep. 660; *The John Farron*, 14 Blatchf. (U. S.) 24, 26, Fed. Cas. No. 7341; *United States v. Burlington & C. Ferry Co.*, 21 Fed. 331, 337; *Waggoner v. St. John*, 10

*Heisk. (Tenn.)* 503; *Marshall v. Curtis*, 5 Bush (Ky.) 607, 615; *Wight v. Maxwell*, 4 Mich. 45, 54; *Walters v. The Mollie Dozier*, 24 Iowa 192, 95 Am. Dec. 722; *Weston v. Morse*, 40 Wis. 455; *The Madrid*, 40 Fed. 677; *The Menominee*, 36 Fed. 197; *Clyde v. Steam Trans. Co.*, 36 Fed. 501, 1 L. R. A. 794; *Russell v. Myers Excursion & Transfer Co.*, 73 N. J. Eq. 192, 67 Atl. 1016; *The Vigilant*, 151 Fed. 747, 81 C. C. A. 371; *The Emma B.*, 162 Fed. 966.

<sup>46</sup> The 12th Rule as originally adopted in 1844 authorized a proceeding in rem against domestic ships where, by the local law, a lien was given to material-men for supplies, repairs, or other necessities. Owing to the confusion arising from various state powers, and the constructions put on them by the state courts, the rule was changed in 1859 so as to provide

effect, the exclusive jurisdiction of the district courts of the United States, as admiralty courts in suits by material-men for supplies and repairs furnished domestic vessels, has been generally asserted by the federal courts,<sup>47</sup> and generally conceded by the state courts.<sup>48</sup> "The tendency of judicial opin-

merely that proceedings in personam, but not in rem, should apply to cases of domestic ships for supplies, repairs or other necessities. The new rule was found to work injustice in many cases, and accordingly the rule given in the text was adopted. In *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654, it was held that the effect of the new rule was to restore the rule of 1844, or rather to render the rule general in its terms, giving to material-men in all cases their option to proceed either in rem or in personam. See also, *The Madrid*, 40 Fed. 677; *Hitchings v. Olsen*, 184 Fed. 305, 106 C. C. A. 447; *Scatcherd Lumber Co. v. Rike*, 113 Ala. 555, 21 So. 136, 59 Am. St. 147.

<sup>47</sup> *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654; *The B. F. Woolsey*, 7 Fed. 108; *The Louis Olsen*, 52 Fed. 652; *The Mary Gratwick*, 2 Sawy. (U. S.) 342, Fed. Cas. No. 17591. And see cases in note 45, this section. Mr. Justice Holmes delivering the opinion in *Atlantic Works v. The Glide*, 157 Mass. 525, 33 N. E. 163, 34 Am. St. 305, to the effect that the state courts have jurisdiction in such cases, said: "The Supreme Court of the United States has given no decision upon the question. Had it done so, of course we should defer to its authority upon a matter of which it is the final judge. But,

until there is a direct adjudication by the only tribunal whose decision is an authority, we feel bound to exercise our own judgment upon the merits of the case. The dicta which have been uttered in rendering decisions of the Supreme Court have not been consistent. In *The Lottawanna*, 21 Wall. (U. S.) 558, 580, 22 L. ed. 654, the jurisdiction of the state courts is denied. In earlier cases, and, if we interpret their language rightly, in later ones, it is said or implied that the state courts can act. *Johnson v. Chicago & P. Elevator Co.*, 119 U. S. 388, 399, 30 L. ed. 447, 7 Sup. Ct. 254; *Norton v. Switzer*, 93 U. S. 355, 365, 366, 23 L. ed. 903; *The Belfast*, 7 Wall. (U. S.) 624, 645, 646, 19 L. ed. 266; *The Steamer St. Lawrence*, 1 Black (U. S.) 522, 530, 531, 17 L. ed. 180; *Maguire v. Card*, 21 How. (U. S.) 248, 251, 16 L. ed. 118."

<sup>48</sup> See cases note 45, this section. There are, however, a few decisions and dicta the other way, asserting the jurisdiction of the state courts to enforce state laws giving liens for labor and materials furnished in repairing domestic vessels. *Atlantic Works v. The Glide*, 157 Mass. 525, 33 N. E. 163, 34 Am. St. 305; *Donnell v. The Starlight*, 103 Mass. 227, 230; *Southern Dock Co. v. Gibson*, 22 La. Ann. 623; *Williamson v. Hogan*, 46 Ill. 504; *Mitchell v. The Magnolia*, 45 Mo.

ion seems to be that the jurisdiction of the state court shall terminate where the national jurisdiction begins, and that

67; *Boylan v. The Victory*, 40 Mo. 244. In the first named case, Mr. Justice Holmes, delivering the judgment of the court, said: "If the statute creating the lien is valid, then it would be strange, to say the least, if the law which creates a right were incompetent to protect it, and we are justified in looking with some nicety at an argument which leads to that result. The main argument against the jurisdiction seems to be that the lien derives its quality from the contract; and that as the latter is maritime the former must be, and, as a maritime lien, solely within the jurisdiction of the district court; or that the statute giving the district courts jurisdiction 'of all civil cases of admiralty and maritime jurisdiction' excludes the state courts from all proceedings in aid of a maritime contract except such as fall within the description of a 'common-law remedy,' in the saving clause; and that proceedings in rem to enforce the statutory lien are a remedy for the enforcement of the contract secured by the lien. \* \* \* In the absence of convincing reasons or binding authority the other way, we feel bound to follow the case of *Donnell v. The Starlight*, to the full extent of the proposition there laid down as settled,—that the courts of a state have jurisdiction to enforce liens, created by its laws, for labor and materials furnished in constructing or repairing domestic vessels." Justices Morton and Knowlton dissented; and

the former in an able opinion states the grounds of dissent, and his reasons for following the numerous federal and state decisions which deny state jurisdiction to enforce statutory liens for repairs upon domestic vessels. The following is from his opinion: "Whether the contract is maritime does not depend on the question whether it can be enforced by a lien and proceedings in rem, but on the nature and subject-matter of it. *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, 20 L. ed. 90; *People's Ferry Co. v. Beers*, 20 How. (U. S.) 393, 401, 15 L. ed. 961; *Walters v. The Mollie Dozier*, 24 Iowa 192, 95 Am. Dec. 722. If its nature and subject-matter make it maritime, then actions to enforce it are exclusively cognizable in the district courts, except as to the common-law remedies saved to suitors. Liens given by state laws to parties furnishing labor and materials in repairing domestic vessels have long been enforced by the district courts. Their enforcement has been sustained by the Supreme Court of the United States. *Peyroux v. Howard*, 7 Pet. (U. S.) 324, 8 L. ed. 506; *The Lottawanna*, 21 Wall. (U. S.) 558, 580, 22 L. ed. 654; *The Corsair*, 145 U. S. 335, 347, 36 L. ed. 727, 12 Sup. Ct. 949. But they have not been enforced by the district courts because the state laws could confer jurisdiction upon them, or could create maritime liens. They could not do either. *The Belfast*, 7 Wall. (U. S.) 624, 644, 19 L. ed. 266;



there shall not be concurrent jurisdiction in any questions of admiralty to be settled by process and proceedings in rem."<sup>49</sup>

**§ 1730. Admiralty courts governed by provisions of state statute.**—The admiralty courts, in enforcing a lien given by a state statute, are governed by the provisions of that statute. While any lien given by a state statute must be enforced by proceedings in rem in admiralty, provided it is founded upon a contract maritime in its character, and the contract was made on the credit of the vessel,<sup>50</sup> yet such lien must be enforced subject to all the qualifications and limitations imposed by the state law.<sup>51</sup> In enforcing the

Ex parte McNiell, 13 Wall. (U. S.) 236, 243, 20 L. ed. 624; Edwards v. Elliott, 21 Wall. (U. S.) 532, 556, 22 L. ed. 487. Neither have they been enforced as a matter of right on the part of the suitor, and because the district courts were bound to enforce them, which would be only another way of saying that the state laws could create maritime liens, and confer jurisdiction on the district courts. The St. Lawrence, 1 Black (U. S.) 522, 528, 17 L. ed. 180. But the state legislatures having given to certain maritime contracts a lien in the nature of a maritime lien, though, strictly speaking, not such, the district courts, which had cognizance of the contracts on which such liens were based, and whose performance they were designed to secure, have enforced them in the interests of justice. \* \* \* Finding the liens in existence, and within their power to enforce, the district courts have enforced them on the same principle on which they have enforced liens given by foreign laws. The

Maggie Hammond, 9 Wall. (U. S.) 435, 19 L. ed. 772; The Havana, 1 Spr. (U. S.) 402, Fed. Cas. No. 6226; Ex parte McNiell, 13 Wall. (U. S.) 236, 243, 20 L. ed. 624; The Columbus, 5 Sawyer (U. S.) 487, 488, Fed. Cas. No. 3044. This was not a conferring of jurisdiction on the district courts by the state or foreign laws. The jurisdiction, as said in Ex parte McNiell, 13 Wall. (U. S.) 236, 243, 20 L. ed. 624, existed already, and was invoked to give effect to the right by applying an appropriate remedy. Whether the lien created by the state law should be enforced was a matter of practice on the part of the district courts, and not of right on the part of the suitor."

<sup>49</sup> Hayford v. Cunningham, 72 Maine 128, 133, per Peters, J.

<sup>50</sup> The Lottawanna, 21 Wall. (U. S.) 558, 581, 22 L. ed. 654; The Howard, 29 Fed. 604; White v. The Cynthia, 2 Fed. 112; The William P. Donnelly, 156 Fed. 302.

<sup>51</sup> The Edith, 94 U. S. 518; The Kingston, 23 Fed. 200; The Canary, No. 2, 22 Fed. 532.

statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by the courts of common law or of equity, when they apply it. "Everything required by the statute as a condition on which the lien arises and vests, must, of course, be regarded by courts of admiralty, for they can only act in enforcing a lien when the statute has, according to its terms, conferred it; but beyond that the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty, as between conflicting claims and liens. The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been conferred by itself, and consequently upon the same footing as all maritime liens, the order of payment between them being determinable upon its own principles. For this reason it ignores altogether liens given, even by the same statute, for contracts and liabilities not maritime in their character, such as those for materials and labor supplied in the construction of the vessel, and for materials and supplies, whether in a foreign or the home port, furnished not on the credit of the vessel itself, and also liens given by the owner of the vessel, as in case of mortgages."<sup>52</sup>

The record must show that the vessel is of the class to which the statutory lien applies; as, for instance, in Michigan it must be shown that the craft is of above five tons burden.<sup>53</sup>

No maritime lien or claim can be founded on contracts for repairs or supplies furnished to vessels, such as canal-boats, engaged wholly in the internal commerce of a state.<sup>54</sup>

<sup>52</sup> *The Guiding Star*, 18 Fed. 263, 268, per Matthews, J.

<sup>53</sup> *Gould v. Jacobson*, 58 Mich. 288, 25 N. W. 194.

<sup>54</sup> *Maguire v. Card*, 21 How. (U. S.) 248, 16 L. ed. 118; *Allen v.*

*Newberry*, 21 How. (U. S.) 244, 16 L. ed. 110; *Fralick v. Betts*, 13 Hun (N. Y.) 632; *Brookman v. Hamill*, 43 N. Y. 554, 3 Am. Rep. 731.

§ 1731. **No lien on vessel at her home port.**—State statutes confer no lien upon a vessel at her home port, if the vessel's credit was not an element of the contract.<sup>55</sup> There was no reason for thinking that such statutes were intended to do more than to give domestic material-men the same protection which the maritime law afforded to foreign material-men, or for thinking that it was intended to withdraw demands of the former from the operation of the general rules and principles by which maritime liens are governed.<sup>56</sup> No lien exists for materials furnished to the charterer of a vessel at her home port, if it appears that the material-man was aware of the terms of the charter party, and did not suppose or believe, at the time the work and materials were contracted for, that they were supplied on the credit of the vessel or of her owners.<sup>57</sup> But the lien is not affected by the fact that the material-man did not rely exclusively upon the vessel, but looked also to the personal credit of the builder or owner.

A charterer who is also master has power to bind the vessel for debts which are a lien under a state statute,<sup>58</sup> just as is the case in the admiralty.<sup>59</sup>

It is competent for the legislature of the state to create liens upon boats and vessels navigating inland waters, such as lakes lying within the limits of the state which are not navigable waters of the United States. Suits to enforce a lien against boats or vessels thereon are not within the admiralty jurisdiction of the United States.<sup>60</sup>

<sup>55</sup> *The Lottawanna*, 21 Wall. (U. S.) 558, 581, 22 L. ed. 654; *The Samuel Marshall*, 49 Fed. 754, 16 L. ed. 110, *affd.* 54 Fed. 396, 4 C. C. A. 385.

<sup>56</sup> *The Columbus*, 5 Sawy. (U. S.) 487, Fed. Cas. No. 3044, per Hoffman, J. See also, *The Young Mechanic*, 2 Curt. (U. S.) 404, Fed. Cas. No. 18180.

<sup>57</sup> *The Howard*, 29 Fed. 604; *Phillips v. Wright*, 5 Sandf. (N. Y.) 342; *Mott v. Lansing*, 57 N. Y. 112.

<sup>58</sup> *Pendleton v. Franklin*, 7 N. Y. 508, Seld. Notes (N. Y.) 11.

<sup>59</sup> See ante, § 1680.

<sup>60</sup> *Stapp v. The Clyde*, 43 Minn. 192, 45 N. W. 430.

§ 1732. **Statutory lien limited to time specified for its enforcement.**—A statutory lien is limited to the time specified for its enforcement, and no rights can be acquired by a proceeding in a state court or in admiralty after the expiration of that time.<sup>61</sup> The limitation of the statute as to the time within which proceedings may be taken to enforce a lien must be recognized and enforced when the lien is set up in a court of admiralty.<sup>62</sup>

§ 1733. **Filing specifications.**—Under a provision that a debt shall cease to be a lien unless the lienholder shall, within a certain number of days after her departure, file specifications of his lien, it is held that the filing of specifications before her departure is not a compliance with the act; and unless the specifications are filed within the limited time after the departure, a subsequent arrest of the vessel could not be sustained.<sup>63</sup> But if the vessel is arrested and gives a bond for her release within the time limited, the filing of the specifications is not necessary, because the bond supersedes any further need of specifications.<sup>64</sup> If the vessel is arrested and sold before the expiration of the time for filing specifications, and no specifications are filed at any time, the proceeds in court should be distributed according to the liens at the time the libel was filed.<sup>65</sup> Whether in any case the filing of specifications is necessary after the filing of the libel and the custody of the marshal seems questionable.<sup>66</sup>

§ 1734. **Departure from port.**—A departure from port within the meaning of the statutes is a going to sea in pur-

<sup>61</sup> *The Alanson Sumner*, 28 Fed. 670.

<sup>62</sup> *The City of Salem*, 31 Fed. 616, 13 Sawy. (U. S.) 607, 4 L. R. A. 125.

<sup>63</sup> *Squires v. Abbott*, 61 N. Y. 530; *King v. Greenway*, 71 N. Y. 413; *The Niagara*, 31 Fed. 163.

<sup>64</sup> *Sheppard v. Steele*, 43 N. Y. 52, 3 Am. Rep. 660; *Onderdonk v. Voorhis*, 2 Rob. (N. Y.) 24.

<sup>65</sup> *The Niagara*, 31 Fed. 163.

<sup>66</sup> *The Niagara*, 31 Fed. 163, per Brown, J.

suit of some trade or business, without reference to the distance or duration of the voyage. A tug-boat engaged in business at Boston departs from her port when she tows a vessel to Lynn, a few miles distant.<sup>67</sup> "In going to Lynn the *Helen Brown* went outside of the headlands and light-houses which mark the outward geographical limits of Boston harbor, and entered Massachusetts Bay. She was then upon the high seas; she had left her port and had gone to sea. Whether her departure was for a longer or shorter voyage, or with the intention of returning sooner or later, can make no difference. She went, not secretly, or for the purpose of avoiding the lien, but openly, and in the line of her regular employment."<sup>68</sup> A cruise from Boston to Newport, though made in order to attend a regatta, is a departure within the meaning of the statute.<sup>69</sup> But a lien is not lost by the vessel's making a trial trip.<sup>70</sup>

**§ 1735. Lienholders to join in suit.**—The statutes generally provide that all claimants of liens may come in and have their rights enforced in one suit, as they may in a libel in admiralty. If any one having a lien neglects to join in the suit or to file his claim against the proceeds, he can not, after a sale of the vessel under judgment and execution upon one of the claims, have the vessel seized in the hands of the purchaser in a suit upon his own claim. The purchaser takes the vessel discharged of all liens.<sup>71</sup>

**§ 1736. Alabama.**<sup>72</sup>—A lien by statute is created on all ships, steamboats, and other water-crafts, whether the same be registered, enrolled, licensed, or not, that may be built, repaired, fitted, furnished, supplied, or victualed within this

<sup>67</sup> *The Helen Brown*, 28 Fed. 111; *Rockefeller v. Thompson*, 2 Sandf. (N. Y.) 395.

<sup>68</sup> *The Helen Brown*, 28 Fed. 111, per Nelson, J.

<sup>69</sup> *The Huron*, 29 Fed. 183.

<sup>70</sup> *Hancox v. Dunning*, 6 Hill (N. Y.) 494.

<sup>71</sup> *The Steamboat Rover v. Stiles*, 5 Blackf. (Ind.) 483; *Roose v. McDonald*, 23 Ind. 157.

<sup>72</sup> Code 1907, §§ 4790, 4791.

state, for work done, or materials supplied by any person within this state, in or about the building, repairing, fitting, furnishing, supplying, or victualing such ships, steamboats, or other water-crafts; and for the wages of the masters, laborers, stevedores, and ship-keepers of such ships, steamboats, or other water-crafts, in preference of other liens thereon for debts contracted by, or owing from the owners thereof; which said lien may be asserted in any court of competent jurisdiction. The lien so created shall expire after the lapse of six months from and after the maturity of the claim or debt, unless within the said six months judicial proceedings shall have been commenced to assert such lien.<sup>73</sup>

§ 1737. **Arizona.**<sup>74</sup>—Every person who may furnish supplies or material, or do repairs or labor, for or on account of any domestic vessel owned in whole or in part in this territory, shall have a lien on such vessel, her tackle, apparel, furniture, and freight money, for the payment of the same.

§ 1738. **California.**<sup>75</sup>—All steamers, vessels, and boats are liable: 1. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees; 2. For supplies furnished in this state for their use at the request of their respective owners, masters, agents, or consignees; 3. For work done or materials furnished in this state for their construction, repair, or equipment; 4. For their wharfage and anchorage within this state;

<sup>73</sup> The *Edna*, 185 Fed. 206. The lien created by the statute applies only to materials, labor or supplies furnished while the ship is in its home port and does not prevent the constitutional jurisdiction of the United States Courts. *Seatcherd Lumber Co. v. Rike*, 113 Ala. 555, 21 So. 139, 59 Am. St. 147.

<sup>74</sup> Rev. Stats. 1901, § 2915.

<sup>75</sup> Code (Civ. Proc.) 1906, § 813.

For proceedings and practice in suits to enforce such liens, see Code (Civ. Proc.) 1906, §§ 814, 827. This statute, so far as it attempts to authorize proceedings in rem for causes of action cognizable in admiralty, is unconstitutional. *The Moses Taylor*, 4 Wall. (U. S.) 411, 18 L. ed. 397, 32 How. Pr. (N. Y.) 460; *Crawford v. The Caroline Reid*, 42 Cal. 469.

5. For nonperformance, or malperformance, of any contract for the transportation of persons or property between places in this state made by their respective owners, masters, agents, or consignees; 6. For injuries committed by them to persons or property in this state. Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued.<sup>76</sup>

§ 1739. **Connecticut.**<sup>77</sup>—Every vessel, in the construction or repairs of which, or of any of its appurtenances, any person shall have a claim for more than twenty dollars, for materials furnished or services rendered, shall be subject to lien for the amount of such claim, which lien shall be on such vessel and its appurtenances, and shall take precedence of any other incumbrance (except a lien for mariners' wages) which shall originate subsequent to the commencement of such services, or the furnishing of such materials, subject to apportionment as subsequently provided, and may be foreclosed like a mortgage of personal property.

No such claim shall remain a lien on such vessel or its appurtenances more than ten days after the person performing such services, or furnishing such materials, has ceased so to do, unless he shall sign and lodge with the town clerk of the town where such vessel was so constructed or repaired, a certificate in writing describing the kind of vessel, the amount claimed as a lien thereon, the place in the town where the

<sup>76</sup> *Edgerly v. The San Lorenzo*, 29 Cal. 418. Limiting the time within which liens under the state statute must be enforced has no effect on the jurisdiction of the admiralty court to enforce general maritime liens. *The San Rafael*, 141 Fed. 270, 72 C. C. A. 388. See also, *Jensen v. Dorr*, 159 Cal.

742, 116 Pa. 553, as to sufficiency of complaint to enforce statutory lien. The materials must be actually furnished to the vessel and used thereon to create the lien. *Bennett v. Beadle*, 142 Cal. 239, 75 Pac. 843.

<sup>77</sup> Gen. Stats. 1902, §§ 4160-4163.

services or materials were furnished, the date of the commencement of the performance of services or furnishing of materials, the name of the vessel, if known to him, and the name of the owner or owner's agent, if known to him, which certificate the town clerk shall record in a book kept by him for that purpose, nor unless such person shall also leave a copy of such certificate with the owner of said vessel, or his agent, if either of them are known to him to have a residence in this state.<sup>78</sup>

No vessel or its appurtenance shall be subject to such liens for a greater amount in the whole than the price agreed to be paid for such vessel or its repairs; and when several liens shall be claimed by different persons to an amount in all exceeding such agreed price, the claimants other than the original contractor shall be first paid in full, if such amount be sufficient for that purpose, but if it be not sufficient, it shall be apportioned among the claimants other than the original contractor, in proportion to the amount of their respective claims; and the court having jurisdiction thereof, on application of any person interested, may direct the manner in which such claims shall be paid.

§ 1739a. **Delaware.**<sup>79</sup>—The mechanics' lien act shall also extend to work and labor or materials performed or furnished in the construction, alteration, furnishing, rigging, launching or repairing of any ship or vessel within this state

<sup>78</sup> The form of certificate may be as follows:—To all persons whom it may concern: This certifies that on the — day of —, A. D. 19—, I commenced to render services (furnish materials) for the construction (repairs) of a vessel designated as a (schooner or other designation as the case may be), and that I claim a lien thereon under the provisions of the statute, for the

the sum of — dollars on account of such services rendered (materials furnished). Said vessel was situated at (describe place) in the town of —, when such services were rendered (materials furnished). The name of the vessel is —. The owner's (agent's) name is —. Dated at —, A. D. 19—. Gen. Stats. 1902, § 4162.

<sup>79</sup> Rev. Code 1893, p. 821.



provided, nevertheless, that no bill of particulars and affidavit shall (be) filed more than four days after such ship or vessel has been launched, rigged, furnished and ready for sea, or after such repairs have been completed. And the same shall contain the name of the ship or vessel, or a description thereof sufficient for identification. Upon filing said bill of particulars and affidavit, the prothonotary may issue a writ of attachment, directed to the sheriff of the county in which the ship or vessel may be, commanding the sheriff to attach the defendant by such ship or vessel, together with the tackle, apparel and furniture, wheresoever the same be found in his bailiwick, so that he be and appear at the next term of the Superior Court to answer the sheriff's demands. The sheriff shall, under such writ, seize and take possession of the said ship or vessel, and have the same inventoried and appraised, and shall be answerable therefor. If the defendant in the attachment shall at any time before judgment appear and enter into recognizance to the plaintiff in said writ of attachment in a reasonable penalty, and with surety to be approved by the prothonotary, with condition to pay the condemnation money, and all costs, or otherwise abide the judgment of the Superior Court in the case, if he fail to make good his plea, then the attachment shall be dissolved, the ship or vessel shall be discharged and the case shall proceed as in other cases of assumpsit for work and labor or materials furnished.

**§ 1740. Florida.**<sup>80</sup>—Liens prior in dignity to all others may exist in favor of the following persons, upon the following described personal property, under the circumstances hereinafter mentioned, to wit: In favor of any person performing by himself or others any labor or service of any kind on,

<sup>80</sup> Gen. Stats. 1906, §§ 2200, 2204. This statute (Rev. Stat. 1892, § 1738, [Gen. Stats. 1906, § 2204]) was not repealed by the mechanic's lien

statute of June 4, 1903, Laws 1903, Ch. 5143; *McKay v. Gulf Refining Co.*, 176 Fed. 93, 99 C. C. A. 107.

to or for the use or benefit of a vessel or water-craft, including masters, mates, and members of the crew, and persons loading or unloading the vessel, or putting in or taking out ballast; upon such vessel or water-craft, her tackle, apparel, and furniture. In favor of any ship chandler, storekeeper, or dealer furnishing stores, provisions, rigging, or other materials to or for the use of any ship, vessel, steamboat or other water-craft; on such ship, vessel, steamboat or other water-craft.

§ 1741. **Georgia.**<sup>81</sup>—Every officer and employé, or guardian of any employé, on any steamboat or other water-craft engaged in the navigation of any river within the border or forming the boundary of this state, shall have a lien upon the said boat or craft for any debt, dues, wages, or demands that he may have against the owner or lessee of such boat or craft, for personal services in connection with the same, or for wood or provisions furnished the same;<sup>82</sup> which lien shall be superior to all liens but tax liens, and such other liens as the claimant had actual notice of before the debt was created.

§ 1742. **Illinois.**<sup>83</sup>—Every sail vessel, steamboat, steam-dredge, tugboat, scow, canalboat, barge, lighter, and other water-craft of above five tons burthen used or intended to be used in navigating the waters or canals of this state, or used

<sup>81</sup> Code 1911, § 3355.

<sup>82</sup> See *Kirkpatrick v. Bank of Augusta*, 30 Ga. 465; Act June 23, 1910 (36 Stat. 604); *The Iola*, 189 Fed. 972. As to the affidavit for the purpose of foreclosing the lien, see *Cape Fear Steamboat Co. v. Torrent*, 46 Ga. 585.

<sup>83</sup> Rev. Stat. 1912, p. 100, § 1. For proceedings to enforce the lien, see §§ 2-46. The question of the jurisdiction of the state court to enforce a lien for domestic supplies and materials is discussed at

length in *The E. P. Dorr v. Waldron*, 62 Ill. 221, 14 Am. Rep. 86, and in *The Montauk v. Walker*, 47 Ill. 335, and the jurisdiction of the state court sustained. The later decisions of the United States courts, as well as those of the Supreme Courts of several of the states, settle the question the other way. One has a right to a lien for towing raft of lumber, *McCaffery v. Knapp*, 74 Ill. App. 80, *affd.* 178 Ill. 107, 52 N. E. 898, 69 Am. St. 290.

in trade or commerce between ports and places within this state, or having their home port in this state, shall be subject to a lien thereon, which lien shall extend to the tackle, apparel, and furniture of such craft, as follows: 1. For all debts contracted by the owner or part owner, master, clerk, steward, agent, or shipshusband of such craft, on account of supplies and provisions furnished for the use of such water-craft, on account of work done or services rendered on board of such craft by any seaman, master or other employé thereof, or on account of work done or materials furnished by mechanics, tradesmen or others in or about the building, repairing, fitting, furnishing or equipping such craft; 2. For all sums due for wharfage, anchorage or dock hire, including the use of dry docks; 3. For sums due for towage, labor at pumping out or raising, when sunk or disabled, and to shipshusband or agent of such water-craft, for disbursements due by the owner on account of such water-craft; 4. For all damages arising for the nonperformance of any contract of affreightment, or of any contract touching the transportation of property entered into by the master, owner, agent or consignee of such water-craft, where any such contract is made in this state; 5. For all damages arising from injuries done to persons or property by such water-craft,<sup>84</sup> whether same are aboard said vessel or not, where the same shall have occurred through the negligence or misconduct of the owner, agent, master or employé thereon; but said craft shall not be liable for any injury or damage received by one of the crew from another member of the crew.

§ 1743. *Indiana.*<sup>85</sup>—All boats, vessels and water-craft of every description, found in the waters of this state, including

<sup>84</sup> As by the negligently towing a schooner, and running it into an elevator situated upon the land. The tort is not a maritime one, and the state court may enforce the remedy. *Johnson v. Chicago*

& P. E. Co., 105 Ill. 462, *affd.* 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. 254.

<sup>85</sup> *Burns' Ann. Stats.* 1914, §§ 8229-8282. The state courts have jurisdiction of actions to

wharf-boats and floating warehouses used for the storing, receiving and forwarding of freights, which are liable to be removed from place to place, at the pleasure of the owner or owners of the same, are liable: 1. For all debts contracted within this state, by the master, owner, agent, clerk or consignee thereof, on account of supplies furnished for use of the same; on account of work done or services rendered for the same, by boatmen, mariners, laborers or other persons; or on account of work done or materials furnished in building, repairing, fitting out, furnishing or equipping such boat, vessel, wharf-boat, floating warehouse or water-craft. 2. For all demands or damages, arising out of any contract of af-freightment made within this state; or any wilful or negligent act of the master, owner or agent thereof, done in connection with the business of such boat, vessel, wharf-boat, floating warehouse or water-craft, within this state; or any contract relative to the transportation of persons or property entered into by the master, owner, agent, clerk or consignee thereof, within this state. 3. For all injuries to persons or property, by such boat, vessel, wharf-boat, floating warehouse or water-craft, or by the owners, officers or crew, done in connection with the business of the same within this state.

Claims growing out of the above causes, whether arising out of contracts made or broken within this state, or wrongs

enforce statutory liens for materials used in the construction of vessels in this state. This statute does not extend to maritime liens arising under contracts made and broken in other states. *J. P. Tweed v. Richards*, 9 Ind. 525; *Coplinger v. The David Gibson*, 14 Ind. 480. Persons furnishing supplies to a boat have a lien although the boat is run by a lessee. *Lawrenceburgh Ferry-boat v. Smith*, 7 Ind. 520. See also, *Holcroft v. Halbert*, 16 Ind. 256.

The state court can not enforce a maritime lien. *Ballard v. Wiltshire*, 28 Ind. 341. But such courts may enforce liens against boats for the building and fitting out the same. *Wyatt v. Stuckley*, 29 Ind. 279; *Sinton v. The R. R. Roberts*, 34 Ind. 448, 7 Am. Rep. 229, 46 Ind. 476. An ordinance of a city fixing a rate of wharfage need not prescribe the manner of enforcing the lien thereon against boats. *Coal-Float v. Jeffersonville*, 112 Ind. 15, 13 N. E. 115.

or injuries done or committed within this state, are liens upon the boat, vessel or water-craft, their apparel, tackle, or furniture and appendages, including barges and lighters, belonging to the owners of the boat, vessel or water-craft, and used therewith at the time the action commenced.

Such liens shall take preference of any claim against the boat itself, or all or any of its owners, masters, or consignees, growing out of any other cause than those above enumerated; and, as between themselves, mariners' and boatmen's wages shall be first preferred. This lien is enforced by attachment.<sup>86</sup>

§ 1743a. **Iowa.**<sup>87</sup>—In an action brought against the owners of any boat to recover any debt contracted by such owner, or by the master, agent, clerk or consignee thereof, for supplies furnished, or for labor done in, about or on such boat or for materials furnished in building, repairing, fitting out, furnishing or equipping the same, or to recover for the non-performance of any contract relative to the transportation of persons or property thereon, made by any of the persons aforementioned, or to recover damages for injuries to persons or property done by such boat or raft, or the officers or the crew thereof in connection with its business, a warrant may

<sup>86</sup> For proceedings and practice, see *Lusk v. Davis*, 27 Ind. 334. *Burns' Ann. Stats.* 1914, §§ 8282-8284.

<sup>87</sup> Code 1897, §§ 4402, 4409. Under this statute there is no lien before seizure. *Scippel v. Blake*, 80 Iowa 142, 41 N. W. 199, 86 Iowa 51, 52 N. W. 476. "There is no language in the chapter giving to a laborer on a boat a lien prior to its seizure, and, if one exists, it must be by a necessary implication from the expressed provisions of the law. The only provisions of the chapter which, to our minds,

give any support to such a claim, are those quoted, giving the right of seizure before judgment, without regard to the personal responsibility of the employer, and the sale of the boat thereafter, to satisfy the judgment." Per Granger, J. The statute, so far as it confers jurisdiction upon the state court to proceed in rem for the enforcement of contracts of a maritime nature, is unconstitutional. So held in *The Hine v. Trevor*, 4 Wall. (U. S.) 555, 13 L. ed. 451.

issue for the seizure of the same, as hereinafter provided. If judgment be rendered for the plaintiff before the boat is discharged, a special execution shall be issued against it. If it has been previously discharged, the execution shall issue against the principal and sureties in the bond without further proceedings.

§ 1744. **Kentucky.**<sup>88</sup>—Except the captain, all the officers and hands employed on board a steamboat, or other brig, schooner, or sloop or model barge, shall have a lien on the boat or vessel, her engine, tackle, furnishing and apparel, for their wages, whether contracted for or earned in or out of the state, with priority therefor over any other debt due from the owner of the boat or vessel, and over all other liens thereon. Mechanics, tradesmen and others shall also have a like lien for work, supplies, materials, stores and provisions done or furnished on or toward the building, repairing, fitting, furnishing or equipping the boat or vessel in this state, with priority therefor over any other debt or debts of the owner, except to the officers and hands, and over all other liens thereafter created. When so done or furnished out of this state, there shall be a like lien therefor, which shall have precedence next after that given when done or furnished in this state; but if done or furnished out of the state subsequent to that done or furnished in this state, the liens shall be joint and equal.

This lien may be enforced by attachment.<sup>89</sup>

§ 1745. **Louisiana.**<sup>90</sup>—The following debts are privileged on the price of ships and other vessels, in the order in which they are placed: 1. Legal and other charges incurred to ob-

<sup>88</sup> Stats. 1909, § 2480. See *The Rapid Transit*, 11 Fed. 322.

<sup>89</sup> For proceedings to enforce the lien, see Stats. 1909, §§ 2482-2486.

<sup>90</sup> Rev. Civ. Code 1900, art.

3237. Vendor's lien on a boat must be enforced within six months after sale though a note payable in future is given. In re *Red River Line*, 115 La. 867, 40 So. 250.

tain the sale of a ship or other vessel, and the distribution of the price; 2. Debts for pilotage, towage, wharfage and anchorage; 3. The expenses of keeping the vessel from the time of her entrance into port until sale, including the wages of persons employed to watch her; 4. The rent of stores in which the rigging and apparel are deposited; 5. The maintenance of the ship and her tackle and apparatus, since her return into port from her last voyage; 6. The wages of the captain and crew employed on the last voyage; 7. Sum lent to the captain for the necessities of the ship during the last voyage, and reimbursement of the price of merchandise sold by him for the same purpose;<sup>91</sup> 8. Sums due to sellers, to those who have furnished materials, and to workmen employed in the construction, if the vessel has never made a voyage; and those due to creditors for supplies, labor, repairing, victuals, armament and equipment, previous to the departure of the ship, if she has already made a voyage; 9. Money lent on bottomry for refitting, victualing, arming and equipping the vessel before her departure; 10. The premiums due for insurance made on the vessel, tackle and apparel, and on armament and equipment of the ship; 11. The amount of damage due to freighters for the failure in delivering goods which they have shipped, or for the reimbursement of damage sustained by the goods through the fault of the captain or crew; 12. Where any loss or damage has been

<sup>91</sup> Advances of money to the captain or owners of a vessel can only be privileged when advanced under imperious necessity to save the ship, or to enable her to complete her voyage. *The Canary*, No. 2, 22 Fed. 532; *Hyde v. Culver*, 4 La. Ann. 9; *Wickham v. Levistones*, 11 La. Ann. 702; *Owens v. Davis*, 15 La. Ann. 22; *Bank of Louisiana v. Wilson*, 19 La. Ann. 1. The statute does not create a lien for money advanced to

repair a dredgeboat. *Elstner-Martin Grocery Co. v. Barmont*, 113 La. 894, 37 So. 868. A vessel owned in this state and used for the trade in the state's waters is not making voyages within the statute, and a privilege granted may be claimed at any time within a half a year without reference to the number of trips the boat makes during the time. *Learned v. Brown*, 94 Fed. 876, 36 C. C. A. 524.

caused to the person or property of any individual by any carelessness, neglect or want of skill in the direction or management of any steamboat, barge, flatboat, water-craft or raft, the party injured shall have a privilege to rank after the privileges above specified. The term of prescription of privileges against ships, steamboats, and other vessels shall be six months. No privilege shall have effect against third persons, unless recorded in the manner required by law in the parish where the property to be affected is situated.<sup>92</sup>

§ 1746. **Maine.**<sup>93</sup>—Whoever furnishes labor or materials for building a vessel, has a lien on it therefor, which may be enforced by attachment thereof, within four days after it is launched;<sup>94</sup> but if the labor and materials have been so fur-

<sup>92</sup> Rev. Civ. Code 1900, art. 3274. Claims which were never recorded can have no effect as privileged claims over those creditors who have liens either by the maritime law, or by the fact that their claims have been recorded under the laws of the United States or the state of Louisiana. *The John T. Moore*, 3 Woods (U. S.) 61, Fed. Cas. No. 7430, affd. 100 U. S. 145, 25 L. ed. 590; *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654. The privilege is lost if a sale be subsequently made in port, and a voyage is thereafter made in the name and at the risk of the purchaser, unless the latter has notice, actual, legal or constructive, of the privilege. Rev. Civ. Code 1900, arts. 3242, 3243; *The Canary*, No. 2, 22 Fed. 532.

<sup>93</sup> Rev. Stat. 1903, ch. 93, §§ 7, 8.

<sup>94</sup> As to form of writ and proceedings to enforce the lien, see Rev. Stats. 1903, ch. 93, §§ 9-26. This statute, so far as it authorizes proceedings in rem in the

courts of the state for the enforcement of contracts maritime in nature, is in contravention of the constitution and laws of the United States. *Warren v. Kelley*, 80 Maine 512, 15 Atl. 49. Comp. Stat. 1910, p. 3127, providing a lien upon ships and vessels on contracts for their building, repair, fitting and furnishing, is constitutional and the lien is enforceable in any court of equity by any appropriate proceedings, the proceeding provided in the statute not being exclusive. *Berwind-White Coal Min. Co. v. Metropolitan S. S. Co.*, 166 Fed. 782; *American Trust Co. v. W. & A. Fletcher Co.*, 173 Fed. 471, 97 C. C. A. 477. To entitle a person to the lien, there must be an appropriation, express or implied, of the labor or materials to the particular vessel against which the lien is claimed. *Sewall v. The Hull of a New Ship, Ware* (U. S.) 565, Fed. Cas. No. 12682; *Read v. The Hull of a New Brig*, 1 Story (U.



nished by virtue of a contract not fully completed at the time of the launching of the vessel, the lien may be enforced within four days after such contract has been completed.<sup>95</sup> He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment; and the owners of any dry dock or marine railway, used for any vessel, have a lien on said vessel for the use of said dock or railway, to be enforced by attachment within four days after the last day in which the same is used or occupied by said vessel.<sup>96</sup>

All domestic vessels shall be subject to a lien to any part owner or other person to secure the payment of debts contracted and advances made for labor and materials necessary for their repair, provisions, stores and other supplies necessary for their employment, and for the use of a wharf, dry dock or marine railway: provided, that such lien shall in no

S.) 244, Fed. Cas. No. 11609. The lien is not restricted to mechanics and laborers, but extends to all persons who render like service. *The Kearsarge, Ware* (U. S.) 546, Fed. Cas. No. 7634. It does not cover charges for insurance on a cargo of lumber purchased for and used in the construction of a ship, as such insurance can not be considered material furnished. *The Kearsarge, Ware* (U. S.) 546, Fed. Cas. No. 7634. It does not cover tools used by workmen in doing the work, and procured for that purpose, because these do not go into the construction of the ship. *The Kearsarge, Ware* (U. S.) 546, Fed. Cas. No. 7634. Materials furnished generally, for two vessels being built by one owner at the same time, may be a lien upon both vessels and may be enforced against either of

them. *The Kearsarge, Ware* (U. S.) 546, Fed. Cas. No. 7634.

<sup>95</sup> Under a former statute the limitation was that the lien should be enforced within four days "after the work has been completed;" and it was held that this meant that it must be enforced within four days after the whole work of building or repairing is completed; and no attachment is required to be laid on the vessel within that time after the plaintiff's own work is done or his materials have been furnished. The lien in this case was enforced after the work had been discontinued, on account of the failure and death of the owner, for more than a year, though the vessel had in the mean time been sold. *Hayford v. Cunningham*, 72 Maine 128.

<sup>96</sup> The form of writ is statutory. Rev. Stats. 1903, ch. 93, § 9.

event continue for a longer period than two years from the time when the debt was contracted or advances made.

§ 1747. **Maryland.**<sup>97</sup>—All boats or vessels of any kind whatsoever used or intended to be used on the waters of the Chesapeake bay and its tributaries, the Chesapeake and Ohio canal, and other waters of this state, as carriers of freight or passengers, and all other boats or vessels belonging in this state, shall be subject to a lien and bound for the payment thereof as preferred debts for all debts due to boat builders, mechanics, merchants, farmers or other persons from the owners, masters or captains, or other agents of such boats or vessels, for materials furnished or work done in the building, repairing or equipping the same.

No person shall be entitled to such lien unless he shall, within six months from the commencement of the building, repairing, equipping or refitting such boat or vessel, deliver to the clerk of the circuit court for the county where the building, repairing, equipping or refitting was done, or the clerk of the superior court of Baltimore city, if done in the city of Baltimore, an account or statement verified by the oath of the claimant taken and subscribed before some justice of the peace or other officer authorized to administer an oath, setting forth the names of the claimant and debtor, and, if the debt was not contracted by the owner but by his agent, the name of such agent, the name or other certain description of the boat or vessel and the place where built, repaired, equipped or refitted, and the particulars or items of the claim or debt; and which account or statement shall be redelivered by such clerk to the party filing the same after it has been recorded as hereinafter provided. The clerks of the several circuit courts for the counties and of the superior court of Baltimore city shall each keep a docket to

<sup>97</sup> Pub. Gen. Laws 1904, art. 63, §§ 43-47. For proceedings to enforce the lien, see §§ 48-52.

be called "Boats' lien docket," wherein it shall be the duty of each of said clerks, upon application being made to him in accordance with the requirements of the preceding paragraph, to record the said statements or accounts filed with him and, immediately thereafter, he shall docket a case between the parties to the claim, entering the claimant as plaintiff and the boat and its owner and the owner's agent, where the debt was contracted by an agent, as defendant, and the day when such claim was filed, and the amount thereof; and the clerk shall be entitled to fifty cents for each entry, to be paid by the defendant and taxed as costs against him, for which and for other costs in prosecuting the claim the defendant shall be liable, in case the lien be established; the clerk to be allowed the same fees for recording said statement or account as are now allowed for recording deeds or bills of sale. The lien continues for two years from the day on which the account or statement shall be filed and no longer, but the claimant may have the benefit of any other lien upon said boat or vessel to which he may be entitled by mortgage, bill of sale, or otherwise. The lien shall not entitle the claimant to preference over creditors or claimants secured by mortgage or bill of sale properly executed and recorded before the claim to be secured by such lien shall have accrued.<sup>98</sup>

<sup>98</sup> Under this provision, where there is no entire contract for the repairing of a vessel, but the repairs are done from day to day upon the orders of the owner, only such repairs will have preference over a mortgage duly executed and recorded as were done prior to the date of the recording of such mortgage. The lien being statutory, no priority is given to it beyond that which its plain lan-

guage implies. *The Marcella Ann*, 34 Fed. 142; *The D. B. Steelman*, 48 Fed. 580. See *The Princess*, 185 Fed. 218; *Lucas v. Taylor*, 105 Md. 90, 66 Atl. 26, where it is held that a lien may be allowed for electric lighting where the claim is filed within six months after claim arose even if this time is more than six months after the contract for the building of the ship.

§ 1748. *Massachusetts.*<sup>99</sup>—When, by virtue of a contract, express or implied,<sup>1</sup> with the owners of a vessel or with the agents, contractors or subcontractors of such owners, or with any of them, or with a person who has been employed to construct, repair or launch a vessel or to assist therein, money is due for labor performed, materials used or labor and materials furnished in the construction, launching or repairs of, or in the construction of the launching ways for, or for provisions, stores or other articles furnished for or on account of such vessel in this commonwealth, the person to whom such money is due shall have a lien upon the vessel, her tackle, apparel and furniture to secure the payment of such debt, and such lien shall be preferred to all others on

<sup>99</sup> Rev. Stats. 1902, ch. 198, §§ 14, 15. This statute, so far as it gives a lien for the building of vessels, is constitutional and valid, and has been recognized to be so in numerous decisions. *Foster v. The Richard Busteed*, 100 Mass. 409, 1 Am. Rep. 125, and cases cited; *McDonald v. The Nimbus*, 137 Mass. 360. The statute contemplates that the vessel must be in the commonwealth when the debt is contracted; and no lien can be enforced for materials furnished in this commonwealth in the construction of a vessel at a port in another state. *McDonald v. The Nimbus*, 137 Mass. 360. A lien upon a vessel built for the United States to be used as a floating light can not be enforced in the courts of the commonwealth upon proceedings commenced after possession of her has been taken by the United States, the spars and rigging have been put up and the lanterns have been put aboard and

prepared for use. *Briggs v. Light-Boats*, 11 Allen (Mass.) 157. The courts of this state, contrary to the great weight of authority, maintain the jurisdiction of the state courts to enforce liens for repairs done upon domestic vessels. *Atlantic Works v. The Glide*, 157 Mass. 525, 33 N. E. 163, 34 Am. St. 305; *Donnell v. The Starlight*, 103 Mass. 227, 230. But see ante, § 1729.

<sup>1</sup> No lien is created under the statute unless the labor has been performed or the materials furnished under a contract in relation to the particular ship in the construction of which the materials were supplied or the work done. *Rogers v. Currier*, 13 Gray (Mass.) 129; *Barstow v. Robinson*, 2 Allen (Mass.) 605; *The Hull of a New Brig*, 1 Story (U. S.) 244, 250, Fed. Cas. No. 11609; *Sewall v. The Hull of a New Ship*, Ware (U. S.) 565, Fed. Cas. No. 12682.

such vessel, except that for mariners' wages, and shall continue until the debt is satisfied.<sup>2</sup>

Such lien shall be dissolved unless the person claiming it within thirty days<sup>3</sup> after the vessel departs from the port at

<sup>2</sup> "The statute does not allow labor and materials, as it does stores and provisions, to be merely furnished 'on account of' the ship; and the difference in the language of the two clauses is significant. The statute doubtless includes materials fitted and adapted to be parts of the ship, and accepted as such by the other party to the contract, even if they have not been put in place upon the ship. But it gives no lien for materials which have neither been built upon or attached to her, nor been prepared and fitted for that purpose, and which have not been actually or constructively made part of her." *Young v. The Orpheus*, 119 Mass. 179, 184. A person who has contracted with the owner of a vessel may enforce a lien for labor performed and materials furnished by subcontractors. *Jones v. Keen*, 115 Mass. 170. A person employed at day's wages by the owner of a vessel to work as a blacksmith in making spikes and bolts from the owner's iron for use in the construction of the vessel has a lien for such labor, although he at the same time does some jobs on other vessels and some outside work by the owner's direction. *Jones v. Keen*, 115 Mass. 170. Labor and materials furnished in the alteration of a vessel to fit her for new uses are furnished in her "construction and repairs" within the meaning of the

statute. *Donnell v. The Starlight*, 103 Mass. 227; *The Ferax*, 1 Spr. 180, Fed. Cas. No. 4737; *The Hope*, 191 Fed. 243. The statutory lien for repairs or supplies furnished in the vessel's home port is a property right in the vessel and constitutes a maritime lien to secure a maritime contract. The lien may be foreclosed only in the Federal Courts. *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. 930.

<sup>3</sup> The lien is dissolved by failure to file the certificate within the time specified, although within that time an attachment is made upon a petition to enforce the lien. *Hawes v. Mitchell*, 15 Gray (Mass.) 234. The lien is gone if the terms of the statute are not complied with. *Dunham v. Johnson*, 135 Mass. 310; *The Mississippi*, 6 Fed. 543; *Merriman v. Currier*, 191 Mass. 133, 77 N. E. 708. To "depart" means to go to sea, irrespective of the distance or duration of the voyage. *The Helen Brown*, 28 Fed. 111. A cruise from Boston to Newport, though made in order to attend a regatta, is "a departure" within the meaning of the act. *The Huron*, 29 Fed. 183. The certificate may be filed before the vessel departs from the port at which she was when the debt was contracted. *Young v. The Orpheus*, 119 Mass. 179. A lien on a ship will be dissolved if the person claiming it knows that large

which she was when the debt was contracted, files in the office of the clerk of the city or town in which the vessel was at such time, a statement giving a true account of the demand claimed to be due him, with all just credits, the name of the person with whom the contract was made, the name of the owner of the vessel, if known, and the name of the vessel or a description thereof sufficient for identification. The statement shall be recorded by such clerk in a book kept by him for that purpose, and the fees therefor shall be the same as for recording mortgages. The lien is enforced by petition.<sup>4</sup>

credits exist, and knows very nearly, though not exactly, their amount, but gives no further account of them, in his statement, than that such credits exist to an amount which is not known and can not be computed by him; or if in his statement he says that the owner of the vessel is unknown, when he has been informed and believes that she was owned by the person who in fact owned her. *Story v. Buffum*, 8 Allen (Mass.) 35. A material-man is not precluded from enforcing his lien against a vessel for materials used in her construction, by reason of having included in his claim of lien, through ignorance and not wilfully or knowingly, materials furnished for another vessel. *Jones v. Keen*, 115 Mass. 170. A lien for materials used in the construction of a vessel is not dissolved by a clerical error, in the certificate filed in the office of the town clerk, in adding up the items of the account, which themselves clearly show the amount of the demand claimed and actually due. Nor is such lien dissolved by the including in the certificate a claim for

materials furnished for the vessel for which no lien in fact exists. *Young v. The Orpheus*, 119 Mass. 179. The statement need not show the kind of work or the purpose of it. *McMonagle v. Nolan*, 98 Mass. 320. As to pleading and practice, see *McMonagle v. Nolan*, 98 Mass. 320; *Donnell v. Manson*, 109 Mass. 576.

<sup>4</sup> For proceedings to enforce, see Rev. Laws 1902, ch. 198, §§ 17-21. The method of procedure is in rem and the order for an attachment must be against the vessel. *Merriam v. Currier*, 191 Mass. 133, 77 N. E. 708. The right to enforce a lien on a ship by petition may be contested by a party who has another lien thereon, although he does not seek to enforce his lien under the petition, but has libeled the ship in the district court of the United States. *Hawes v. Mitchell*, 15 Gray (Mass.) 234. On a petition to enforce a lien on a vessel, if interest is not due as part of the debt, but as damages only, it is to be computed from the filing of the petition, and not from the time of a prior demand; and the

§ 1749. *Michigan*.<sup>5</sup>—Every water-craft of above five tons burthen, used, or intended to be used, in navigating the waters of this state, shall be subject to a lien thereon: 1. For all debts contracted by the owner or part owner, master, clerk, agent or steward of such craft, on account of supplies and provisions furnished for the use of said water-craft; on account of work done, or services rendered, on board of such craft, by seamen, or any employé, other than the master thereof; on account of work done, or services rendered, by any person, in or about the loading or unloading of said water-craft; on account of work done or materials furnished, by mechanics, tradesmen or others, in or about the building, repairing, fitting, furnishing or equipping such craft: provided, that when labor shall be performed or materials furnished as aforesaid, by a subcontractor, or workman other than an original contractor, and the same is not paid for, said person or persons may give the owner or his agent, or

fact that, before bringing the petition, proceedings were had in a court of the United States, which were dismissed for want of jurisdiction, makes no difference. *Young v. The Orpheus*, 119 Mass. 179.

<sup>5</sup> Howell's Stats. 1912, §§ 13625, 13627, 13634, 13668. An averment that the water-craft was of "above five tons burden" is necessary. Jurisdiction is not to be presumed, but must be established. *Gould v. Jacobson*, 58 Mich. 288, 25 N. W. 194. A complaint under the statute to enforce a lien may be amended at the trial, by permission of the court and made to aver that the vessel was to be used in sailing the waters of the state. *Sarmiento v. The Catharine C.*, 110 Mich. 120, 67 Mich. 1085. It is not required that a

lienor either allege or prove that the materials were used in the construction of the vessel. *The Winnebago*, 141 Fed. 945, 73 C. C. A. 295, certiorari denied, 200 U. S. 616, 52 L. ed. 621, 26 Sup. Ct. 752. Contracts for construction are not maritime contracts and liens arising therefrom are not within the jurisdiction of admiralty courts but may be enforced in state courts. *Delaney Forge & Co. v. The Winnebago*, 142 Mich. 84, 105 N. W. 527, 113 Am. St. 566. The lien may be enforced in the admiralty court, though the record must show that the vessel is of the class to which the statutory lien may attach. *Gould v. Jacobson*, 58 Mich. 288, 25 N. W. 194; *Detroit Lumber Co. v. The Petrel*, 153 Mich. 528, 117 N. W. 80.

the master or clerk of said craft, timely notice of his or their said claim, and from thenceforth said person or persons shall have a lien upon said craft, pro rata, for his or their said claims, to the amount that may be due by said owner, to said original contractor, for work or labor then done on said water-craft. 2. For all sums due for wharfage, anchorage, or dock hire, including the use of dry docks; the lying immediately in front of or attached to any wharf, dock or pier, within this state, so as to prevent the use of any portion of such wharf, dock or pier, by other water-craft, with or without the discharge of freight or passengers across such wharf, dock or pier, after a notice to leave, shall be an evidence of an agreement to pay for such use whatever the same may be worth. 3. For sums due for bottomry, salvage, towage, lighterage, insurance, labor at pumping out or raising such water-craft, and for general average, whether in whole or in part, within this state. 4. For all damages arising from the nonperformance of any contract of affreightment, or of any contract touching the transportation of persons or property, entered into by the master, owner, agent or consignee of such water-craft, where any such contract is to be, or shall have been performed, in whole or in part, within this state. 5. For all damages arising from injuries done to persons or property by such water-craft, where the same shall have occurred through the negligence or misconduct of the owner, part owner, master, agent or other employé of said water-craft, or through the failure on the part of such water-craft, to observe any law of the United States relative to the equipment or management of such craft, including injuries to any person, not of the ship's company, from accidents on board said water-craft, occurring as aforesaid.

This lien is enforced by suit in seizure of the property. Intervening liens may be filed before sale under judgment. Liens may be enforced at any time within six years from their origin; but no lien can be enforced against a bona fide



purchaser without notice, unless suit be commenced within one year.

§ 1750. *Minnesota*.—The general mechanics' lien law applies to labor performed or materials or machinery furnished for constructing, altering, or repairing any boat, vessel, or other water-craft by virtue of a contract or agreement with the owner.

Every boat or vessel used in navigating the waters of this state is liable:<sup>6</sup> 1. For all debts contracted by the master, owner, agent, or consignee thereof, on account of supplies furnished for its use, or on account of work done or services rendered on board for its benefit; or on account of labor done or materials furnished by mechanics, tradesmen, or others in and for building, repairing, fitting out, furnishing, or equipping the same; 2. For all sums due for wharfage or anchorage of such boat or vessel within the state; 3. For all demands or damages accruing from the nonperformance or malperformance of any contract of affreightment, or any contract touching the transportation of persons or property

<sup>6</sup> Gen. Stats. 1913, §§ 8318, 8325. This statute is constitutional. *Stapp v. The Clyde*, 43 Minn. 192, 45 N. W. 430. This statute is not inconsistent with the provisions in the general mechanics' lien law relating to vessels. *The Menominie*, 36 Fed. 197. This statute creates a lien on the boat or vessel in favor of the claims named, though it does not in terms declare that they shall be liens. *The Menominie*, 36 Fed. 197. The statute was enacted before the decisions of the Supreme Court of the United States in *The Moses Taylor*, 4 Wall. (U. S.) 411, 18 L. ed. 397, 32 How. Pr. (N. Y.) 460, and *The Hine v. Trevor*, 4 Wall. (U. S.) 555, 18 L. ed. 451. The provis-

ion for the enforcement of the lien by a proceeding in rem in the state courts is unconstitutional; the lien must be enforced in the courts of admiralty. The provision limiting the time of bringing suit is binding upon the United States courts; but these courts will distribute the proceedings in accordance with the established rules of the maritime law, and not in accordance with the state statute. *The Menominie*, 36 Fed. 197. A vessel is liable for materials furnished and labor performed in order to raise her from the bottom of a lake and removing it to the Minnesota river. *Laing v. The Forest Queen*, 69 Minn. 537, 72 N. W. 809.

entered into by the master, owner, agent, or consignee of the boat or vessel on which such contract is to be performed; and, 4. For all injuries done to persons or property by such boat or vessel: provided, that no boat or vessel shall be liable for any debt contracted on account of work done or services rendered on board of or for the benefit of such boat or vessel until such contract is fully performed. Actions under these provisions must be commenced within one year after the cause of action accrues.

§ 1751. **Mississippi.**—Under the general mechanics' lien law, every boat or other water-craft built within the state is liable for the payment of any debt contracted for labor performed or materials furnished about the construction, alteration, or repairs thereof.<sup>7</sup> It is also provided<sup>8</sup> that there shall be a lien on all ships, steamboats and other water-craft for

<sup>7</sup> See ante, § 1210.

<sup>8</sup> Code 1906, §§ 3085, 3087. This statute creates a lien on all water-craft for work done in building vessels by any person in the state, good against all the world, and to continue for six months in which to commence judicial proceedings in the United States or state courts; and a purchaser of a vessel without notice, during the existence of the lien thereon for building it, takes it subject to such lien. *Archibald v. Citizens' Bank*, 64 Miss. 523, 1 So. 739. An electric-light plant furnished for a steamboat, for the creation and distribution of electric lights, comes within this statute. *Mulholland v. Thompson-Houston Electric Light Co.*, 66 Miss. 339, 6 So. 211. This statute is separate and distinct from the mechanics' lien law, and the lien it creates is not subject to any of

the provisions of that law. Its enactment was suggested by the decisions of the Supreme Court of the United States, and the plan adopted to meet them was to create the lien, and leave its enforcement to the appropriate tribunal determinable by the facts of the case. In case an independent contractor incurs debts for work and materials used in repairing a vessel, the material-men and laborers can have no lien on the vessel and the owner of the vessel, for such a contractor is not the owner's agent in buying the materials or in employing the laborers. *Valverde v. Spottswood*, 77 Miss. 912, 28 So. 720. Under the common law one has a right to a lien for his services in the repair of a boat, while it remains in possession of he who repairs it. *Karnosky v. Hoyle*, 97 Miss. 562, 52 So. 481.

work done or materials supplied by any person in this state for or concerning the building, repairing, fitting, furnishing, supplying or victualling such ships, steamboats or other water-craft, and for the wages of the persons employed on board such vessel, boat, or craft, for work done or services rendered, in preference to all other debts due and owing from the owners thereof.

The lien expires six months after the claim is due, unless judicial proceedings have been commenced to assert such lien.

§ 1752. *Missouri.*<sup>9</sup>—The former maritime law has been repealed.

§ 1753. *Montana.*<sup>10</sup>—Any boat found within the waters of this state is liable: 1. For all debts contracted by the master, owner, agent, clerk, or consignee thereof, on account of supplies furnished for the use of such boat, or on account of work done or materials furnished in building, repairing, fitting out, furnishing, or equipping such boat; 2. For all demands or damages accruing from the nonperformance or malperformance of any contract of affreightment, or any contract relative to the transportation of persons or property, entered into by the master, owner, agent, clerk, or consignee thereof; 3. For all injuries to persons or property by such boat, or by the officers or crew, done in connection with the business of such boat.

Claims growing out of any of the above causes are liens upon such boat, its apparel, tackling, furniture and appendages, including barges and lighters, if owned by the owners of such boat, and used therewith, at the time suit is commenced.

Such liens shall take preference of any claim against the

<sup>9</sup> Rev. Stats. 1899, ch. 82, which gave a lien was repealed by Act June 4, 1909.

<sup>10</sup> Code (Civ. Proc.) 1895, §§ 1450-

1454. For proceeding to enforce lien, see Code (Civ. Proc.) 1895, §§ 1456-1466.

boat itself, or any or all of its owners, growing out of any other causes than those above enumerated, and as between themselves they shall be preferred in the following order:

1. Those resulting from wages for services on board such boat within the year then passed, providing that suit is brought within twenty days after the cessation of such labor;
2. Those resulting from contracts made within this state;
3. All other causes. Actions against boats under the provisions of this act shall not be brought after the lapse of one year from the time the cause of action accrued. The lien shall attach from the commencement of the suit, subject only to such other liens as are of a preferred class.

§ 1754. **New Hampshire.**<sup>11</sup>—If any person shall, by himself or others, perform labor or furnish materials toward building, repairing, fitting, or furnishing a vessel within this state, payment for which is due, he shall have a lien therefor on the vessel for the space of four days after the vessel is completed. Such lien may be secured by attachment.<sup>12</sup>

§ 1755. **New Jersey.**<sup>13</sup>—Whenever a debt shall be contracted by the master, owner, agent or consignee of any ship or vessel within this state for either of the following pur-

<sup>11</sup> Pub. Stats. & Sess. Laws 1901, ch. 141, §§ 9, 17.

<sup>12</sup> See § 1215.

<sup>13</sup> Comp. Stats. 1910, p. 3128, § 2 et seq.; Comp. Stats. 1910, p. 3127, § 1. The statute does not conflict with the constitution of the state by violating the right of trial by jury. *Edwards v. Elliott*, 36 N. J. L. 449, 13 Am. Rep. 463, *affd.* 21 Wall. (U. S.) 532, 22 L. ed. 487. Under this act it is immaterial where the contract was made, if the work was done or the materials furnished in the state. *Baeder v. Carnie*, 44 N. J. L. 208. The statute applies as well to foreign

as to domestic vessels. Supplies furnished to a foreign vessel, on the credit of one of the owners, do not create a maritime lien, but do create a lien under the statute which may be enforced in the courts of the state. *Randall v. Roche*, 30 N. J. L. 220, 82 Am. Dec. 233. As to proceedings, see *Gad-dis v. Howell*, 31 N. J. L. 313. Unless there is a contract to complete the repairs before anything shall become due, a workman may stop work before the repairs are completed, and enforce a lien for the work done. Thus, if the contract be to put a vessel in repair as

poses,—1. On account of any work done or materials or articles furnished in this state, for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel; 2. For such supplies, provisions, and stores furnished within this state for the use of such ship or vessel at the time when the same were furnished;<sup>14</sup> 3. On account of the towing of such ship or vessel, the wharfage of such ship or vessel, and the expenses of keeping such ship or vessel in port, including expenses incurred in taking care of and employing persons to watch such ship or vessel,—such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture, and continue to be a lien on the same until paid, and shall be preferred to all other liens thereon except mariners' wages.

§ 1756. **New York.**<sup>15</sup>—A debt which is not a lien by the maritime law, and which amounts to fifty dollars or upwards

soon as possible, and a dispute arises between the contracting parties before the completion of the work, the workman may enforce his lien for the work performed. *Baeder v. Carnie*, 44 N. J. L. 208.

<sup>14</sup> A cook on board a tug, who by agreement with the master boards the crew, can create no lien on the tug for supplies purchased by him. *Kretzmer v. The William A. Levering*, 35 Fed. 783. One who furnishes coal for the use of a steam tug has a lien under the statute. *Comp. Stat. 1910*, pp. 3127, 3128. *Russell v. Myers Excursion & Transfer Co.*, 73 N. J. Eq. 192, 67 Atl. 1016; *Hitchings v. Olsen*, 184 Fed. 305, 106 C. C. A. 447. A lien exists for one who furnishes supplies to a vessel while the vessel is at its home port. *The J. S. Warden*, 155 Fed. 697.

<sup>15</sup> *Birdseye, C. & G. Consol. Laws 1909*, p. 3210, §§ 80, 81, 83. This statute, which is the Act of 1862 (*Laws 1862*, ch. 482), revised, is not repugnant to the provision of the state constitution, that no person shall be deprived of property without due process of law, as it provides a reasonable notice, and gave an opportunity to litigate the lien. *Happy v. Mosher*, 48 N. Y. 313; *Sheppard v. Steele*, 43 N. Y. 52, 3 Am. Rep. 660. The sections of the act which attempt to confer jurisdiction upon the state courts to enforce maritime contracts by proceedings in rem are void. *The Cylvan Stream*, 35 Fed. 314; *Perry v. Haines*, 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. 8. The following cases in admiralty to enforce liens in maritime contracts created under this statute have been reported. *The Delos DeWolf*, 3 Fed. 236; *The Julia L.*

on a sea-going or ocean-bound vessel, or fifteen dollars or upwards on any other vessel, shall be a lien upon such vessel, her tackle, apparel and furniture, and shall be preferred to all other liens thereon, except mariners' wages,<sup>16</sup> if such debt is contracted by the master, owner, charterer, builder or consignee of such ship or vessel, or by the agent of either of them, within this state, for either of the following purposes,—1. For work done or materials or other articles furnished in this state for or towards the building, repairing, fitting, furnishing, or equipping of such ship or vessel;<sup>17</sup> 2. For such provisions and stores, furnished within this state, as are fit and proper for the use of such vessel, at the time when they were furnished. 3. For wharfing and the expense of keeping such vessel in port, and for the expense for employing persons to watch her; 4. For loading or unloading such vessel, or for the advances made to procure necessities therefor, or for the in-

Sherwood, 14 Fed. 590; *The Ella B.*, 26 Fed. 111; *The Alanson Sumner*, 28 Fed. 670; *The Grapeshot*, 22 Fed. 123; *The Arctic*, 22 Fed. 126; *The Sylvan Stream*, 35 Fed. 314.

<sup>16</sup> As to vessels engaged in canal navigation, see the *Ella B.* 26 Fed. 111; *King v. Greenway*, 71 N. Y. 413; *Mott v. Lansing*, 57 N. Y. 112; *Crawford v. Collins*, 45 Barb. (N. Y.) 269, 30 How. Pr. (N. Y.) 398. There is no admiralty jurisdiction to enforce liens against canal boats, and such liens may be enforced in the state courts. *Frailick v. Betts*, 13 Hun (N. Y.) 632; *Brookman v. Hamill*, 43 N. Y. 554, 3 Am. Rep. 731; *Sheldon v. Parker*, 3 Hun (N. Y.) 498, 5 T. & C. (N. Y.) 616.

<sup>17</sup> *The New York Sensation*, 61 Hun (N. Y.) 624, 15 N. Y. S. 950, 40 N. Y. St. 952. The statute gives a lien on unfinished vessels

for materials furnished and used in building them. Where such materials are delivered to the builders in this state, though shipped from outside the state, the debt is contracted in this state within the meaning of the statute. Where such materials are furnished for and used in the construction of two vessels at the same time and place, the lien against both may be enforced in the same proceedings. *Phoenix Iron Co. v. The Hopatcong*, 127 N. Y. 206, 27 N. E. 841; *Kenyon v. Covert*, 53 Hun (N. Y.) 638, 7 N. Y. S. 34, 28 N. Y. St. 985. Ferry-boats are vessels within the meaning of the statute. One is entitled to a lien for furnishing supplies to a dredge when the supplies are ordered by the master. A laborer is also entitled to a lien under the same circumstances. *The Colfax*, 179 Fed. 975.

insurance thereof; 5. For towing or piloting such vessel, or for the insurance or premium of insurance of or on such vessel or her freight; but no lien exists for a debt contracted for any purpose specified herein, unless it amounts to the sum of twenty-five dollars or more.

When a vessel shall have sustained damage by any other vessel through the negligence or wilful misconduct of the person navigating such vessel, to the extent of fifty dollars, the owner of the damaged vessel shall have a lien, unless a lien is given therefor by maritime law, upon the vessel causing the damage, her tackle, apparel and furniture, to the extent of such damage, which shall be deemed a debt for the purpose of this article, and the master, owner, agent or consignee of the damaged vessel may enforce such lien in like manner and with like effect as in case of other liens herein created; but a notice of the lien must be filed in the office of the clerk of the county in which such damage is sustained, and proceedings to enforce the lien must be commenced within ten days after the damage has been done, or such damage shall cease to be a lien upon such vessel. But if such damage is sustained in either of the counties of New York, Kings or Queens such notice shall be filed in the office of the clerk of the city and county of New York, and if the vessel causing such damage is built, used or fitted for the navigation of any of the canals of lakes of the state, a certified copy of such notice shall be filed in the office of the comptroller.

Every debt herein specified shall cease to be a lien upon such vessel unless the lienor shall, within ninety days after the debt becomes due, file a notice of lien, containing the name of the vessel, the name of the owner, if known, the particulars of the debt and a statement of the amount claimed to be due from such vessel, and verified by the lienor, his legal representative, agent or assignee, to be true and correct. If the debt is based upon a written contract a copy of such contract shall be attached to such notice. The notice shall be filed in the office of the clerk of the county in which the

debt is contracted. But if the debt was contracted in the city of New York, such notice shall be filed in the office of the clerk of the county of New York. If the vessel is built, used or fitted for the navigation of any of the canals or lakes of the state, the lienor shall immediately after filing the notice in the county clerk's office, file a copy thereof in the office of the comptroller of the state, duly certified by the county clerk in whose office the original notice is filed, provided, however, that whenever any debt hereinabove specified is contracted by the master, owner, charterer, builder or consignee of any ship or vessel navigating the western and northwestern lakes, or any of them, or the river St. Lawrence, or by the agent of such master, owner, charterer, builder or consignee, such debt shall not cease to be a lien upon such ship or vessel if the person to whom such debt may be owing shall, by the first Tuesday of February next succeeding the time such debt becomes due cause to be drawn up, verified and filed, specifications<sup>18</sup> of such debt in the form and comprising the statements herein prescribed.

<sup>18</sup> If the vessel is arrested, and gives bonds within the time limited for filing specifications, the filing of them is not necessary. *Sheppard v. Steele*, 43 N. Y. 52, 3 Am. Rep. 660; *Onderdonk v. Voorhis*, 2 Rob. (N. Y.) 24; *In re Tilton*, 19 Abb. Pr. (N. Y.) 50. If the vessel be libeled and sold before the expiration of the time limited and no specifications are filed at any time, the proceeds should be distributed according to the liens upon the vessel at the time the libels were filed. *The Niagara*, 31 Fed. 163. The lien ceases if the specifications be not filed in time. *Squires v. Abbott*, 61 N. Y. 530; *King v. Greenway*, 71 N. Y. 413. The departure of a domestic vessel, in the regular

course of her occupation, from Brooklyn to Long Beach, on her return making fast to the shore in Rockaway Inlet, is such a leaving of the port as to prevent the enforcing of a lien against her arising under the laws of the state of New York. *The Whistler*, 30 Fed. 199. A tug-boat leaves the port of New York when she goes to Hoboken or Jersey City, and a lien is lost by the lapse of the time limited after such departure. *The Arctic*, 22 Fed. 126; *Hancox v. Dunning*, 6 Hill (N. Y.) 494; *The Jenny Lind*, 3 Blatchf. (U. S.) 513, Fed. Cas. No. 7287; *The Kingston*, 23 Fed. 200. What is a sufficient bill of particulars. *The Arctic*, 22 Fed. 126. What is a sufficient verification. *The Arctic*, 22 Fed.



Every lien for a debt shall cease if the vessel navigates the western or northwestern lakes, or either of them, or the Saint Lawrence river, at the expiration of six months after the first of January next succeeding the time when the debt was contracted, and in case of any other vessel, at the expiration of twelve months after the debt was contracted. If, upon the expiration of the time herein limited in either of such cases, such vessel shall be absent from the port at which the debt was contracted, the lien shall continue until the expiration of thirty days after the return of such vessel to such port. If proceedings are instituted for the enforcement of the lien within the time herein limited, such lien shall continue until the termination of such proceedings.

§ 1757. **North Carolina.**<sup>19</sup>—Every vessel, her tackle, apparel and furniture shall be subject to a lien for all labor done by contractors or others in loading or discharging the cargo of such vessel, and also for all labor done by any subcontractor or laborer employed in discharging or loading any such vessel, when such labor is done under contract with a contractor or stevedore who may be employed by the master, agent or owner of such vessel.

The liens shall be filed as is provided for other liens. The subcontractor or laborer may give notice to the master, agent

126. Bond to release. *Onderdonk v. Voorhis*, 36 N. Y. 358. When court has no jurisdiction. *Poole v. Kermit*, 59 N. Y. 554. A notice is insufficient when it only states the amount due from a vessel "for work done upon the same and for materials furnished and labor and services performed." *The Catherine Whiting*, 99 Fed. 445, 39 C. C. A. 592. The notice must be filed within 30 days after the debt is contracted, and it is not sufficient to file it within 30 days after the

debt becomes due. *In re Froment*, 125 App. Div. (N. Y.) 647, 109 N. Y. S. 1073. Credit must be given to the vessel and not to its owner to entitle a claimant to a lien. *The William P. Donnelly*, 156 Fed. 302.  
<sup>19</sup> Revisal 1905, §§ 2041, 2042, 2045. One who furnishes an engine for a gas boat, if he furnishes it on the credit of the vessel is entitled to a lien. *The Pearl*, 189 Fed. 540. As to enforcement, see § 2043.

or owner of such vessel that the contractor or stevedore is or will become indebted to him, when it shall be the duty of such master, agent or owner of such vessel to retain out of the amount due to such contractor or stevedore under his contract, as much as shall be due or claimed by the person giving the notice, and after such notice is given no payment to the contractor or stevedore shall be a credit on or a discharge of the lien herein provided.

The sum total of all the liens due to different subcontractors and laborers, performed for any contractor or stevedore under any contract with any master, agent or owner of any vessel, shall not exceed the amount due to such contractor or stevedore at the time of notice given to such owner, agent or master, or the amount due to such contractor or stevedore at the time of the service of summons upon such master, agent or owner when no notice has been given.

§ 1758. **Ohio.**<sup>20</sup>—The general mechanics' lien law gives to every person who does work or labor upon or furnishes machinery, material or fuel for constructing, altering, or repairing a boat, vessel, or other water-craft a lien to secure the payment there upon such boat, vessel or other water-craft.

§ 1759. **Oregon.**<sup>21</sup>—Every boat or vessel used in navigating the waters of this state, or constructed in this state, shall

<sup>20</sup> § 1220, ante; Laws 1913, p. 369. Where a vessel arranges to carry passengers on tickets bought for another vessel, the vessel carrying the passengers has a lien for their price against the vessel selling the tickets. *Eley v. The Strewsbury*, 69 Fed. 1017. A claim on the part of the owner of a boat for an allowance in lieu of a homestead can not prevail as against liens which exist by virtue of the general admiralty law,

nor against those created by the state statute. *Johnson v. Ward*, 27 Ohio St. 517, 520; *The Guiding Star*, 9 Fed. 521.

<sup>21</sup> Any person performing labor or furnishing materials for a boat or vessel is entitled to a lien, though he do this through a contractor. The lien, moreover, does not depend upon any expressed intention or conscious purpose on his part to claim a lien; but the lien, as an incident of the law,

be liable and subject to a lien: 1. For wages due to persons employed, for work done or services rendered on board of such boat or vessel; 2. For all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors or subcontractors of such owner, or any of them, or with any person having them employed to construct, repair, or launch such boat or vessel, on account of labor done or materials furnished by mechanics, tradesmen, or others in the building, repairing, fitting, and furnishing or equipping such boat or vessel, or on account of stores and supplies furnished for the use thereof, or on account of launch ways constructed for the launching of such boat or vessel; 3. For all sums due for wharfage, anchorage, or towage of such boat or vessel within this state; 4. For all demands or damages accruing from the nonperformance or malperformance of any contract of affreightment, or of any contract touching the transportation of persons or property, entered into by the master, owner, agent, or consignee of the boat or vessel on which such contract is to be performed, and for damages or injuries done to persons or property by such boat or vessel, and for damages or injuries by such boat or vessel resulting in the death of any person. The lien is enforced by action and order of sale of

attaches upon the performance of the act, and can only be waived or discharged by an agreement or understanding to that effect. *The City of Salem*, 10 Fed. 843, 7 Sawy. (U. S.) 477. A maritime lien exists against a vessel of the state sailing the waters of the United States for furnishing dock privileges at the request of the owner. This lien is to be enforced in the Admiralty Courts of the United States. *The George W. Elder*, 159 Fed. 1005. See also, *Aurora Shipping Co. v. Boyce*, 191

Fed. 960, 112 C. C. A. 372. A subcontractor's lien is not lost by taking judgment against the contractor. *Benbow v. The James Johns*, 56 Ore. 554, 108 Pac. 634. A bank with whom the owner of a vessel keeps an account, and which pays the checks of the latter drawn in favor of third persons in payment of materials furnished for the vessel, has no lien thereon for any balance due the bank on such account. *The City of Salem*, 31 Fed. 616.

such boat or vessel. The action must be commenced within one year after the cause of action has accrued.<sup>22</sup>

§ 1760. **Pennsylvania.**<sup>23</sup>—Ships and vessels of all kinds<sup>24</sup> built, repaired, fitted, furnished and supplied with necessities for navigation within this commonwealth shall be subject to a lien for all debts contracted by the builders, masters, owners, agents or consignees thereof, for work done or materials and supplies found<sup>25</sup> or provided in the building, repairing, fit-

<sup>22</sup> Bellinger & Cotton's Ann. Codes & Stats. 1902, § 5722. This limitation is binding in admiralty. *The City of Salem*, 31 Fed. 616.

<sup>23</sup> Purdon's Dig. (13th ed.), pp. 366, 367.

<sup>24</sup> A canal-boat is among the vessels upon which a lien is given. *Hipple v. Canal-Boat Fashion*, 3 Grant Cas. (Pa.) 40; *Parkinson v. Manny*, 2 Grant Cas. (Pa.) 521. The word "vessels of all kinds" are broad enough to include crafts of every description, great and small. They include an old steam-boat from which the boilers, wheel, engines, and machinery have been removed, and which has been changed into a pleasure barge for excursion parties, having cabins fitted up as dancing halls. *The City of Pittsburgh*, 45 Fed. 699. Under the Act of April 20, 1858, giving liens against domestic vessels navigating the rivers Allegheny, Monongahela, or Ohio, a lien exists for supplies furnished to an excursion boat and dispensed to passengers from a lunch-counter kept on board the boat, such supplies having been furnished upon the credit of the boat on the order of the master,

a part owner. The lien covers debts thus contracted for soda-water, cider, and spirituous and malt liquors, supplied to the boat and dispensed thereon to passengers. *Bovard v. The Mayflower*, 39 Fed. 41. Repairs or supplies furnished to a dredge-boat that has no motive power does not entitle the furnisher to a lien given by the statute for repairs or supplies furnished "all ships, steam-boats or vessels navigating the rivers Allegheny, Monongahela or Ohio in this state." *The Enterprise*, 181 Fed. 746. This statute limits the liens to two years from the date of the last item of the account. It is held that the statute contemplates a continuous account, and not one with no charges for a year and more. *Rees v. Jutte*, 153 Pa. St. 56, 25 Atl. 998.

<sup>25</sup> The lien arises from the actual performance of the work or the actual delivery of the material. There is no lien for a breach of contract on the part of the master or owner in allowing the performance of a contract for work or material. *Dalzell v. The Daniel Kaine*, 31 Fed. 746.

ting, furnishing, supplying or equipping of the same in preference to any other debt due from the builders, masters, owners, agents or consignees thereof.<sup>26</sup>

The lien aforesaid shall continue for and during the period of one year next after the work is done or the materials and supplies are furnished or provided to such ship or vessel and no longer.

The lien for work done and materials and supplies furnished as aforesaid shall exist in favor of all ship-builders, merchants, dealers, tradesmen and mechanics for all work done or materials and supplies furnished or provided in the building, repairing, fitting, furnishing, supplying or equipping of such ships or vessels.<sup>26a</sup>

All the provisions contained in the act<sup>26b</sup> entitled "An act relative to the attachment of vessels," are extended to steam-engine and boiler makers, in all cases in which engines or boilers shall be furnished by such makers to such ship or vessel.

All the provisions contained in the act<sup>26c</sup> entitled "An act relating to the attachment of vessels," are hereby extended to venders of copper sheathing.

All the provisions contained in the act<sup>26d</sup> entitled "An act relating to the attachment of vessels," are hereby extended to all manufacturers of iron; and the lien provided for by

<sup>26</sup> Under this statute the liens have priority over a mortgage for purchase-money recorded under the act of congress. *The Venture*, 26 Fed. 285. A lien for work and materials furnished in the completion of a vessel, the new hull of which was brought from Delaware, may be enforced in the state courts, the admiralty courts not having exclusive jurisdiction. *Baizley v. The Odorilla*, 121 Pa. St. 231, 15 Atl. 521, 1 L. R. A. 505;

*The Odorilla v. Baizley*, 128 Pa. St. 283, 18 Atl. 511.

<sup>26a</sup> Provided that nothing contained in this act shall be construed to alter or repeal the provisions of an act, entitled, "A supplement to an act relative to the attachment of vessels, approved the twentieth day of April, Anno Domini one thousand eight hundred and fifty-eight.

<sup>26b</sup> June 13, 1836.

<sup>26c</sup> June 13, 1836.

<sup>26d</sup> June 13, 1836.

said act shall exist in their favor, with like effect as though originally named therein.

Any of the said persons, having done work or provided materials, may file a libel in the office of the prothonotary of the district court, or court of common pleas of the proper county wherein the cause of action shall arise, or in any county where the said ship may be found, against such ship or vessel, her tackle, furniture and apparel.

§ 1761. **South Carolina.**<sup>27</sup>—When by virtue of a contract, expressed or implied, with the owners of a ship or vessel, or with the agents, contractors, or subcontractors of such owners, or any of them, or with any person having been employed to construct, repair, or launch such ship or vessel, or to assist them, money is due to any person for labor performed, materials used, or labor and materials furnished in the construction, launching, repairs of, or for constructing the launching-ways for, or for provisions, stores, or other articles furnished for or on account of, such ship or vessel in this state, such person shall have a lien upon the ship or vessel, her tackle and furniture, to secure the payment of such debt; which lien shall be preferred to all others thereon, except mariners' wages, and shall continue until the debt is satisfied.

Such lien shall be dissolved unless the person claiming the same shall file, within ninety days after he ceases to labor on or furnish labor or materials for such ship or vessel, in the office of the register of mesne conveyance or clerk of court of the county within which the ship or vessel was at the time the debt was contracted, a statement, subscribed and sworn to by himself or by some person in his behalf, giving a just and true account of the demands claimed to be due to him, with all just credits; and also the name of the person with whom the contract was made, the name of the

<sup>27</sup> Code 1912, §§ 4153, 4154.

owner of the ship or vessel, if known, and the name of the ship or vessel, or a description thereof, sufficient for identification; which statement shall be recorded by said register of mesne conveyance, or clerk, in a book kept by him for that purpose; for which he shall receive the same fees as for recording other papers of equal length.

This lien is enforced by petition to the court of common pleas.

**§ 1762. Tennessee.**<sup>28</sup>—Any debt contracted by the master, owner, agent, or consignee of any steam or keel boat, within this state, on account of any work done, or materials or articles furnished for or toward the building, repairing, fitting, furnishing, or equipping such boat, or for wages due to the hands of the same, shall be a lien upon such boat, her tackle and furniture, to continue for three months from the time said work is finished, or said materials or articles furnished, or said wages fall due, and until the termination of any suit that may be brought for said debt.

This lien is enforced by petition and warrant to attach.

**§ 1763. Texas.**<sup>29</sup>—Every person who may furnish supplies or materials, or do repairs or labor for or on account of any domestic vessel, owned in whole or in part in this state, shall have a lien on such vessel, her tackle, apparel, furniture and freight money, for the security and payment of the same.

The provisions of the preceding article shall not be construed to alter or affect in any way the general law regulating the liens of seamen on foreign vessels.

**§ 1764. Vermont.**<sup>30</sup>—A person who performs labor, or furnishes materials in building, repairing, fitting or furnishing a ship, vessel or steamboat, shall have a lien thereon for

<sup>28</sup> Ann. Code 1896, §§ 3547, 3548, 5313-5325.

<sup>29</sup> Rev. Civ. Stats. 1911, arts. 5650, 5651.

<sup>30</sup> Pub. Stats. 1906, §§ 2642, 2643.

his wages and materials, until eight months after it is completed, and may secure the same by attachment thereof, and such attachment shall have precedence of all other attachments and claims.

Before such lien attaches, such person shall have a legal claim for his services performed, or materials furnished, and shall demand payment of the same of the owner, agent, contractor or person in whose care such ship, vessel or steamboat is; and, upon such demand, a payment or tender of the just amount due him shall discharge such lien.

§ 1764a. Virginia.<sup>31</sup>—If any person has any claim against the master or owner of any steamboat or other vessel, raft, or river-craft, or against any steamboat or other vessel, raft, or river-craft found within the jurisdiction of this state, for materials or supplies furnished or provided, or for work done for, in, or upon the same, or for wharfage, salvage, pilotage, or any contract for transportation of, or any injury done to, any person or property by such steamboat or other vessel, raft, or river-craft, or by any person having charge of her, or in her employment, such person shall have a lien upon such steamboat or other vessel, raft, or river-craft, for such materials or supplies furnished, work done, or services rendered, wharfage, salvage, pilotage, and for such contract or injury

<sup>31</sup> Code 1904, § 2963. This statute has been held to be in conflict with the United States Judiciary Act, 1789, § 9, and third division of section 711, United States Rev. Stat. [U. S. Comp. Stats. 1901, p. 577]. *Stewart v. Potomac Ferry Co.*, 12 Fed. 296, 5 Hughes (U. S.) 372. An action may be maintained in the superior court against a steamboat for machinery furnished for its construction, though there are no express provisions for recording the lien, or

for attachment pending the action. Such action may properly be brought on the equity side of the court. Such court has authority to appoint a receiver to take charge of the property pending the action. *Washington Iron Works v. Jensen*, 3 Wash. St. 584, 28 Pac. 1019. It is held that only a contractor, and not a subcontractor, can enforce the lien given by this statute. *Waddell v. The Daisy*, 2 Wash. T. 76, 3 Pac. 616.



as aforesaid; and may, in a pending suit, sue out of the clerk's office of the circuit court of the county, or the circuit or corporation court of the corporation, in which such steamboat or other vessel, raft, or river-craft, may be found, an attachment against such steamboat or other vessel, raft, or river-craft, with all her tackle, apparel, furniture, and appurtenances, or against the estate of such master or owner. An attachment may be sued out under this section for a cause of action that may have arisen without the jurisdiction of this state, as well as within it, if the steamboat or other vessel, raft, or river-craft be within the jurisdiction of this state at the time the attachment is sued out or executed.

§ 1765. *Washington*.<sup>32</sup>—All steamers, vessels and boats, their tackle, apparel and furniture, are liable: 1. For services rendered on board at the request of, or under contract with, their respective owners, charterers, masters, agents or consignees; 2. For work done or material furnished in this state for their construction, repair or equipment at the request of their respective owners, charterers, masters, agents, consignees, contractors, subcontractors, or other person or persons having charge in whole or in part of their construction,

<sup>32</sup> *Remington v. Ballinger's Ann. Codes & Stats. 1910, § 1182.* One who furnishes necessary equipment for a steamer is entitled to a lien where the equipment was furnished on the credit of the vessel. *The South Portland*, 100 Fed. 494, 40 C. C. A. 514. The lien created by above statute may be enforced in the state courts when the claim is not in the admiralty jurisdiction. *West v. Martin*, 51 Wash. 85, 97 Pac. 1102, 21 L. R. A. (N. S.) 324n. The right to a statutory lien is not lost when the seller reserves the title to equipment furnished a vessel under a

conditional sale. *Fairbanks-Morse Co. v. Union Bank & Trust Co.*, 55 Wash. 538, 104 Pac. 815. One may enforce a lien on a vessel for work and material furnished and used in its construction by an ordinary civil action to foreclose. *Thompson v. Allen*, 56 Wash. 582, 106 Pac. 173, 134 Am. St. 1124. See also, *McRae v. Bowers Dredging Co.*, 86 Fed. 344. The foreclosure under the statute must be begun within three years after the materials are furnished. *Fairbanks-Morse Co. v. Union Bank & Trust Co.*, 55 Wash. 538, 104 Pac. 815.

alteration, repair or equipment; and every contractor, builder or person having charge, either in whole or in part, of the construction, alteration, repair or equipment of any steamer, vessel or boat, shall be held to be the agent of the owner, for the purposes of this act, and for supplies furnished in this state for their use, at the request of their respective owners, charterers, masters, agents or consignees, and any person having charge, either in whole or in part, of the purchasing of supplies for the use of any such steamer, vessel or boat, shall be held to be the agent of the owner for the purposes of this act; 3. For their wharfage and anchorage within this state; 4. For nonperformance or malperformance of any contract for the transportation of persons or property between places within this state, or to or from places within this state, made by their respective owners, masters, agents or consignees; 5. For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state.

Demands for these several causes constitute liens upon all steamers, vessels and boats, and their tackle, apparel and furniture, and have priority in the order herein enumerated, and have preference over all other demands; but such liens continue in force only for a period of three years from the time the cause of action accrued.

§ 1766. **West Virginia.**<sup>33</sup>—The citizens of this state shall have a lien upon all domestic steamboats, steamers and vessels, propelled wholly or in part by steam, which play upon the navigable waters of this state, and which are registered in this state, for all work and labor done upon said vessels, and for all materials, goods, wares and merchandise furnished said vessels; said lien to be enforced by appropriate remedy in courts having jurisdiction of the subject-matter.

<sup>33</sup> Code 1906, § 3123.

§ 1767. *Wisconsin.*<sup>34</sup>—Every ship, boat or vessel used in navigating the waters of this state shall be liable for and the claims or demands hereinafter mentioned shall constitute a lien on such ship, boat or vessel, which shall take precedence of all other claims or liens thereon: 1. For all debts contracted by the master, owner, agent or consignee thereof, on account of supplies furnished for the use of such ship, boat or vessel, or on account of work done or services rendered on board of such ship, boat or vessel, or on account of labor done or materials furnished by mechanics, tradesmen or others in and for building, repairing, fitting out, furnishing or equipping such ship, boat or vessel, or on account of any indebtedness for insurance effected upon such ship, boat or vessel, the engines, machinery, sails, rigging, tackle, apparel, or furniture thereof, against any fire or marine risk; 2. For all sums due for wharfage, towage or anchorage of such ship, boat or vessel within this state; 3. For all demands or damages accruing from the nonperformance or malperformance of any contract of affreightment or any contract touching the transportation of persons or property entered into by the master, agent, owner or consignee of the ship, boat or vessel on which such contract is to be performed; and 4. For all damages arising from injuries done to persons or property by such ship, boat or vessel; but no person employed as master, or otherwise, on board of any such ship, boat or vessel, to collect or receive freights or passage money, shall have any lien as provided in this section, or be entitled to his action in accordance with its provisions. Such lien may be enforced by proceedings in

<sup>34</sup> Stats. 1898, §§ 3348, 3349, 3351. Liens given by the statute for supplies and repairs on domestic ships in home ports can be enforced in rem only by the federal courts. *Weston v. Morse*, 40 Wis. 455. The above statute gives a lien on vessels which may be en-

forced by a special attachment in an action against the owner, but the remedy is not an exclusive one. The owner's interest is subject to be attached also under the general attachment statutes. *Phillips v. Eggert*, 133 Wis. 318, 113 N. W. 686.

admiralty, or in the cases herein mentioned.

The receiving of the note or other evidence of indebtedness of the owner, master, agent or consignee of such ship, boat or vessel, for any such claim or demand shall not affect the right of the party to his lien hereunder, unless expressly received in payment therefor and so specified therein.

The lien is enforced by attachment.

§ 1768. **Maritime lien arising from torts committed by master.**—It may be stated in general that a maritime lien arises from all torts committed by the master in the course of his regular employment and service as master; just as it is a general principle that, from all authorized contracts made by the master on account of the ship, there results an implied hypothecation of the ship. The most frequent examples of such torts occur in cases of collisions occurring through negligence. But the lien may also arise in consequence of negligence resulting in personal injuries, or it may arise from tortious breaches of contracts.

§ 1769. **Lien arising against vessel to blame in collision.**—A lien arises against the vessel in fault in a collision for the damages done,<sup>35</sup> and it is no defense that the vessel was at the time under the entire charge of a charterer.<sup>36</sup> The owners can not take away this remedy against the vessel by any contract with a third party. Neither is it any defense that the vessel was at the time of the collision in charge of a pilot whose employment was made compulsory by a state law.<sup>37</sup>

For damages by collision there is no maritime lien upon

<sup>35</sup> *The Ticonderoga*, Swabey 215; *The Columbia*, 27 Fed. 704; *The Bristol*, 11 Fed. Rep. 156, *affd.* 20 Fed. 800; *The John G. Stevens*, 170 U. S. 113, 42 L. ed. 969, 18 S. Ct. 544.

<sup>36</sup> *Miller v. Morgan*, 22 La. Ann. 625.

<sup>37</sup> *The China*, 7 Wall. (U. S.) 53, 19 L. ed. 67.

the cargo except to the extent of the freight due, though the cargo belong to the owner of the vessel in fault.<sup>38</sup>

**§ 1770. No maritime lien upon immovable structure.—**

There can be no maritime lien upon an immovable structure, such as a bridge, pier, boom, light-house or building, because such a structure can not be seized and sold. The lien can attach only to things movable engaged in navigation, or things which are the subject of commerce on the high seas or navigable waters.<sup>39</sup>

But the owner of an immovable structure, such as a bridge, pier, or building, lawfully placed in navigable water, may proceed in rem against a vessel for injuries sustained from a collision caused by the negligent management of the vessel. If no maritime lien attached to the vessel, it might take its departure into a distant state or foreign jurisdiction, and the owner of the structure would have no effectual remedy.<sup>40</sup> If, by the negligence of a tug-boat towing a schooner, the latter is run into a grain elevator situated on the land, the tort is not a maritime one, and is not within the exclusive jurisdiction of a court of admiralty; but a state court may afford a remedy for the injury.<sup>41</sup>

<sup>38</sup> *The Victor*, 1 Lush. 72; *The Roecliff*, L. R. 2 P. 353; *The Bristol*, 29 Fed. 867. And see *Allen v. Mackay*, 1 Spr. (U. S.) 219, 224, Fed. Cas. No. 228; *Spafford v. Dodge*, 14 Mass. 66, 81.

<sup>39</sup> *The Rock Island Bridge*, 6 Wall. (U. S.) 213, 18 L. ed. 753, 35 How. Pr. (N. Y.) 190; *The Plymouth*, 3 Wall. (U. S.) 20, 18 L. ed. 25; *The Neil Cochran*, 1 Brown Adm. 162; *The Ottawa*, 1 Brown Adm. 356; *The Maud Webster*, 8 Ben. (U. S.) 547, Fed. Cas. No. 9302.

<sup>40</sup> *The Arkansas*, 17 Fed. 383, 5

*McCrary* (U. S.) 364. Per Love, J.: "The admiralty jurisdiction owes its existence chiefly to the fact that the common-law tribunals, by reason of their modes of procedure, and their doctrine that possession is indispensable to a lien upon movables, are wholly inadequate to give relief against ships and vessels afloat upon the high seas and other navigable waters of the earth."

<sup>41</sup> *Johnson v. Chicago & P. Elev. Co.*, 105 Ill. 462, affd. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. 254.

A tort is maritime where the injury is received upon a vessel afloat, though the negligence originated on the land.<sup>42</sup>

§ 1771. **Personal injuries from negligence.**—A lien arises against a vessel for damages occasioned by failure to provide safe machinery for the discharge of her cargo. As a hog-head was being hoisted from the hold of a steamship, a guy-rope belonging to the ship parted, and the fall of the hog-head injured libelant, one of a gang of longshoremen engaged in discharging the cargo. The officers of the ship knew of the insufficiency of the rope. It was held that he should recover damages against the ship.<sup>43</sup>

A person injured by the negligence of the master and owners has a lien upon a foreign vessel for the damages incurred. Thus, one employed in loading a foreign vessel with coal, through the negligence of the master and owners is not closing certain sections of the hatchway, fell through the same and was injured. It was held that a suit in rem might be sustained, and that the libelant had a lien upon the vessel for the damages recovered.<sup>44</sup>

§ 1771a. **Damages resulting in death of person.**—For damages resulting in the death of a person through negligence on the high seas, or on waters navigable from the sea, no suit in admiralty can be maintained in the courts of the United States, in the absence of an act of congress, or a statute of a state, giving the right of action therefor.<sup>45</sup>

§ 1772. **Rank of liens given by state laws.**—Claims maritime in their nature for which a state law gives a lien are of

<sup>42</sup> Leonard v. Decker, 22 Fed. 741; The Plymouth, 3 Wall. (U. S.) 20, 18 L. ed. 25; The Maud Webster, 8 Ben. (U. S.) 547, Fed. Cas. No. 9302.

<sup>43</sup> The Carolina, 30 Fed. 199, affd.

32 Fed. 112; The Rheola, 19 Fed. 926.

<sup>44</sup> The Cristobal Colon, 44 Fed. 803.

<sup>45</sup> The Harrisburg, 119 U. S. 199, 30 L. ed. 385, 7 Sup. Ct. 140; The Wydale, 37 Fed. 716.

equal dignity with liens created by the general admiralty law for similar purposes, and are entitled in distribution to rank with similar claims arising in foreign ports.<sup>46</sup> "I am not able," said Mr. Justice Matthews,<sup>47</sup> "notwithstanding numerous opinions to the contrary in other courts of equal authority, to discover solid ground for the distinction contended for. The claims are in their character, both classes being maritime, alike, and of equal merit. The lien is given by the law, and, although the source of one is the maritime law, and that of the other a local statute, nevertheless they are both so distinctively of a maritime nature that they are exclusively cognizable in the admiralty courts. The statute which gives a lien to secure the claims of the domestic creditor does not recognize any such distinction; and the admiralty rule which authorizes its enforcement in the admiralty courts, provides equally for all suits by material-men for supplies or repairs or other necessities, without any distinction in consequence of their claims arising in a foreign or home port. In both cases the lien is given by the law administered in admiralty courts, and there is no circumstance, it seems to me, that takes from the local law its equal force and effect with that of the general maritime law. It is because the latter, by virtue of its own principles, recognizes the efficacy of the local statute to confer the lien, that courts of admiralty acquire jurisdiction to enforce it at all; in doing so, they are in fact, enforcing the general maritime law, and that law, in adopting and enforcing the lien given by the local law, incorporates it into its own system, and puts it on the same footing as if it had been given by the maritime law originally. It does not add to it any qualifications which render it inferior to the lien given by the mari-

<sup>46</sup> *The Guiding Star*, 18 Fed. 263, 236; *The Rapid Transit*, 11 Fed. affg. 9 Fed. 521; *The General* 322, 331; *The Madrid*, 40 Fed. 677. *Burnside*, 3 Fed. 228; *Goble v. Schooner Delos DeWolf*, 3 Fed. <sup>47</sup> *The Guiding Star*, 18 Fed. 263, affg. 9 Fed. 521.

time law itself to similar claims of no higher degree of merit."<sup>48</sup>

**§ 1773. Rank of maritime liens.**—Maritime liens for supplies in foreign ports and statutory liens for similar supplies in a home port hold the same rank.<sup>49</sup> But a court of admiralty, in enforcing liens under state laws of a maritime character, will do so according to the general rules and practice in admiralty, without reference to any rules laid down by the state courts in constructing the local law.<sup>50</sup> A court of admiralty will sometimes, on the particular facts of a case, disregard the rule of equality of distribution among claimants of the same class, and pay the last furnisher before the first. It will do this as against local liens in the same manner as it does in the case of ordinary maritime liens. The statute will be construed according to the peculiar principles of maritime law.<sup>51</sup>

**§ 1774. Decisions not in accord with rule.**—There are a few decisions, however, which do not follow this rule, but

<sup>48</sup> The classes into which the claims were divided in this case, and their priority in rank, are stated as follows: "1. Seamen's wages. 2. All claims which by the general admiralty law have a lien, as for supplies (including fuel) and repairs in a foreign port. 3. Such claims as are maritime in their nature and subject-matter, for which the state law has given a lien, including supplies, repairs and insurance. \* \* \* 4. Claims for materials and labor in the building of the boat. 5. Mortgage claims. 6. Claims for borrowed money for those purposes to which no liens attach in admiralty." *The Guiding Star*, 9 Fed. 521, 525.

<sup>49</sup> *The Grapeshot*, 22 Fed. 123;

*The Arctic*, 22 Fed. 126; *The Madrid*, 40 Fed. 677; *The Guiding Star*, 18 Fed. 263, affg. 9 Fed. 521; *The General Burnside*, 3 Fed. 228; *The Rapid Transit*, 11 Fed. 322; *The J. W. Tucker*, 20 Fed. 129; *The Amos D. Carver*, 35 Fed. 665; *The Venture*, 26 Fed. 285; *The Wyoming*, 35 Fed. 548; *The Menominee*, 36 Fed. 197; *Clyde v. Steam Transp. Co.*, 36 Fed. 501, 1 L. R. A. 794; *The Battler*, 67 Fed. 251; *German-American Bank of Buffalo v. The Unadilla*, 73 Fed. 350; *The Daisy Day*, 40 Fed. 538. *Contra*: *The General Burnside*, 3 Fed. 228; and *The St. Joseph*, Brown (U. S.) Adm. 202, overruled.

<sup>50</sup> *The Guiding Star*, 18 Fed. 263.

<sup>51</sup> *The Rapid Transit*, 11 Fed. 322, 334.



hold that, as between maritime liens for repairs or supplies furnished in a foreign port and statutory liens for repairs or supplies furnished in a home port, the former have priority.<sup>52</sup> "No instance is found in which such statutory liens have been allowed to displace or supersede liens created by the maritime law. They are but quasi maritime, have uniformly been so considered by the courts, and are recognized and allowed only after all maritime liens proper are paid. The creditors holding them are citizens of the state, and it is permitted to direct the order in which their claims shall be paid. To allow state legislation a greater effect would be to concede the right to alter and change the maritime law of the nation in a most material respect. The right so to change and alter has been most emphatically denied (as in principle it must be), whenever the subject has been mentioned."<sup>53</sup>

This view was regarded as the better opinion in a recent case in which maritime liens were preferred to liens created by a state statute for premiums of insurance.<sup>54</sup> It may be doubted, however, whether a state lien for premiums of insurance should be placed in the same rank as a state lien for domestic supplies. The latter are certainly quasi maritime, but liens for premiums are not even that; for insurance is not a marine contract.<sup>55</sup>

**§ 1775. Nonmaritime liens postponed until maritime liens satisfied.**—As between liens maritime and liens nonmaritime, the latter are postponed until the former are satisfied.<sup>56</sup> Among nonmaritime liens may be mentioned the following: liens for construction, although a statutory lien is given for claims arising thereon by the local law of the port

<sup>52</sup> The *E. A. Barnard*, 2 Fed. 712. And see *The Superior*, 1 Newb. (U. S.) 176.

<sup>53</sup> The *E. A. Barnard*, 2 Fed. 712, per Butler, J.

<sup>54</sup> The *Woodward*, 32 Fed. 639; *The Daisy Day*, 40 Fed. 603.

<sup>55</sup> See § 1698.

<sup>56</sup> The *Guiding Star*, 18 Fed. 263, affg. 9 Fed. 521.

where the vessel was built, including all claims for materials furnished, labor performed, and money advanced in building the vessel;<sup>57</sup> liens arising from mortgages given by the owner;<sup>58</sup> and liens for moneys advanced on the credit of a vessel for general purposes, not maritime, or maritime only in part.

But in distributing a surplus after the payment of all maritime claims, a court of admiralty acts as a court of equity, and will follow the local statute as construed by the state courts. Thus, if the state courts construing a statute of the state give precedence to a construction lien over a mortgage, the court of admiralty will follow the same rule.<sup>59</sup>

**§ 1776. Priority as between different maritime liens.**—As between different maritime liens of the same rank, payment is made according to the equitable priority of the liens themselves.<sup>60</sup>

In a few earlier cases the rule was declared to be, that priority is given to that lien on which the libel is filed and the vessel first arrested, without regard to the dates at which the liens respectively accrued.<sup>61</sup> This rule was based upon a view of maritime liens since discarded, that the lien "is, in reality, only a privilege to arrest the vessel for a debt which, of itself, constitutes no incumbrance on the vessel, and becomes such only by virtue of an actual attachment." Under such a view it is obvious that the party first attach-

<sup>57</sup> *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487.

<sup>58</sup> *The Emily Souder*, 17 Wall. (U. S.) 666, 21 L. ed. 666; *The Guiding Star*, 18 Fed. 263, affg. 9 Fed. 521.

<sup>59</sup> *The Guiding Star*, 18 Fed. 263, affg. 9 Fed. 521.

<sup>60</sup> *The Fanny*, 2 Low. (U. S.) 508; *The J. W. Tucker*, 20 Fed. 129; *The America*, 16 Law Rep. 264, 271; *The E. A. Barnard*, 2

Fed. 712; *The Kate Hinchman*, 6 Biss. (U. S.) 367, Fed. Cas. No. 7620; *The Superior*, 1 Newb. (U. S.) 176; *The General Burnside*, 3 Fed. 228, 236; *The Arcturus*, 18 Fed. 743; *The Frank G. Fowler*, 17 Fed. 653, 21 Blatchf. (U. S.) 410.

<sup>61</sup> *The Triumph*, 2 Blatchf. (U. S.) 433n; *The Globe*, 2 Blatchf. (U. S.) 427, 433.

ing the vessel must necessarily have a prior right; and it is equally obvious that, under the view of the nature of a maritime lien which makes the lien a right of property, mere priority of attachment can give no title to a preference.<sup>62</sup>

**§ 1777. Liens payable in inverse order of their dates.—**

Liens arising from the preservation or improvement of a vessel are to be paid in the inverse order of their dates. An equitable priority as between liens of the same rank often arises out of the character of the liens themselves, or out of the time when they accrued.<sup>63</sup> "A later lien for salvage is entitled to priority over a former salvage, because the last service has preserved the benefit of the former. The same is true of successive repairs of a vessel on different voyages, or on different parts of the same voyage, or of liens on successive bottomry bonds. The later improvements or advances are for the preservation of the former, or for further improvements upon the vessel; and they have, therefore, an equitable priority. As regards such liens, therefore, the rule is that they shall be discharged in the inverse order of their dates."<sup>64</sup>

**§ 1778. Contemporaneous liens paid pro rata.—**Contemporaneous liens, or those that are treated as such, are to be paid pro rata.<sup>65</sup> "If the liens are of the same rank and for supplies, or materials, or services in preparation for the same voyage, or if they arise upon different bottomry bonds

<sup>62</sup> The *J. W. Tucker*, 20 Fed. 129, 132, per Brown, J.; The *Frank G. Fowler*, 17 Fed. 653, 21 Blatchf. (U. S.) 410; The *Arcturus*, 18 Fed. 743; The *Samuel J. Christian*, 16 Fed. 796.

<sup>63</sup> The *Eliza*, 3 Hagg. Adm. 87; The *Bold Buccleugh*, 7 Moore P. C. 267; The *Fanny*, 2 Low. (U. S.) 508, The *Jerusalem*, 2 Gall. (U. S.) 345, Fed. Cas. No. 7294; The *De*

*Smet*, 10 Fed. 483, 489n; The *E. A. Barnard*, 2 Fed. 712; The *J. W. Tucker*, 20 Fed. 129.

<sup>64</sup> The *J. W. Tucker*, 20 Fed. 129, 132, per Brown, J.

<sup>65</sup> The *Exeter*, 1 C. Rob. 173; The *Albion*, 1 Hagg. 333; The *Rapid Transit*, 11 Fed. 322, 334; The *J. W. Tucker*, 20 Fed. 129; The *Paragon*, 1 Ware (U. S.) 322, 325, Fed. Cas. No. 10708.

to different holders for advances at the same time, for the same repairs, such claims are regarded as contemporaneous and concurrent with each other, and they will be discharged *pro rata*.<sup>66</sup>

Among the holders of maritime liens equal in dignity, he is preferred who first institutes proceedings to enforce his claim.<sup>67</sup>

§ 1779. **Pro rata distribution not applied to vessels of northern lakes.**—The rule of *pro rata* distribution is not applied to vessels engaged in the navigation of the northern lakes and rivers. The voyages of such vessels being short and frequent, the rule has been adopted to a considerable extent of making the divisions of claims by the successive open seasons of navigation, rather than by separate voyages; and from this has been adopted the further rule of paying maritime liens for repairs and supplies accruing during the same season *pro rata*, without regard to the particular date or voyage at which they accrued.<sup>68</sup>

<sup>66</sup> *The J. W. Tucker*, 20 Fed. 129, 133, per Brown, J.; *The Dora*, 34 Fed. 343.

<sup>67</sup> *The William Gates*, 48 Fed. 835.

<sup>68</sup> *The Superior*, 1 Newb. (U. S.) 176, 185; *The Kate Hinchman*, 6 Biss. (U. S.) 367, Fed. Cas. No. 7420; *The Athenian*, 3 Fed. 248; *The City of Tawas*, 3 Fed. 170; *The General Burnside*, 3 Fed. 228, 236; *The J. W. Tucker*, 20 Fed. 129, 132, per Brown, J. "While this rule is neither strictly logical nor consistent with the theory of beneficial liens, yet, as applied to short and frequent voyages during the open season of each year, it is not merely convenient in application, but on the whole, as I

think, it works out practical justice better than any other rule suggested. It occupies a middle ground, and is in effect a compromise between the theoretical right of priority of the materialman who furnishes supplies for the last voyage on the one hand, and the corresponding obligation on his part to prosecute at once in order to retain that priority which commercial policy would disallow. The season of navigation is regarded as in the nature of a single voyage; and the rules applicable to a single ocean voyage are applied, as regards liens for supplies, to the navigation of a whole season."

The same considerations of convenience and policy apply in the case of canal-boats and other similar craft which make short and frequent trips, and are laid up during the winter season, and a pro rata rule of distribution should be adopted as respects beneficial liens of the same class.<sup>69</sup> Accordingly, this rule was applied to liens for towage services rendered to a canal-boat upon numerous trips from New York to ports on the Connecticut river and back, during the season from April to November, and no priority was given to the claim under which the vessel was arrested.<sup>70</sup> Claims for ordinary repairs and supplies furnished upon running account to a tug-boat used in harbor navigation, which are nearly contemporaneous and overlap each other, should be paid pro rata in case of a deficiency.<sup>71</sup>

§ 1780. **Liens payable in order of dates at which claims accrue.**—Liens not concurrent, and without any ground of equitable priority, are payable in the order of the dates at which the claims accrued.<sup>72</sup> “If the liens arise from causes which are of no benefit to the ship, such as liens for damages by collision, or other torts, or negligence; and if the claims are such as can not be treated as contemporaneous or concurrent; and if there are no equitable grounds for preferring the later liens, such as laches in the enforcement of prior ones, or other grounds of general policy,—then, as stated by Story, J., in the case of *The Jerusalem*,<sup>73</sup> ‘the rule would seem to apply, *qui prior est tempore, potior est jure*,’ and the liens should be satisfied in the order in which they accrue.”<sup>74</sup>

<sup>69</sup> *The J. W. Tucker*, 20 Fed. 129, 132, per Brown, J.

<sup>70</sup> *The J. W. Tucker*, 20 Fed. 129.

<sup>71</sup> *The Grapeshot*, 22 Fed. 123; *The Arctic*, 22 Fed. 126; *The J. W. Tucker*, 20 Fed. 129, 134; *The G. F. Brown*, 24 Fed. 399.

<sup>72</sup> *The J. W. Tucker*, 20 Fed. 129.

<sup>73</sup> 2 Gall. 345, 350, Fed. Cas. No. 7294.

<sup>74</sup> *The J. W. Tucker*, 20 Fed. 129, per Brown, J.

§ 1781. **Prior lien for supplies preferred over subsequent lien for damages.**—A prior lien for supplies is entitled to preference over a subsequent lien for damages arising on the same voyage, considered as a mere question of rank and independently of the equitable marshaling of securities.<sup>75</sup> “The general maritime law adjusts all liens by the voyage. By this law, as applied everywhere and without exception since the ordinance of Louis XIV, more than two centuries ago, supply liens have been held to be superior in rank to liens for damage to cargo on the same voyage, wherever such liens have been recognized at all. By similitude they are therefore superior to towage damage.”<sup>76</sup> In a case decided in the district of New Jersey, it was held that a damage lien arising *ex delicto* and not *ex contractu* takes precedence of prior liens for repairs and supplies.<sup>77</sup> But as a general rule of preference, this is stoutly disputed. “A lien being, while it lasts,” says Brown, J., in a recent case,<sup>78</sup> “in the nature of a proprietary right—a *jus in re*—should not be impaired, or postponed to subsequent rights, except upon some laches of the lienor, or upon some clear and undoubted equity in favor of the later claimant. Such an equity clearly arises from subsequent services or expenditures that operate for the protection of the prior interests. This principle, and the obligations of diligence in enforcing liens after a reasonable period, lie at the basis of nearly all the discriminations in the ranking of liens. But a subsequent damage lien is of no benefit to prior interests. \* \* \* The maritime law, as embodied in the codes of the principal maritime nations

<sup>75</sup> *The Young America*, 30 Fed. 789, 794; *The Grapeshot*, 22 Fed. 123; *The Samuel J. Christian*, 16 Fed. 796; *The Orient*, 10 Ben. (U. S.) 620, Fed. Cas. No. 10569; *The Augustine Kolbe*, 39 Fed. 539.

<sup>76</sup> *The Gratitude*, 42 Fed. 299, 300, per Brown, J.

<sup>77</sup> *The M. Vandercook*, 24 Fed.

472, followed in *The Daisy Day*, 40 Fed. 538. This case is fully examined by Brown, J., in *The Young America*, 30 Fed. 789, 794, and declared erroneous. See also, *The Liberty*, No. 4, 7 Fed. 226.

<sup>78</sup> *The Young America*, 30 Fed. 789, 797, per Brown, J.

from the marine ordinance of Louis XIV. downward, not only gives no support to the doctrine that damage liens are entitled to a priority over liens *ex contractu*, but affords abundant evidence to the contrary. In the ordinance of 1681, the damage claims of merchant freighters were ranged in the last rank, below the liens of seamen or material-men that accrued during the voyage or prior to departure. Express mention of damage from collision is found in comparatively few of the modern codes; but wherever found, it is placed last in the whole order of privileges. It is so in the code of Germany,<sup>79</sup> \* \* \* in the Belgian law of August 24, 1879,<sup>80</sup> \* \* \* and in the Norwegian code.<sup>81</sup> \* \* \* The new Italian code<sup>82</sup> \* \* \* makes the demand a charge on the ship, but apparently after all other privileges. \* \* \* In the French Project de 1867, specific provision was made for damage interests arising from collision, and they were placed last; namely, in the fifteenth rank. The justice of this low rank of collision claims, as a general rule, seems to me obvious; since injury from collision by the faults of other vessels is one of the ordinary risks of navigation. As such, it is insurable, and is usually covered by insurance. \* \* \* For these reasons I should hesitate long, in a case not presenting any additional grounds for the equitable marshaling of remedies, before according any preference to a collision lien over a lien for bottomry, or for necessary supplies, which hold the same rank as bottomry."

**§ 1781a. Decree for damages in collision case overriding all prior liens.**—But contrary to this view the authorities generally hold that a decree for damages in a case of collision overrides all prior claims, such as liens for repairs and supplies, including even liens for seamen's wages, and a

<sup>79</sup> Arts. 757, 772.

<sup>80</sup> Art. 4, § 17.

<sup>81</sup> Arts. 79, 101.

<sup>82</sup> §§ 661, 675.

bottomry bond made on the same voyage.<sup>83</sup> It has precedence over the lien of the crew of the offending vessel for wages earned by them on board such vessel before the colli-

<sup>83</sup> English authorities: *The Chimera*, Coote, Adm. 138, 142; *The Aline*, 1 W. Rob. 111; *The Linda Flor*, Swab. 309; *The Elin*, 8 Prob. Div. 39, affirmed on appeal, 8 Prob. Div. 129. American: *Henry* Adm. 199; *The Spaulding*, 1 Brown Adm. 310; *The Pride of the Ocean*, 3 Fed. 162, 7 Fed. 247; *The John G. Stevens*, 40 Fed. 331; *The Leonard Richards*, 41 Fed. 818; *The Maria and Elizabeth*, 12 Fed. 627; *The M. Vandercook*, 24 Fed. 472; *The R. S. Carter*, 38 Fed. 515, affd. 40 Fed. 331; *Norwich Co. v. Wright*, 13 Wall. (U. S.) 104, 122, 20 L. ed. 585; *The F. H. Stanwood*, 49 Fed. 577, 1 C. C. A. 379, where the above cases are cited; and also the following cases to the contrary, with one exception arising in the Federal districts of New York: *The America*, 16 Law Rep. (1853) 264; *The Orient*, 10 Ben. (U. S.) 620, Fed. Cas. No. 10569; *The Samuel J. Christian*, 16 Fed. 796; *The Grape-shot*, 22 Fed. 123; *The Young America*, 30 Fed. 789; *The Amos D. Carver*, 35 Fed. 665; *The Daisy Day*, 40 Fed. 538; *The Gratitude*, 42 Fed. 299. Judge Jenkins, reviewing these decisions in *The F. H. Stanwood*, 49 Fed. 577, 1 C. C. A. 379, says: "With the exception of *The Orient* and *The Carver*, these were cases of damage arising from negligent towage, and the decisions are, with the exception of *The Daisy Day*, predicated upon the express ground that they are

claims arising ex contractu, for violation of the contract to tow safely, and present quasi torts in distinction from cases of pure torts. It may well be doubted whether, in the light of the cases of *The Quickstep*, 9 Wall. (U. S.) 665, 19 L. ed. 767, and *Norwich Co. v. Wright*, 13 Wall. (U. S.) 104, 20 L. ed. 585, the distinction can be upheld. Judge Severens, in *The Daisy Day*, expressly repudiates the distinction, and holds that claims in damage outrank claims arising ex contractu; but follows the doctrine of *The Orient* and *The Samuel J. Christian*, so far as to prefer seamen's wages to claims 'for such torts as negligence in towage, provided the seaman whose claim is in question was free from fault.' With respect to the cases in the district of New York,—or so far, at least, as respects cases of pure torts,—they are expressly overruled by Mr. Justice Blatchford in *The R. S. Carter*, 40 Fed. 331. Notwithstanding the ability manifested in the discussion of the question in those cases, they are shorn of their power by the later and controlling holding of superior authority. \* \* \* In *The Gratitude*, Judge Brown, who had held negatively on the priority of liens for damages by collision, recognizes the binding authority of Mr. Justice Blatchford's decision, but seeks to distinguish between cases of damage done in invitum to an



sion, but is subordinate to the lien for such wages earned after the collision. This rule that prior wages are postponed to the payment of the damages by collision is rested upon two grounds:<sup>83a</sup> "First, that the seamen share in the fault of the offending vessel, and from considerations of public policy to discourage negligent navigation; second, that it would be inequitable to permit a fund impounded to compensate a wrong to be diverted to the payment of a participant in that wrong, or to one having a remedy against the owner of the offending vessel denied to the owner of the injured vessel." Judge Jenkins, stating these grounds in the case of *The Stanwood*, adds: "We think it opposed to every principle of natural justice to permit one or more of an offending crew to hold priority over a claim for damages caused, directly or indirectly, by their act, and in the course of a common employment. That would be to reward guilt at the expense of innocence, and to tender premium to negligence. Careful navigation is essential to safety. It should be the constant care of courts of admiralty that no license be given to conduct prejudicial to life or property; that no safeguard to prudent navigation be removed; that no immunity be offered to negligent conduct."

Damages for a collision override the lien of a bottomry bond, for the reason "that a lender of money upon bottomry is a voluntary creditor, who, for the advantage to be derived therefrom, and with knowledge of the risks attending the voyage, deliberately enters into a contract with the ship, and, moreover, is permitted to obtain compensation for the risk assumed by exacting a maritime premium, while the relation to the ship of him whose demand arises out of a collision is involuntary. It is created by circumstances over

independent vessel and damage by negligence under a voluntary contract of towage. As suggested above, the distinction may not be sustainable." *The John G. Stev-*

*ens*, 170 U. S. 113, 42 L. ed. 969, 18 S. Ct. 544.

<sup>83a</sup> *The Stanwood*, 49 Fed. 577, 1 C. C. A. 379.

which the creditor in damage has no control, and he can receive no compensation for the risk.”<sup>84</sup>

§ 1782. **Lien for damages against tug-boat.**—A lien against a tug-boat for damages done the vessel in tow charges the tug-boat as she was at the time the lien attached; that is, subject to the liens already upon the boat for provisions, supplies and repairs. Therefore a rest should be made in all running accounts against the boat for supplies at the date when the damage lien accrued; and the supply claims up to that date should be paid in full, as against the damage claim, but without preference among themselves. The surplus should then be applied upon the damage claim so far as necessary; and any surplus still remaining should be applied to claims arising after the damage claim.<sup>85</sup>

§ 1783. **Claims for damages by different lienors on account of collisions.**—In the case of different lienors for damages by collisions on successive voyages, the first lienor is entitled to preference if he is not chargeable with laches, and has done nothing to waive his lien. The last lien in such case stands in no relation of benefit to the first lien, and there is nothing in the mere fact of the second tort to postpone the lien arising out of the first.<sup>86</sup>

§ 1784. **Priority of lien for necessary repairs over prior lien for damages for breach of contract.**—A prior lien for damages for a breach of contract may have priority of a lien for necessary repairs. Where a vessel had been chartered to carry a cargo of wheat, but commenced to leak before the voyage was commenced, so that her cargo had to be discharged, it was held that the claim of the carpenter who re-

<sup>84</sup> *The Pride of the Ocean*, 3 Fed. 162, 167, per Benedict, J.

<sup>85</sup> *The Grapeshot*, 22 Fed. 123; *The Frank G. Fowler*, 17 Fed. 653;

*The Samuel J. Christian*, 16 Fed. 796.

<sup>86</sup> *The Frank G. Fowler*, 17 Fed. 653, 21 Blatchf. (U. S.) 410, revg. 8 Fed. 331.

caulked and coppered the vessel after the cargo was removed must be deferred till the charterer's claim for damages for breach of the contract should be satisfied, because the lien for repairs attached after the lien for damages, and the repairs were not made in any respect for the benefit of the prior lienor.<sup>87</sup>

**§ 1785. Material-men's liens superior to government's claims of forfeiture.**—The liens of material-men for supplies are preferred to the claim of the government for a forfeiture if the material-men were innocent of all participation in the illegal use of the vessel, and innocent of all knowledge of such use.<sup>88</sup>

**§ 1786. Lien for seamen's wages favored in admiralty.**—The lien for seamen's wages is one highly favored in the admiralty. It is preferred to liens arising under bottomry bonds.<sup>89</sup> It is superior to a lien for damages from such torts as negligence in towage, provided it does not appear that the seaman contributed to such negligence.<sup>90</sup> Seamen's wages are entitled to priority of lien upon remnants saved from a foundering vessel. Thus, the captain and crew of a vessel saved the yawl-boat, compass, barometer, clock, and marine glasses, and left the vessel in a foundering condition in a storm. These articles were sold, and the creditors of the vessel entered into an agreement to apply the proceeds pro rata upon their respective claims. The sailors did not sign the agreement. It was held that they had a lien upon the

<sup>87</sup> *The Director*, 34 Fed. 57, 17 Sawy. (U. S.) 172.

<sup>88</sup> *The St. Jago de Cuba*, 9 Wheat. (U. S.) 409, 6 L. ed. 122; *North American Commercial Co. v. United States*, 81 Fed. 748, 26 C. C. A. 591. See also, *United States v. The Haytian Republic*, 65 Fed. 120.

<sup>89</sup> *The Dora*, 34 Fed. 348; *The Charles Carter*, 4 Cranch (U. S.) 328, 2 L. ed. 636; *The Virgin*, 8 Pet. (U. S.) 538, 553, 8 L. ed. 1036.

<sup>90</sup> *The Daisy Day*, 40 Fed. 538; *The Orient*, 10 Ben. (U. S.) 620; *The Samuel J. Christian*, 10 Fed. 796. See ante, § 1781a.

proceeds of the articles sold, the same as they would have had against the vessel, for the full amount of their wages.<sup>91</sup>

**§ 1787. Priority of salvage lien over liens for repairs and materials.**—A lien for salvage services has priority of rank over claims for repairs and materials.<sup>92</sup> Such lien is superior to a state statutory lien for supplies subsequently furnished in the home port.<sup>93</sup> It has priority, too, over wages earned prior to the salvage service. This is upon the equitable consideration that the subsequent service has preserved the subject of the lien.<sup>94</sup> But liens for wages earned on a voyage subsequent to that on which the salvage services were rendered have priority.<sup>95</sup>

**§ 1788. Rank of liens for towage.**—Liens for towage services generally hold the same rank as claims for necessary materials and supplies.<sup>96</sup> Towage claims are entitled to priority over a mortgage and over home-port supply claims, but are inferior in rank to seamen's wages.<sup>97</sup> They take precedence also of bottomry bonds executed previously to the rendering of the towage services.<sup>98</sup>

**§ 1789. Lien of owner not allowed to prejudice other liens.**—Liens of an owner or part owner should not be allowed to the prejudice of other lienholders. The president of an incorporated company owning the vessel, being a

<sup>91</sup> *Hart v. Proceeds of The Oakland*, 32 Fed. 234; *Saylor v. Taylor*, 77 Fed. 476, 23 C. C. A. 343.

<sup>92</sup> *The M. Vandercook*, 24 Fed. 472; *Merrill v. Fisher*, 204 Mass. 600, 91 N. E. 132, 134 Am. St. 706.

<sup>93</sup> *The Lillie Laurie*, 50 Fed. 219.

<sup>94</sup> *The Selina*, 2 Notes Cas. Adm. & Ecc. 18; *The Athenian*, 3 Fed. 248; *The Stanwood*, 49 Fed. 577, 1 C. C. A. 379, per Jenkins, J.

<sup>95</sup> *The Lillie Laurie*, 50 Fed. 219; *The Paragon*, 1 Ware (U. S.) 322,

326, Fed. Cas. No. 10708; *Surplus of the Ship Trimountain*, 5 Ben. (U. S.) 246, Fed. Cas. No. 14175; *The Hope*, 1 Asp. 563; *Porter v. The Sea Witch*, 3 Wood (U. S.) 75, Fed. Cas. No. 11289.

<sup>96</sup> *The St. Lawrence*, L. R. 5 Prob. D. 250; *The City of Tawas*, 3 Fed. 170; *The Athenian*, 3 Fed. 248; *The J. W. Tucker*, 20 Fed. 129, 135.

<sup>97</sup> *The Mystic*, 30 Fed. 73.

<sup>98</sup> *The St. Lawrence*, L. R. 5 Prob. D. 250.

shareholder in the company, occupies the position of a part owner in this respect, and should not be allowed a lien to the prejudice of an outside lienholder.<sup>99</sup> Neither should the master of a ship be allowed a lien upon her earnings as a general creditor.<sup>1</sup>

**§ 1790. Law of place of contract and of forum.**—As respects liens arising from contracts made by the master within our own jurisdiction, and the priorities of such liens in respect to all the claims of the ship, our own law, as the law of the place of the contract as well as of the forum, should prevail.<sup>2</sup>

The maritime law of the place of the transaction determines whether there is a lien or not, not the law of the vessel's flag. Thus, by our maritime law, material men have liens for necessities furnished to a foreign ship. Though the English law gives no such lien, this does not affect the application of our general maritime law to British vessels in our ports, nor abridge the authority of British masters to obtain necessary supplies by simple contract in our ports, nor prevent such lien from attaching. Supplymen in New York, who there furnish necessities to a British ship, on the master's order and on the credit of the ship, have maritime liens therefor which take precedence of prior mortgages.<sup>3</sup>

**§ 1791. Comity in enforcing liens.**—By comity, in enforcing liens against a foreign vessel, the law of the country to which it belongs should be observed, in respect to the claims of those on board, as among themselves,<sup>4</sup> and in re-

<sup>99</sup> *The Queen of St. Johns*, 31 Fed. 24.

<sup>1</sup> *Shaw v. Gookin*, 7 N. H. 16.

<sup>2</sup> *The Olga*, 32 Fed. 329, per Brown, J.; *The Scotia*, 35 Fed. 907.

<sup>3</sup> *The Scotia*, 35 Fed. 907.

<sup>4</sup> *The Olga*, 32 Fed. 329; *The*

*Brantford City*, 29 Fed. 373, 384; *The Havana*, 1 Spr. (U. S.) 402, Fed. Cas. No. 6226; *The Pawashick*, 2 Low. (U. S.) 142, Fed. Cas. No. 10851. *The Angela Maria*, 35 Fed. 430.

spect to claims for supplies and for services furnished in our own ports.<sup>5</sup> Thus, where seamen shipped in Japan upon a Dutch vessel for a voyage to New York and back, and the voyage was broken up by a sale of the vessel in New York, it was held that the liens of the master and seamen were regulated by the code of the Netherlands, and that they were entitled to priority out of the proceeds of the ship for the payment of their wages over liens for supplies and stevedore's services furnished in New York.<sup>6</sup>

If a foreign vessel is subject to a lien for materials furnished for her construction or for advances, upon her arrest and sale under admiralty process issuing from an American court, it is the duty of the court to administer and apply, as against the vessel of her proceeds, the foreign law exactly as it would be applied if the vessel were in a court of her home country, although the lien be for things for which our law would create no lien.<sup>7</sup>

§ 1792. **Classification of liens.**—A classification of liens against an Italian vessel which was sold to satisfy the liens was made as follows:<sup>8</sup> 1. The taxed costs of the libellant; 2. The port dues, as established by law; 3. The claims of the pilots for pilotage; also towage, if taken necessarily and as part of a pilotage service, but not otherwise;<sup>9</sup> 4. Claims for necessary provisions furnished for the support of the crew since the vessel's arrival in port, and up to the completion of the voyage and the discharge of the cargo; 5. Wages of seamen; as the fund is more than sufficient for the above claims, they will be paid in full; 6. In concurrence with each other, to be paid ratably, since the residue of the proceeds will be insufficient to pay all bills for towage into port other than above stated, stevedore's expenses of unloading cargo after applying the freight thereupon, which in this case is

<sup>5</sup> *The Velox*, 21 Fed. 479; *The Angela Maria*, 35 Fed. 430.

<sup>6</sup> *The Velox*, 21 Fed. 479.

<sup>7</sup> *The Maud Carter*, 29 Fed. 156.

<sup>8</sup> *The Olga*, 32 Fed. 329.

<sup>9</sup> *The Mystic*, 30 Fed. 73.

nothing, and other liens necessarily contracted by the vessel since her arrival in port in completion of her obligations on the last voyage; 7. The bottomry and supply claims before the arrival of the vessel, in the inverse order of their several dates, the claims being independent, and not concurrent; 8. The master's lien for wages is recognized, as given by the Italian law; but it must be postponed, in case of a deficiency, to those liens which the master has himself contracted, and upon which he is personally responsible. As between him and the lienors to whom he is answerable, he can not be allowed to withdraw the fund from the registry to their prejudice.<sup>10</sup> The bills being more than sufficient to absorb the residue, there will be nothing left for the master.

§ 1793. **Mortgagor in possession may confer right of lien.**—A mortgagor of a vessel left in possession and control for use has an implied authority to confer a right of lien for necessary repairs and supplies which will bind the mortgagee, though the repairs be made or the supplies furnished without his actual knowledge, or express consent.<sup>11</sup> *Williams v. Allsup*<sup>12</sup> is a leading case on this subject. There a shipwright detained a vessel for his charges for necessary repairs, made by the mortgagor's direction, without the knowledge of the mortgagee, and the shipwright's lien was sustained, against the claim of the mortgagee. The reasoning of the judges leading to this result was as follows: "I put my decision," said Erle, C. J., "on the ground that, the mortgagee having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of

<sup>10</sup> *The Selah*, 4 Sawy. (U. S.) 40, Fed. Cas. No. 12636; *The Velox*, 21 Fed. 479; *The Felice B.*, 40 Fed. 653; *The Angela Maria*, 35 Fed. 430.

<sup>11</sup> *The Live Oak*, 30 Fed. 78; *The Isaac May*, 21 Fed. 687; *The Charlotte Vanderbilt*, 19 Fed. 219; *The Granite State*, 1 Spr. (U. S.)

277, Fed. Cas. No. 5687; *The May Queen*, 1 Spr. (U. S.) 588, Fed. Cas. No. 9360; *The Lulu*, 10 Wall. (U. S.) 192, 19 L. ed. 906. It is immaterial that the mortgage was duly recorded before the lien for supplies attached. *The Charlotte Vanderbilt*, 19 Fed. 219.

<sup>12</sup> 10 C. B. (N. S.) 417. The lien

earning wherewithal to pay off the mortgage debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose." Willes, J., said: "By the permission of the mortgagees the mortgagor has the use of the vessel. He has, therefore, a right to use her in the way in which vessels are ordinarily used. Upon the facts which appear in this case, this vessel could not be so used unless these repairs had been done to her. The state of things, therefore, seems to involve the right of the mortgagor to get the vessel repaired,—not on the credit of the mortgagees, but upon the ordinary terms, subject to the shipwright's lien. It seems to me that the case is the same as if the mortgagees had been present when the order for the repairs was given." Byles, J., said: "As it is obvious that every ship will from time to time require repairs, it seems but reasonable under circumstances like these, to infer that the mortgagor had authority from the mortgagees to cause such repairs as should become necessary to be done upon the usual and ordinary terms. Now, what are the usual and ordinary terms? Why, that the person by whom the repairs are ordered should alone be liable personally, but that the shipwright should have a lien upon the ship for the work and labor he has expended on her. Nor are the mortgagees at all prejudicially affected thereby. They have a property augmented in value by the amount of repairs."

§ 1793a. **Mortgage not a maritime contract.**<sup>13</sup>—A lien for a maritime contract has priority.<sup>14</sup> A mortgage to secure the

in this case was a common-law lien. Whether such a lien is enforced at common law or in the admiralty, the lien supported by possession will prevail over the right of a mortgagee out of possession. *Scott v. Delahunt*, 65 N. Y. 128, affg. 5 Lans. (N. Y.) 372; *Loss v. Fry*, 1 Robt. (N. Y.) 7.

<sup>13</sup> *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654; *The Madrid*, 40 Fed. 677; *Bogart v. The John Jay*, 17 How. (U. S.) 399, Fed. Cas. No. 1597.

<sup>14</sup> *Baldwin v. The Bradish Johnson*, 3 Woods (U. S.) 582, Fed. Cas. No. 798; *The Lillie Laurie*, 50 Fed. 219.



purchase-money of a vessel is not a maritime contract, and does not import a maritime lien. The mortgagee can not bring a libel in admiralty on the mortgage and subject the vessel to the payment of his claim by process in rem. The statute of the United States<sup>15</sup> requires registration of the mortgages and other conveyances, merely as affecting their validity as against the grantors or other persons having actual notice thereof, but leaves all questions as to the priority of the incumbrances as they were before. "The mortgage is but a conveyance of the title of the grantor, and can pass only what at the time he had, subject to every lien that had already become vested. More than this, the mortgagee is owner, and the vessel continues liable to become subject, while his title subsists, to whatever liens by subsequent transactions the law imposes, precisely as though there had been no change of title or ownership. The mortgagee, as creditor, has no higher rank than any other alienee."<sup>16</sup>

But a lien secured under the provisions of a state statute is subordinate to a claim secured by a prior mortgage on the vessel,<sup>17</sup> unless the mortgage was given to secure an antecedent debt, in which case, in New York and some other states, the mortgagee is not in the situation of a bona fide purchaser, and has no equity superior to a material-man who has a lien for necessary supplies furnished on the credit of the vessel.<sup>18</sup> "The rule as to priority is not the same in courts of admiralty as in courts of common law and equity. In the latter courts the rule of priority of liens is expressed by the maxim, *qui prior est tempore potior est jure*. But in admiralty the reverse of this rule is more often true than otherwise. There the rule is, that those things which in the highest degree contribute to the safety and preservation of

<sup>15</sup> Rev. Stats., § 4192.

<sup>17</sup> The D. B. Steelman, 48 Fed.

<sup>16</sup> The Guiding Star, 18 Fed. 580.  
263, 269, per Matthews, J.

<sup>18</sup> The James T. Easton, 49 Fed.  
656. See post, § 1794.

the vessel—the thing which is the subject of all the liens—form the basis of the lien entitled to priority.”<sup>19</sup>

§ 1794. **Liens for supplies in foreign ports superior to prior mortgages.**—Liens for advances and supplies in foreign ports take precedence of prior mortgages to home creditors.<sup>20</sup> As between a lien under a state statute for home supplies and a mortgage, the lien for supplies take precedence,<sup>21</sup> though the mortgage lien first attached, and had been recorded before the supplies were furnished. A mortgage is not an admiralty contract, and must be postponed to maritime liens, and to liens which are treated by the general admiralty law as of equal dignity.<sup>22</sup> The prevailing rule is, that liens given to material-men by state statutes, for supplies furnished a vessel at her home port, are of equal rank with strictly maritime liens, and therefore take precedence over mortgages of the vessel.<sup>23</sup> In some cases, however, it has been held that, as between a lien under a state statute for materials and supplies furnished in a home port and a mortgage lien, the lien that first attached has priority.<sup>24</sup>

A surplus remaining after the payment of maritime-lien

<sup>19</sup> The Madrid, 40 Fed. 677, per Mr. Justice Lamar.

<sup>20</sup> The Emily Souder, 17 Wall. (U. S.) 666, 21 L. ed. 684.

<sup>21</sup> The Guiding Star, 9 Fed. 521; The Granite State, 1 Spr. (U. S.) 277, Fed. Cas. No. 5687; The William T. Graves, 8 Ben. (U. S.) 568, Fed. Cas. No. 17758; The Favorite, 3 Sawy. (U. S.) 405, Fed. Cas. No. 4699; The St. Joseph, Brown Adm. (U. S.) 202; The Kiersage, 2 Curt. (U. S.) 421, Fed. Cas. No. 7761; The Madrid, 40 Fed. 677; The John Farron, 14 Blatchf. (U. S.) 24, Fed. Cas. No. 7341; The Kingston, 23 Fed. 200; The Venture, 26 Fed. 285; The General

Burnside, 3 Fed. 228; Clyde v. Steam Transp. Co., 36 Fed. 501.

<sup>22</sup> Bogart v. The John Jay, 17 How. (U. S.) 399, Fed. Cas. No. 1597; The Emily Souder, 17 Wall. (U. S.) 666, 21 L. ed. 684.

<sup>23</sup> The Madrid, 40 Fed. 677.

<sup>24</sup> The Josephine Spangler, 9 Fed. 773; The De Smet, 10 Fed. 483; The Grace Greenwood, 2 Biss. (U. S.) 131, Fed. Cas. No. 5652; The Kate Hinchman, 6 Biss. (U. S.) 367, Fed. Cas. No. 7620; The John T. Moore, 3 Woods (U. S.) 61, Fed. Cas. No. 7430, affd. 100 U. S. 145, 25 L. ed. 590; Baldwin v. The Bradish Johnson, 3 Woods (U. S.) 582, Fed. Cas. No. 798.

claims can not be awarded to a general creditor who has no lien as against a mortgagee.<sup>25</sup>

§ 1795. **Mortgage lien postponed to construction lien.**—A mortgage is postponed to a construction lien given by a state statute.<sup>26</sup> This is certainly the case where the contracts for labor and material were made before the mortgage was recorded,<sup>27</sup> or the liens for materials and labor existed when the mortgage was given.<sup>28</sup>

§ 1796. **Rank of bottomry bond.**—A bottomry bond outranks all ordinary liens save those of mariners for their wages, and the liens mentioned below. A bottomry bond is a maritime contract by which a ship is hypothecated in security for money borrowed for the purposes of her voyage, under the condition that, if the ship arrive at the port of her destination, the borrower, personally, as well as the ship, shall be liable for the repayment of the loan, together with such premium thereon as may have been agreed on, but that, if the ship be lost, the lender shall have no claim against the borrower, either for the sum advanced or the premium.<sup>29</sup> Where, from the whole instrument it was manifest that the lender takes upon himself the peril of the voyage, the instrument is one of bottomry. Lord Stowell held that, when the instrument simply provided that "the money was to be paid

<sup>25</sup> The Wyoming, 37 Fed. 543.

<sup>26</sup> The Guiding Star, 9 Fed. 521; Jones v. Keen, 115 Mass. 170; Donnell v. The Starlight, 103 Mass. 227.

<sup>27</sup> Jones v. Keen, 115 Mass. 170. But in Underwriters' Wrecking Co. v. The Katie, 3 Woods (U. S.) 182, Fed. Cas. No. 14342, it was held that a lien given by the local law of Kentucky upon a steamboat, for work and materials furnished in that state for her construction, will be postponed by a

United States court sitting in Louisiana, to a subsequent mortgage, duly recorded according to the act of congress in New Orleans, where she was registered and enrolled, and which was her home port at the date of the mortgage and of its registration.

<sup>28</sup> Provost v. Wilcox, 17 Ohio 359.

<sup>29</sup> The Dora, 34 Fed. 343, per Billings, J.; The Launberga, 154 Fed. 959.

at a certain time after the arrival of the ship at her port," that was a sufficient description of a sea risk, and made the instrument one of bottomry.<sup>30</sup> A bottomry bond takes precedence of maritime liens for supplies and repairs,<sup>31</sup> except when it appears that the demands on which these liens are founded consist of actual repairs subsequently put upon the vessel, and which tended to increase her value, or when delay in enforcing the bottomry bond has tended to induce the material-man to make the repairs.<sup>32</sup> But a claim for damages caused by a collision occurring during the voyage is entitled to priority over a bottomry loan made upon the same voyage prior to the happening of the collision.<sup>33</sup>

The lien of a ship's agent in a foreign port, for advances made in payment of her part of a general average arising out of a jettison of part of the cargo, should be paid before a bottomry bond.<sup>34</sup>

**§ 1797. No lien while vessel in court's custody.**—No liens in a strict sense can arise against a vessel while it is in the custody of the court, though claims arising against the vessel may be paid out of the proceeds of sale.<sup>35</sup> This rule is for the protection of a party's rights during the litigation.<sup>36</sup> But the parties interested may waive the benefits of the rule; and they do this when by their direction the arrest of the vessel is formal only, actual possession not being taken by the marshal, and the vessel is allowed to pursue her ordinary business without interruption. In such case the vessel may incur maritime obligations, in contract or in tort, to third persons having no notice of her arrest.<sup>37</sup>

<sup>30</sup> *The Nelson*, 1 Hagg. Adm. 169. Also, *The Dora*, 34 Fed. 343.

<sup>31</sup> *The Thomas Fletcher*, 24 Fed. 375.

<sup>32</sup> *The Felice B.*, 40 Fed. 653.

<sup>33</sup> *Force v. The Pride of the Ocean*, 3 Fed. 162.

<sup>34</sup> *The Dora*, 34 Fed. 343.

<sup>35</sup> *The Phebe*, 1 Ware (U. S.)

354, 360, Fed. Cas. No. 11065; *The Grapeshot*, 22 Fed. 123; *Merritt v. Merchandise*, 30 Fed. 195, *affd.* 32 Fed. 111; *The San Jacinto*, 30 Fed. 266.

<sup>36</sup> *The Witch Queen*, 3 Sawy. (U. S.) 17, Fed. Cas. No. 17915.

<sup>37</sup> *The Young America*, 30 Fed. 789.

§ 1797a. **Partial payments.**—When advances are made and lumber furnished to a vessel at various times during a period of about two months, but all during one stay in port, and as part of one transaction, and the account embraces some items which have the force of maritime liens, and others which do not, a cash payment will be applied in discharge of the latter, and the lien of the former will be preserved.<sup>38</sup>

§ 1798. **Lien security carried with assignment of debt.**—The assignment of a debt secured by a maritime lien carries with it the lien security where the parties so intend; and if the assignment be absolute, the assignee should proceed in the admiralty in his own name.<sup>39</sup> In some earlier cases it was doubted whether the lien could pass by a transfer of the claim. A seaman's lien for wages in particular was regarded as personal, and not assignable without the assent of the court.<sup>40</sup> If the assignment be for a part of the debt only, the action may be maintained by the assignor for the benefit of himself and the assignee.<sup>41</sup>

The assignee of a draft given by the owner of a vessel for the amount of a lien claim against her, which in terms recognizes and confirms the lien, may enforce the lien.<sup>42</sup>

<sup>38</sup> The *D. B. Steelman*, 48 Fed. 580.

<sup>39</sup> The *Sarah J. Weed*, 2 Low. (U. S.) 555, Fed. Cas. No. 12350; The *M. Vandercook*, 24 Fed. 472; The *Liberty* No. 4, 7 Fed. 226, 231; The *American Eagle*, 19 Fed. 379; The *Pride of America*, 19 Fed. 607; The *Boston*, Blatchf. & H. (U. S.) 309, Fed. Cas. No. 1669; *Cobb v. Howard*, 3 Blatchf. (U. S.) 524, Fed. Cas. No. 2924; *Swett v. Black*, 1 Spr. (U. S.) 574, Fed. Cas. No. 6859; The *Hull of a New Ship*, 2 Ware (U. S.) 203, Fed. Cas. No. 13690; The *B. F. Woolsey*, 7 Fed. 108, 116; The *Two Marys*, 10 Fed. 919; *Nash v. Mosher*, 19

Wend. (N. Y.) 431; The *General Jackson*, 1 Spr. (U. S.) 554, Fed. Cas. No. 5314; The *Panama*, Olcott (U. S.) 343, Fed. Cas. No. 10703; *Park v. The Edgar Baxter*, 37 Fed. 219; The *Victorian* No. 2, 26 Ore. 194, 41 Pac. 1103, 46 Am. St. 616. So under statute of Indiana. *Sinton v. Steamboat Roberts*, 46 Ind. 476.

<sup>40</sup> The *A. D. Patchin*, 12 Law Rep. 21. See The *Sarah J. Weed*, 2 Low. (U. S.) 555, Fed. Cas. No. 12350, where the cases are fully examined by Lowell, J.

<sup>41</sup> *Fretz v. Bull*, 12 How. (U. S.) 466, 13 L. ed. 1068.

<sup>42</sup> The *Pride of America*, 19

§ 1799. **Maritime lien not lost by sale of vessel.**—A maritime lien being a right of property, it is not lost by a sale of the vessel if the lien be enforced with due diligence. The lien follows the property, and may be enforced against a bona fide purchaser.<sup>43</sup> But as against such a purchaser, the lien can not be enforced after a reasonable opportunity has been afforded for its enforcement and no lien has been filed.<sup>44</sup> It is only where no reasonable opportunity has existed to enforce the lien, through the absence of the vessel or of the lienholder, or other sufficient cause, or the purchaser has notice of the lien, or has such notice that he is put upon inquiry, that a lien is upheld against subsequent purchasers or incumbrancers after any considerable delay.<sup>45</sup> Where a lienholder delayed nearly two years before taking proceedings to enforce his lien, and in the meantime the vessel had been sold, but the purchaser had information sufficient, before or at the time of his purchase, to put him on inquiry as to any liens that might exist against the vessel, the fact that the proceedings were not instituted against the vessel till after the purchase was held not to operate as a waiver of the lien.<sup>46</sup> As against an intervening mortgagee in one case,<sup>47</sup> and as against the intervening purchaser in another,<sup>48</sup> a libel was dismissed after a delay of two years. Under similar

Fed. 607; *The Woodland*, 104 U. S. 180, 26 L. ed. 705. See also, *The Scerapis*, 57 Fed. 436; *Moore v. The Robilant*, 42 Fed. 162, 165.

<sup>43</sup> *Vandewater v. Mills*, 19 How. (U. S.) 82, 15 L. ed. 554; *The St. Lawrence*, 1 Black (U. S.) 522; *The Arcturus*, 18 Fed. 743; *The Tonawanda*, 27 Fed. 877, 575; *The Ella*, 84 Fed. 471.

<sup>44</sup> *The Lillie Mills*, 1 Spr. (U. S.) 307, Fed. Cas. No. 8352; *The Bristol*, 11 Fed. 156, 163; *The Robert Gaskin*, 9 Fed. 62; *The Wexford*, 7 Fed. 674; *The Eastern Star*, 1 Ware (U. S.) 185, Fed. Cas.

No. 4254; *The D. M. French*, 1 Low. (U. S.) 43, Fed. Cas. No. 3938; *The Louisa*, 2 Woodb. & M. (U. S.) 48, Fed. Cas. No. 10652.

<sup>45</sup> *The Atlantic Crabbe* (U. S.) 440, Fed. Cas. No. 2976; *The Prospect*, 3 Blatchf. (U. S.) 526, Fed. Cas. No. 11443; *The Eliza Jane*, 1 Spr. (U. S.) 152, Fed. Cas. No. 4363; *The Bristol*, 11 Fed. 156.

<sup>46</sup> *The Louie Dole*, 14 Fed. 862, 11 Biss. (U. S.) 479.

<sup>47</sup> *The Nevada*, 2 Sawy. (U. S.) 144, Fed. Cas. No. 5839.

<sup>48</sup> *The Lauretta*, 9 Fed. 622.

circumstances a lien has been held lost after a delay of eight months,<sup>49</sup> after twenty months,<sup>50</sup> after a year,<sup>51</sup> and after two years and a half.<sup>52</sup> A delay of less than a year in bringing a libel for damages by collision was held to be not unreasonable as against a subsequent purchaser. The accident was so notorious that the possibility of claims arising out of it could not have escaped reasonably diligent inquiry on the part of the purchaser, had he desired to ascertain all possible outstanding liens.<sup>53</sup>

**§ 1799a. Lien for repairs in nature of proprietary right.—**

A maritime lien for repairs is in the nature of a proprietary right, and is not lost by merely delivering the vessel to the owner in a foreign port before payment. Such lien differs from a common-law lien. Delivery does not interfere in any way with the lienor's rights, unless the lien was expressly waived.<sup>54</sup>

<sup>49</sup> *The Eliza Jane*, 1 Spr. (U. S.) 152, Fed. Cas. No. 4363.

<sup>50</sup> *The General Jackson*, 1 Spr. (U. S.) 554, Fed. Cas. No. 5314.

<sup>51</sup> *The Lillie Mills*, 1 Spr. (U. S.) 307, Fed. Cas. No. 8352.

<sup>52</sup> *The Artisan*, 8 Ben. (U. S.) 538, Fed. Cas. No. 567; *The Columbia*, 13 Blatchf. (U. S.) 521, Fed. Cas. No. 3036.

<sup>53</sup> *The Columbia*, 27 Fed. 704. See *The Bristol*, 11 Fed. 156, *affd.* 20 Fed. 800.

<sup>54</sup> *The Lime Rock*, 49 Fed. 383. In this case the repairs made upon a foreign vessel were admittedly necessary to enable her to prosecute her voyage. The owner was not a resident of the state, and in making the contract stated that he was then without funds to pay for the repairs. The vessel was to be delivered to him on completion, and he was to pay half the bill thirty days thereafter, and

the remainder as the vessel earned the money. The vessel was delivered, but no part of the bill was paid at the expiration of the thirty days. Held that, although the evidence indicated that the repairs were made partly upon the credit of the owner, there was nothing to show an intention to waive the lien. The vessel was to be put back by the agreement, into the possession of its owner, thirty days before any payment on account of the repairs was to be made, and after that payment the vessel was still to be left in the possession of the owner, that she might earn the balance of the debt; but it is equally a part of the contract in this case that the one-half of the bill for repairs was to be paid promptly at the end of thirty days after the completion of the repairs.

§ 1800. **Lien sometimes lost by delay in enforcing it.**—What delay will have this effect depends much upon the circumstances of the case. In general it may be said that the delay must be unreasonable, and must operate to the prejudice of third persons, after an opportunity has arisen to enforce the lien.<sup>55</sup> Under a state statute, a lien for the construction of a steamboat, which left the state immediately after it was built, and did not return for nine years, was then enforced.

The general statutes of limitation do not apply.<sup>56</sup> The maritime law fixes no period of time within which this lien must be enforced, though this period has sometimes been limited by statute. It has been said that the lien should in no case be extended beyond the next voyage, if the interests of third persons have intervened without notice.<sup>57</sup> But there is no inflexible rule fixing the time within which maritime liens must be enforced. The statutes giving liens for construction, and for supplies furnished domestic vessels, generally prescribed the time within which the liens shall be enforced. Maritime liens must be enforced with reasonable diligence, having reference to all the circumstances of the case.<sup>58</sup> "As maritime liens are secret incumbrances, and tend to mislead those who subsequently trust to the ship, unless

<sup>55</sup> *The Prospect*, 3 Blatchf. (U. S.) 526, Fed. Cas. No. 11443; *In re Dubuque*, 2 Abb. Adm. (U. S.) 20, 33; *The Lauretta*, 9 Fed. 622; *The Wyoming*, 36 Fed. 493; *The Seminole*, 42 Fed. 924; *The Lillie*, 42 Fed. 237; *Curtin v. The Asher W. Parker*, 84 Fed. 832, 28 C. C. A. 224; *The Angler*, 83 Fed. 845; *Berwind-White Coal Min. Co. v. Metropolitan S. S. Co.*, 166 Fed. 782; *The Marjorie*, 151 Fed. 183, 80 C. C. A. 551; *McHorney v. The D. B. Steelman*, 70 Fed. 326; *The Tiger*, 90 Fed. 826; *The Cimbria*, 156 Fed. 378.

<sup>56</sup> *Reed v. Insurance Co.*, 95 U. S. 23, 24 L. ed. 348; *The Key City*, 14 Wall. (U. S.) 653, 20 L. ed. 896; *Smith v. Sturgis*, 3 Ben. (U. S.) 330, Fed. Cas. No. 13111; *Sinton v. Steamboat Roberts*, 46 Ind. 476.

<sup>57</sup> *Leland v. The Medora*, 2 Woodb. & M. (U. S.) 92, 104, Fed. Cas. No. 8237.

<sup>58</sup> *The J. W. Tucker*, 20 Fed. 129, 133; *The Young America*, 30 Fed. 789, 792; *American Ins. Co. v. Coster*, 3 Paige (N. Y.) 323; *The John Dillon*, 46 Fed. 527.



they are enforced with diligence, according to the circumstances and the existing opportunities for enforcing them, they will be deemed either abandoned through laches as against subsequent lienors or incumbrancers, or postponed to the claims of the latter, as circumstances may require."<sup>59</sup> What is reasonable diligence under all the circumstances of the case should be determined by reference to the equitable maxim, *Sic utere tuo ut alienum non loedas*,—enforce your rights so as not to injure others.<sup>60</sup>

A maritime lien for repairs based on a running account extending over nearly four years, during which time the account was largely reduced by payments made with considerable irregularity, and continued for months after the date of last charge, and up to a date less than a week previous to the filing of the libel, is not barred by laches, though the last repairs were made nearly a year before the filing of the latter. If, during the time of these payments, indebtedness to other lienors is incurred, their claims should not take precedence.<sup>61</sup>

**§ 1800a. Limitation as against bona fide purchaser.**—The period of limitation as against a bona fide purchaser is "reasonable opportunity to enforce the lien."<sup>62</sup> Thus, "as against a bona fide purchaser who makes all reasonable efforts to discover incumbrances, and fails to find any, such a lien, after a delay of nearly a year to take any steps to enforce it, where the vessel has been all the time within easy reach of process, and the vendor, meantime, as in this case, has become insolvent, is lost through laches. After such ample opportunity to enforce the lien, the loss should fall upon the lienor,

<sup>59</sup> *The J. W. Tucker*, 20 Fed. 129, per Brown, J.

<sup>60</sup> *The Young America*, 30 Fed. 789, 792, per Brown, J.; *The Algonquin*, 88 Fed. 318.

<sup>61</sup> *The John Dillon*, 46 Fed. 527.

<sup>62</sup> *The Chusan*, 2 Story (U. S.) 455, Fed. Cas. No. 2717; *The Util-*

*ity*, Bl. & H. (U. S.) 218, Fed. Cas. No. 16806; *The Eliza Jane*, 1 Spr. (U. S.) 152, Fed. Cas. No. 4363; *The Lillie Mills*, 1 Spr. (U. S.) 307, Fed. Cas. No. 8352; *The Bristol*, 11 Fed. 156, 163, affd. 20 Fed. 800; *The Lyndhurst*, 48 Fed. 839.

and not on the bona fide vendee. The period of limitation of liens in admiralty, as against a bona fide purchaser, is 'a reasonable opportunity to enforce them.'"<sup>63</sup>

§ 1801. **When lien lost in case of ocean vessel.**—In the case of ordinary ocean voyages the lien is lost after the beginning of a subsequent voyage, if a reasonable opportunity existed for the arrest of the ship;<sup>64</sup> and this rule is applied even to bottomry bonds.<sup>65</sup> "In nearly all the maritime codes the privileges guaranteed by law, if not enforced before the departure of the vessel upon another voyage, are postponed to the liens connected with the later voyage."<sup>66</sup> The liens connected with every new voyage start with a priority over all former ones after the vessel has sailed, if there has previously been opportunity to enforce them.<sup>67</sup>

§ 1801a. **Rule not applied to vessel making daily trips about harbor.**—This rule is not applied to vessels making daily or hourly trips about a harbor. "In harbor cases, therefore, unless liens for supplies are to be practically abolished altogether, the letter of the general maritime rule can not be followed, but its general spirit and purpose only. This plainly is to give the ship a short credit, to enable her to earn her freight, to collect it, and pay her bills. The settled practice in this country has sustained these liens in harbor cases for a time. \* \* \* I think the time allowed for retaining priority in these harbor cases may be justly reduced to forty days. That will give the short credit incident to the usual rendering of monthly bills, and ten days more for settlement, or libeling the boat in case of nonpayment. It ac-

<sup>63</sup> The *Lyndhurst*, 48 Fed. 839.

<sup>64</sup> *Leland v. The Medora*, 2 Woodb. & M. (U. S.) 92, Fed. Cas. No. 8237; *The Utility*, Blatchf. & H. (U. S.) 218, 225, Fed. Cas. No. 16806; *The Boston*, Blatchf. & H. (U. S.) 309, 327.

<sup>65</sup> *The Royal Arch*, 1 Swab. 269-

284; *Blaine v. The Chas. Carter*, 4 Cranch (U. S.) 328, 332, 2 L. ed. 636; *The Rapid Transit*, 11 Fed. 322, 334; *The J. W. Tucker*, 20 Fed. 129, per Brown, J.

<sup>66</sup> *The Young America*, 30 Fed. 789, 792, per Brown J.

<sup>67</sup> *The Gratitude*, 42 Fed. 299.

cords in some degree with the period of modern Atlantic voyages; it does not exceed the time ordinarily enjoyed by the ship in the ante-steam period; and it is short enough not to imperil, as a rule, the security, or the partial security, afforded to damage claims, which the maritime law designs also to protect, though subordinately to contract liens on the same voyage, according to the universal practice (except under peculiar circumstances) of at least the last two hundred years. The long extension of time heretofore given has led to evils and abuses here, which observation satisfies me ought to be corrected by a nearer approach to the general maritime rule; and the time limit of forty days, after which such liens will be held to lose their priority as regards any liens arising on a subsequent voyage, or trip, will, I think, subserve all that necessity and that encouragement of commerce for which maritime liens have been created, and for which they are preserved; and that time will not ordinarily or substantially prejudice damage liens, which are of a lower rank, beyond that inferiority which for centuries has been assigned to them as non-beneficial liens. The time limit is, indeed, an arbitrary limit; and so is the season limit, or any other limit that can be adopted for harbor tugs consistently with the existence of such liens at all for any practical use. Any other rule than the voyage rule must be arbitrary, and that rule would leave no practical security whatever."<sup>68</sup>

§ 1802. Rule in navigation of lakes and rivers.—Neither is this rule applicable to vessels engaged in the navigation of the western lakes and rivers of the United States; and as regards these the rule has been adopted quite generally of making the division of claims by the successive open seasons of navigation, rather than by separate voyages.<sup>69</sup> But even

<sup>68</sup> *The Gratitude*, 42 Fed. 299, 300, 301, per Brown, J.

<sup>69</sup> *The Buckeye State*, 1 Newb. (U. S.) 111, Fed. Cas. No. 13445; *The Dubuque*, 2 Abb. Adm. (U. S.)

20, 32; *The Hercules*, 1 Brown Adm. 560; *The Detroit*, 1 Brown

Adm. 141; *The Athenian*, 3 Fed. 248; *The City of Tawas*, 3 Fed. 170; *The Arcturus*, 18 Fed. 743.

under this rule, if the liens upon a vessel equal or exceed her whole value, they should be enforced with diligence; otherwise, after a comparatively short period of inactivity, they will be postponed in favor of subsequent maritime liens acquired without notice.<sup>70</sup>

Where the creditors of a boat engaged in navigation upon the Mississippi and Ohio rivers knew that the boat was practically insolvent, and took no steps to enforce their claims, but on the contrary continued to give the boat credit, upon a sale of the boat in admiralty and distribution of the proceeds, these not being sufficient to pay all claims in full, it was held that those more than six months old were stale.<sup>71</sup>

§ 1803. **Lienholder may await return of vessel.**—The lienholder may ordinarily await the return of the vessel to the port where the lien debt was incurred. A ship whose home port was in Philadelphia became subject to a maritime lien at Jersey City, but was allowed to sail for Europe upon promise of prompt payment by the ship's agents. She returned to Philadelphia twice, but of these visits the lienholder knew nothing. She was attached by him on her subsequent return to Philadelphia two years after the lien claim was incurred. In the meantime the ship had been sold to innocent purchasers. It was held the lienholder had not been guilty of such negligence as to lose his remedy against the ship. Had the ship returned to the port where the expenses were incurred under such circumstances that the lienholder should have known of her return, the lien would doubtless have been lost.<sup>72</sup>

746; *The J. W. Tucker*, 20 Fed. 129, 133, per Brown, J.; *The Grapeshot*, 22 Fed. 123, 125; *The Young America*, 30 Fed. 789, 792. See ante, § 1779.

<sup>70</sup> *The Young America*, 30 Fed. 789, 793; *The Grapeshot*, 22 Fed. 123, 125.

<sup>71</sup> *The Thomas Sherlock*, 22 Fed. 253.

<sup>72</sup> *The Tonawanda*, 27 Fed. 575. Per Butler, J.: "This is certainly a serious question,—one about which there is room for doubt. The libelants could have ascertained the fact, of course, either

§ 1804. **Due diligence to require creditor to follow the vessel.**—Due diligence may sometimes require the lienor to follow the vessel into other districts than that where the claim accrued, instead of taking out process where the claim accrued and awaiting the return of the vessel to that district, even though that be her home port. Thus, if a vessel upon which there is a lien for repairs goes to a port in another district, and is there sold to a purchaser who has no notice of the lien, it is incumbent upon the lienor, immediately upon hearing of the sale, to endeavor to seize the vessel in any port which she frequents; and if he fails to do so, his claim may be adjudged stale.<sup>73</sup> As regards vessels engaged in the navigation of the western lakes and rivers, a reasonable opportunity to enforce a lien is given, within the meaning of the law, whenever the creditor is able, by the exercise of reasonable diligence, to ascertain the whereabouts of the debtor vessel.<sup>74</sup>

Where the lienholder and the owner of the vessel are both residents of the same district, and no change of ownership occurs, there may be no obligation upon the lienholder to pursue the vessel into another district.<sup>75</sup>

§ 1805. **Claim for seamen's wages stale as against bona fide purchaser.**—A claim for seamen's wages is stale, as against a bona fide purchaser for value, if not presented and prosecuted during the season after the claim accrued.<sup>76</sup> To

by keeping a constant watch upon the vessel's movements, or upon the entries at the port of Philadelphia. Did their duty, however, require this? Is such a course, under similar conditions, customary? I think not. When all the circumstances are considered, I think the libelants must be held to a higher degree of vigilance than is usually exercised or required, to visit them with the consequences of remissness, for fail-

ing to discover these visits."

<sup>73</sup> The *C. N. Johnson*, 19 Fed. 782; The *D. M. French*, 1 Low. (U. S.) 43, 45, Fed. Cas. No. 3938, per Lowell, J.

<sup>74</sup> The *C. N. Johnson*, 19 Fed. 782, per Brown, J.

<sup>75</sup> The *Emma L. Coyne*, 11 Chic. L. N. 98.

<sup>76</sup> The *Harriet Ann*, 6 Biss. (U. S.) 13, Fed. Cas. No. 1601; The *Live Oak*, 30 Fed. 78; *Leland v. The Medora*, 2 Woodb. & M. (U.

allow a seaman, after his voyage is over and his contract ended, and his connection with the vessel dissolved, and after he has embarked for years in employment elsewhere, to retain a secret lien on the vessel and thus prevent her sale or use unincumbered, and thus embarrass any new purchaser without notice, would be very bad policy.<sup>77</sup> Seamen can not assert liens for wages earned on board a vessel which is violating the law, or which is at fault in a collision, for the seamen are presumably participating in the violation of the law, or sharing in the fault of the colliding vessel.<sup>78</sup>

**§ 1806. When lien for damages not deemed stale.**—Where there is no question of priority involved, maritime lien for damages will not be deemed stale, though there has been a delay of two years in filing a libel, merely on the ground that some witnesses have in the meantime been lost by the respondents.<sup>79</sup> But after such a lapse of time, a lien would not be enforced as against the rights of innocent third parties.<sup>80</sup>

**§ 1806a. State statute providing for notice, not applicable to foreign vessel.**—A state statute which provides that, if a notice of the lien is duly filed, the lien may continue for one year, or other fixed time, is not applicable to foreign vessels on which a maritime lien would exist by the maritime law without the aid of a statute. "Even if the statute could be held to refer to foreign vessels at all," said Judge Brown,<sup>81</sup> "I doubt whether it is competent for state legislation to change the maritime law, or the rules of decision to be ap-

S.) 92, 104, Fed. Cas. No. 8237; *The Bolivar*, Olcott's Adm. 474, Fed. Cas. No. 1609; *The Eastern Star*, Ware's Adm. (U. S.) 184, Fed. Cas. No. 4254. And see *The Nellie Bloomfield*, 27 Fed. 524.

<sup>77</sup> *Packard v. The Louisa*, 2 Woodb. & M. (U. S.) 48, Fed. Cas. No. 10652, per Woodbury, J.

<sup>78</sup> *The Elexena*, 53 Fed. 359.

<sup>79</sup> *Martino Cilento*, 22 Fed. 859. And see *The Pirate*, 32 Fed. 486, 489.

<sup>80</sup> *The Bristol*, 20 Fed. 800. In *The Carrie*, 46 Fed. 796, a lien was enforced notwithstanding a delay of between two and three years.

<sup>81</sup> *The Lyndhurst*, 48 Fed. 839.

plied by courts of admiralty in the administration of that law, further than by the mere establishment and annexing of a lien to maritime contracts or torts, which lien courts of admiralty alone may recognize and enforce.<sup>82</sup> \* \* \* In *The Chusan*, \* \* \* Story, J., held that state legislation could not abolish a maritime lien. The maritime law deals largely with interstate and international rights and relations. The constitution, in conferring upon the federal courts exclusive jurisdiction of admiralty and maritime causes, manifestly designed to provide for a single harmonious national system of maritime law. To accomplish this it confined its administration to the national tribunals alone."<sup>83</sup>

**§ 1807. When lien will be held to be seasonably filed.**—Under a state statute which provides that the lien should continue until the debt is satisfied,<sup>84</sup> a petition to enforce it filed more than fifteen years after the lien debt was created, but upon the first return of the vessel within the jurisdiction of the state, was held to be seasonably filed, although her ownership had been changed.<sup>85</sup> The legal record of a statutory lien is notice to all subsequent purchasers of the vessel. Where a claim of lien for materials furnished in the construction of a vessel was filed within the time limited after the first departure of the vessel from the port, and during the next two and one-half years the vessel came into that port on several occasions to the knowledge of the person

<sup>82</sup> See *The J. F. Warner*, 22 Fed. 342, 345; *Holmes v. Oregon &c. R. Co.*, 5 Fed. 75, 6 Sawy. (U. S.) 262; *The Garland*, 5 Fed. 924; *Brookman v. Hamill*, 43 N. Y. 554, 3 Am. Rep. 731; *Vose v. Cockcroft*, 44 N. Y. 415, writ of error dismissed, 14 Wall. (U. S.) 5, 20 L. ed. 875; *Poole v. Kermit*, 59 N. Y. 554.

<sup>83</sup> *The Chusan*, 2 Story (U. S.) 455, Fed. Cas. No. 2717; *The Lot-*

*tawanna*, 21 Wall. (U. S.) 558, 575 22 L. ed. 654; *In re Long Island, North Shore &c. Transp. Co.*, 5 Fed. 599, 619; *The Manhasset*, 18 Fed. 919.

<sup>84</sup> Massachusetts, see ante, § 1748.

<sup>85</sup> *Young v. The Orpheus*, 119 Mass. 179; *Foster v. The Richard Busted*, 100 Mass. 409, 1 Am. Rep. 125; *McDonald v. The Nimbus*, 137 Mass. 360.

claiming the lien, but he did not file his petition to enforce the lien until four and one-half years after such departure, and after the vessel had been sold, it was held that the petition was seasonably filed.

**§ 1807a. Lien waived by an agreement.**—A maritime lien may be waived by an agreement releasing the lien and accepting the debtor's personal responsibility, and the lien cannot afterwards be enforced though the debtor fails to make all the payments agreed upon.<sup>86</sup>

**§ 1808. Lien not lost by accepting a note.**—A maritime lien is not lost by the acceptance of a note for the claim, unless the note was taken in payment or in lieu of the original claim, though payable at a future time.<sup>87</sup> A lien upon a vessel for materials furnished is not waived by taking the promissory note of the debtor signed also by a third person, and acknowledging payment of the account; but upon the nonpayment of the note at maturity, and offer to surrender the note, the lien may be enforced.<sup>88</sup> The note of a third person, when taken for an antecedent debt of a vessel, is no

<sup>86</sup> *The Half Moon*, 46 Fed. 812; *The Nebraska*, 69 Fed. 1009, 17 C. A. 94.

<sup>87</sup> *The Nestor*, 1 Sumn. (U. S.) 73, Fed. Cas. No. 10126; *The St. Lawrence*, 1 Black (U. S.) 522, 17 L. ed. 180; *The Alabama*, 22 Fed. 449; *The Kimball*, 3 Wall. (U. S.) 37, 18 L. ed. 50; *The Bird of Paradise*, 5 Wall. (U. S.) 545, 18 L. ed. 662; *The Guy*, 9 Wall. (U. S.) 758, 19 L. ed. 710; *The General Meade*, 20 Fed. 923; *The Acme*, 7 Blatchf. (U. S.) 366, Fed. Cas. No. 28; *The Pride of America*, 19 Fed. 607; *The Woodland*, 104 U. S. 180, 126 L. ed. 705; *The D. B. Steelman*, 48 Fed. 580; *The John C. Fisher*, 50 Fed. 703, 1 C. C. A.

624. The rule under the state statutes is the same as it is in admiralty. *Merrick v. Avery*, 14 Ark. 370; *Sinton v. The R. R. Roberts*, 46 Ind. 476; *The Agnes Barton*, 26 Fed. 542; *The Queen of St. Johns*, 31 Fed. 24; *The Crescent*, 88 Fed. 298. See also, *Sarmiento v. The Catherine C.*, 110 Mich. 120, 67 N. W. 1085; *The Ella*, 84 Fed. 471.

<sup>88</sup> *Moore v. Newbury*, 6 MeLean (U. S.) 472, Newb. (U. S.) 49, Fed. Cas. No. 9772; *The Winnebago*, 141 Fed. 945, 73 C. C. A. 295, certiorari denied, 200 U. S. 616, 50 L. ed. 621, 26 Sup. Ct. 752; *The L. B. X.*, 93 Fed. 233.



discharge of the maritime lien of the person receiving it.<sup>89</sup> A receipt of payment by note is not conclusive, but only *prima facie*, evidence of payment.<sup>90</sup> In the absence of such a receipt, or other *prima facie* evidence that the note was taken in payment, the burden is upon the owner of the vessel or other claimant to prove that the note was taken in payment of the lien debt.<sup>91</sup> If the note or draft itself recognizes and confirms the lien, there is no presumption of payment, but the contrary.<sup>92</sup> A maritime lien is not lost by giving credit for the claim unless the lien be expressly waived.<sup>93</sup>

**§ 1809. Accepting long-time note a waiver.**—If the credit given by a note extends beyond the time allowed under state statutes for enforcing liens, the credit is an absolute waiver of the lien. If the limitation be to an uncertain period, as for instance to a certain number of days after the vessel is launched, and this expires before the time of payment arrives, the lien is gone; otherwise, if the day of payment arrives while the lien is in force, it is a question of fact and not of law whether the credit was a waiver of the lien.<sup>94</sup> But notes given with a fraudulent intent do not preclude the lien creditor from enforcing his lien against a vessel before the notes mature, and within the time allowed for filing liens.<sup>95</sup>

<sup>89</sup> *The James T. Easton*, 49 Fed. 656; *Noel v. Murray*, 13 N. Y. 167; *Hall v. Stevens*, 116 N. Y. 201, 206, 22 N. E. 374, 5 L. R. A. 802; *The Chusan*, 2 Story (U. S.) 455, 466-470, Fed. Cas. No. 2717; *The Chelmsford*, 34 Fed. 399; *The Gen. Meade*, 20 Fed. 923.

<sup>90</sup> *The Pride of America*, 19 Fed. 607; *The Alabama*, 22 Fed. 449.

<sup>91</sup> *Carter v. Townsend*, 1 Cliff. (U. S.) 1.

<sup>92</sup> *The Pride of America*, 19 Fed. 607; *The Agnes Barton*, 26

Fed. 542; *The Woodland*, 104 U. S. 180, 26 L. ed. 705.

<sup>93</sup> *The Lime Rock*, 49 Fed. 383; *The Pioneer*, 53 Fed. 279.

<sup>94</sup> *The Kearsage*, 1 Ware (U. S.) 546, Fed. Cas. No. 7634, revd. 2 Curt. (U. S.) 421, Fed. Cas. No. 7762; *Veltman v. Thompson*, 3 N. Y. 438; *Mott v. Lansing*, 57 N. Y. 112; *Happy v. Mosher*, 48 N. Y. 313, revg. 47 Barb. (N. Y.) 501.

<sup>95</sup> *Chester Rolling Mills v. The Hopatcong*, 53 Hun (N. Y.) 634, 1 Silv. (N. Y.) 567, 6 N. Y. S. 215, 25 N. Y. St. 702.

§ 1810. **Additional security.**—The taking of a mortgage on the vessel to secure the payment of notes given for lien claims is not a waiver of the maritime lien.<sup>96</sup> The lien of a bottomry bond is in terms and in its character so inconsistent with the ordinary maritime lien as to operate as a waiver and displacement of the maritime lien.<sup>97</sup> It is difficult to see why the taking of additional security by way of mortgage on the vessel should be presumed of itself to be a waiver of a maritime lien.<sup>98</sup> But if a person holding a lien on a vessel consents to its sale, and agrees to accept the purchaser's notes secured by a mortgage for the amount due him, he thereby waives his claim. Though the mortgage and notes were not executed as agreed, the lienholder can not afterwards reassert his lien against a second innocent purchaser.<sup>99</sup>

The recovery of a personal judgment against the owner or agent of the vessel does not impair the lien upon the vessel, the judgment remaining unsatisfied.<sup>1</sup> But the pursuit of a maritime claim in a state court is a waiver of the maritime lien. The lien, having passed into the judgment of the state court, is thereby waived and lost, it being clearly consonant with reason and the analogies of the law, that, if a party having an undisputed maritime lien voluntarily waives it by seeking another remedy incompatible with it, he can not be reinstated in his original right.<sup>2</sup>

§ 1810a. **Maritime lien not to be divested by any proceeding for forfeiture in common-law court.**—No state can confer jurisdiction upon its courts to divest a maritime lien which

<sup>96</sup> *The D. B. Steelman*, 48 Fed. 580.

<sup>97</sup> *The Ann C. Pratt*, 1 Curt. (U. S.) 340, Fed. Cas. No. 409, affd. 18 How. (U. S.) 63, 15 L. ed. 267.

<sup>98</sup> *The Queen of St. Johns*, 31 Fed. 24.

<sup>99</sup> *Kornegay v. Styron*, 105 N. Car. 14, 11 S. E. 153.

<sup>1</sup> *The Bengal*, 1 Swab. 468; *The*

*John and Mary*, 1 Swab. 471; *King v. Greenway*, 71 N. Y. 413; *Fralick v. Betts*, 13 Hun (N. Y.) 632; *Moore v. The Robilant*, 42 Fed. 162; *The Lillie*, 42 Fed. 237; *The Brothers Apap*, 34 Fed. 352; *The Odorilla v. Baizley*, 128 Pa. St. 283, 18 Atl. 511.

<sup>2</sup> *The Swallow*, 1 Bond (U. S.) 189, Fed. Cas. No. 13305. And see *The D. B. Steelman*, 48 Fed. 580.

has once attached to a vessel. Such lien attaches at the moment of the contract or tort in which it originates, and travels with the ship wherever it may go, and into whosoever possession it may come. The state of Virginia provided by statute that a sale of a vessel forfeited by proceedings in the state court, for violating the oyster laws of the state, "shall vest in the purchaser a clear and absolute title." This statute, in so far as it would divest the maritime liens of innocent parties attaching before the arrest of the vessel, is unconstitutional and void; and such vessel may be subsequently seized in the hands of the purchaser, and subjected to such liens, by proceedings in the federal admiralty courts.<sup>3</sup>

§ 1811. No lien for unpaid balance after vessel has been sold under execution to satisfy lien.—After a vessel has been sold under execution to satisfy a lien debt, there can be no lien for the unpaid balance against the vessel.<sup>4</sup> "I can recall no instance in which a creditor may sell his debtor's property a second time for the same debt. He invites the public to purchase, proposing to take the proceeds while the purchaser takes the property. How can he afterwards, in effect, claim the property also? It seems to me that no authority for this proposition can be needed."<sup>5</sup>

A sale under a decree in the admiralty discharges all prior

<sup>3</sup> The *Elexena*, 53 Fed. 359. The case of *Taylor v. Carryl*, 20 How. (U. S.) 583, 15 L. ed. 1028, is distinguished. There the Supreme Court was divided on the question of the competency of the admiralty court at Philadelphia to deal with the *Royal Saxon* while in custody of a common-law court. The majority held that it was not. The justices who dissented from this view were the admiralty judges, Tancy of Baltimore, Grier of Philadelphia, Wayne of Savannah, and Clifford of Belfast, Maine.

<sup>4</sup> The *Mary Morgan*, 28 Fed. 196, 202.

<sup>5</sup> The *Mary Morgan*, 28 Fed. 196, 202, per Butler, J.; The *H. A. Baxter*, 172 Fed. 260, *affd.* 179 Fed. 1018, 102 C. C. A. 663, holding that where a vessel is sold in good faith after libellant had a decree on default establishing his lien for repairs furnished in a foreign port the libellant is entitled to be paid in full as the holder of a preferred claim out of the money received from such sale.

liens under a state law, and the purchaser takes the property discharged of all incumbrances.<sup>6</sup> A maritime lien upon a vessel, existing at the time of the commencement of proceedings under a state law to enforce a lien, is not destroyed by a subsequent sale of the vessel under those proceedings, but the maritime lien may be enforced notwithstanding.<sup>7</sup> After a maritime lien has attached, it can not be defeated by a sale under execution issuing from a state court upon a judgment obtained by a third person against the owner,<sup>8</sup> though such lien will be lost by unreasonable delay if the vessel has passed into the hands of a bona fide purchaser.<sup>9</sup>

§ 1812. **Liens transferred to proceeds of sale by good faith sale.**—If a sale be made by the master in good faith, and under such circumstances that the sale is warranted, any prior lien upon her is transferred to the proceeds only, and the vessel cannot be held liable in the hands of a purchaser. Thus, where a steamship was driven ashore, and filled with water and running ice, and the testimony indicated that she was regarded not only by the master, but by agents and surveyors of the underwriters and others, as a total wreck, and in that condition she was sold by the master, it was held that the circumstances did not establish fraud in the sale, and that the vessel, as afterwards repaired, was not liable for supplies furnished prior to the accident. The fact that it subsequently appeared that the ship was not injured so much as was supposed was held not to invalidate the sale, it not appearing that the master acted fraudulently.<sup>10</sup>

<sup>6</sup> *Kelsey v. Beers*, 16 Abb. Pr. (N. Y.) 228; *The Raleigh*, 2 Hughes (U. S.) 44, Fed. Cas. No. 11539.

<sup>7</sup> *The John Cuttrell*, 9 Fed. 777.

<sup>8</sup> *The Gazelle*, 1 Spr. (U. S.) 378, Fed. Cas. No. 5289; *Maxwell v. The Powell*, 1 Woods (U. S.) 99; *The Lillie*, 42 Fed. 237; *The*

*Julia Ann*, 1 Spr. (U. S.) 382, Fed. Cas. No. 7577; *The William T. Graves*, 14 Blatchf. (U. S.) 189, Fed. Cas. No. 17759.

<sup>9</sup> *Crosby v. The Littie*, 40 Fed. 367.

<sup>10</sup> *The Raleigh*, 32 Fed. 633, *affd.* 37 Fed. 125.

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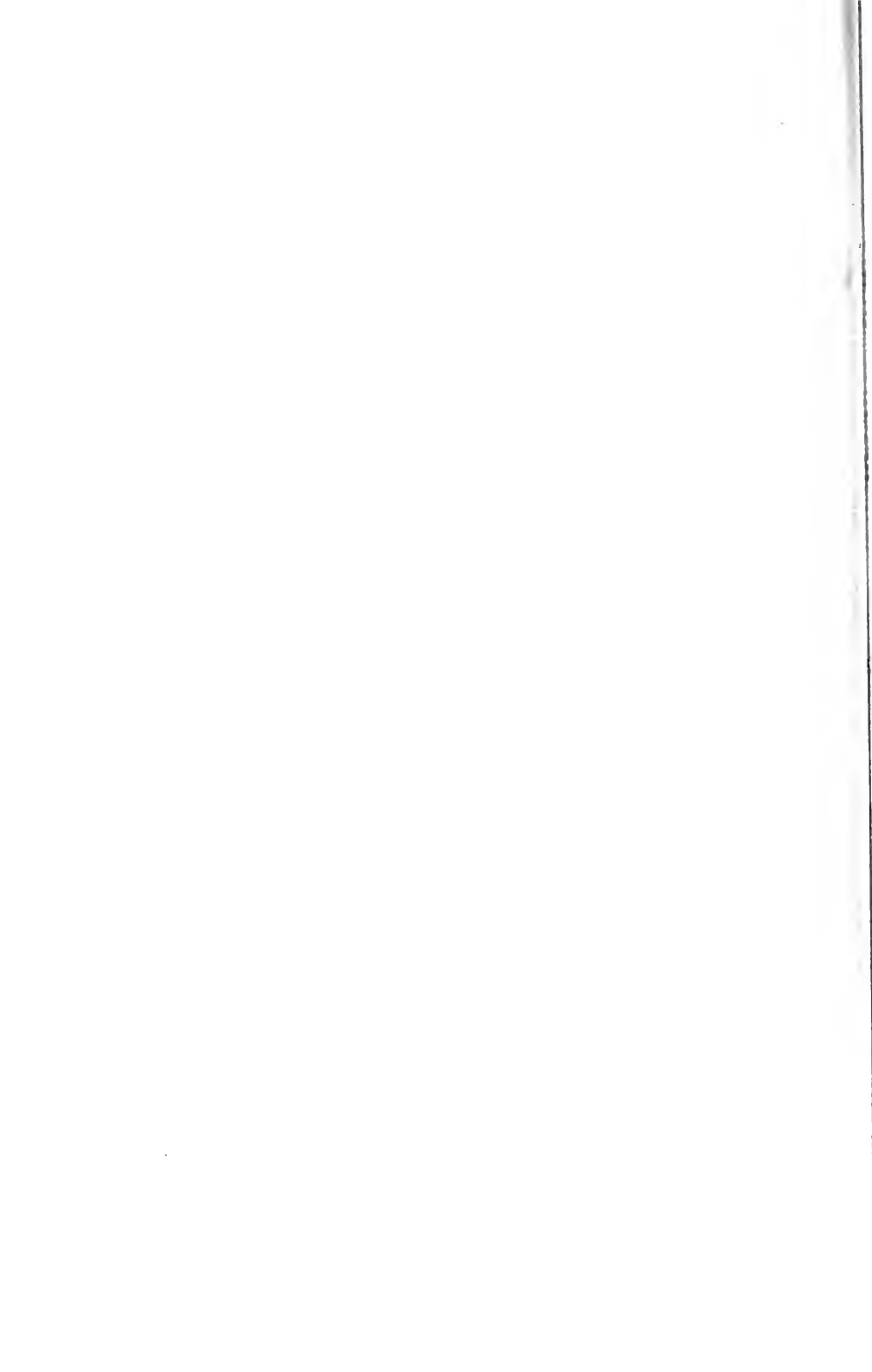
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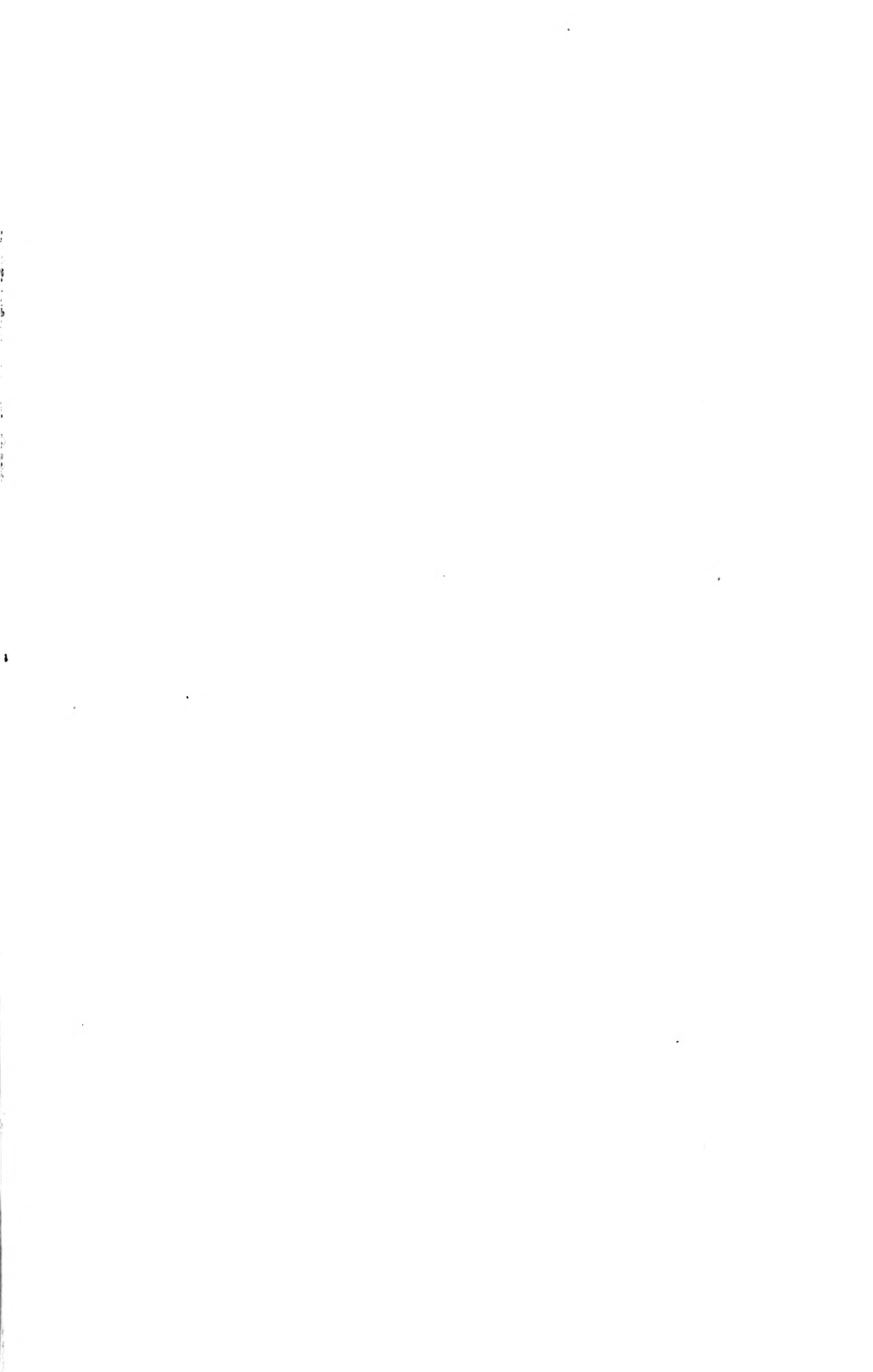
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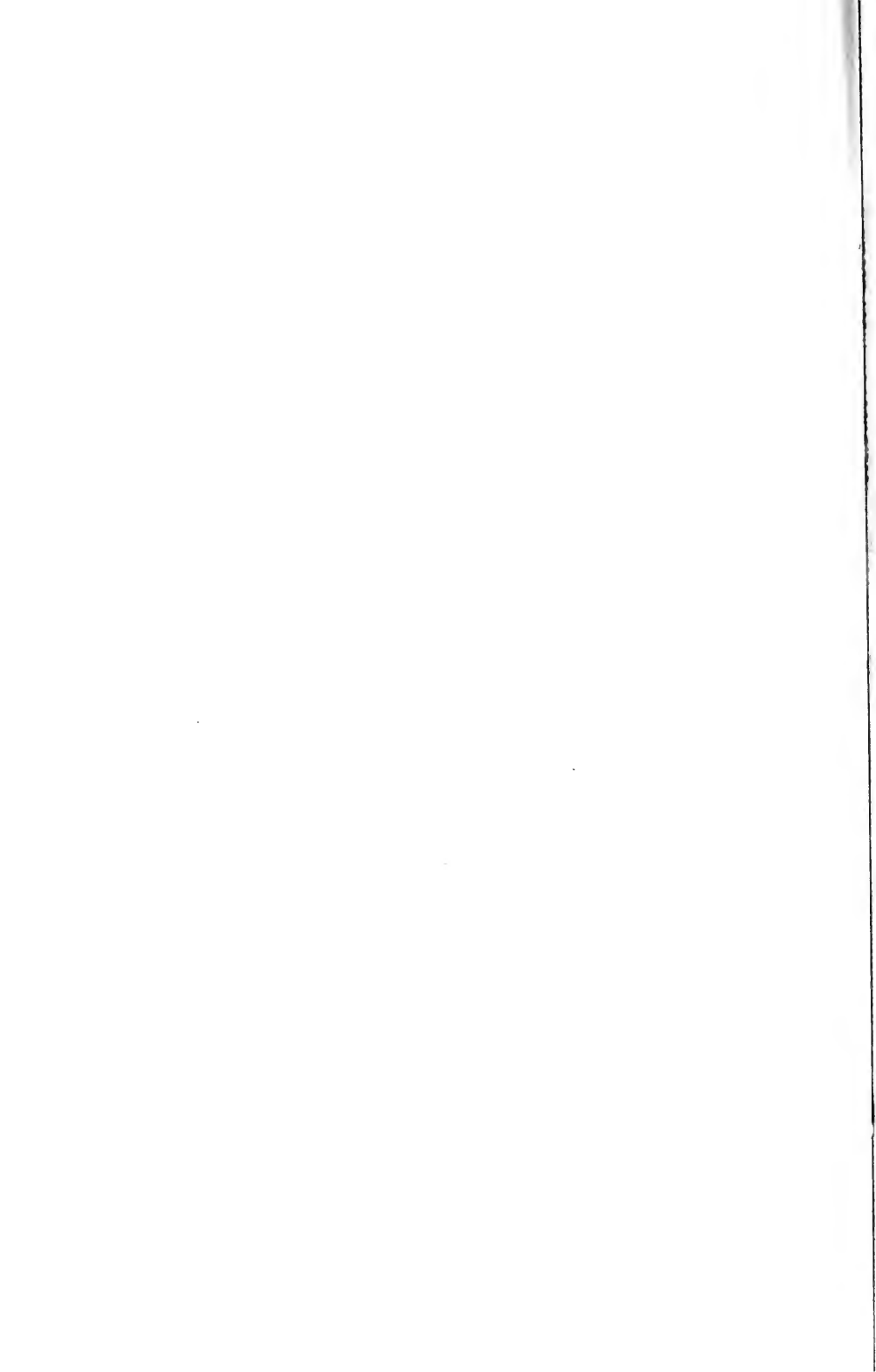
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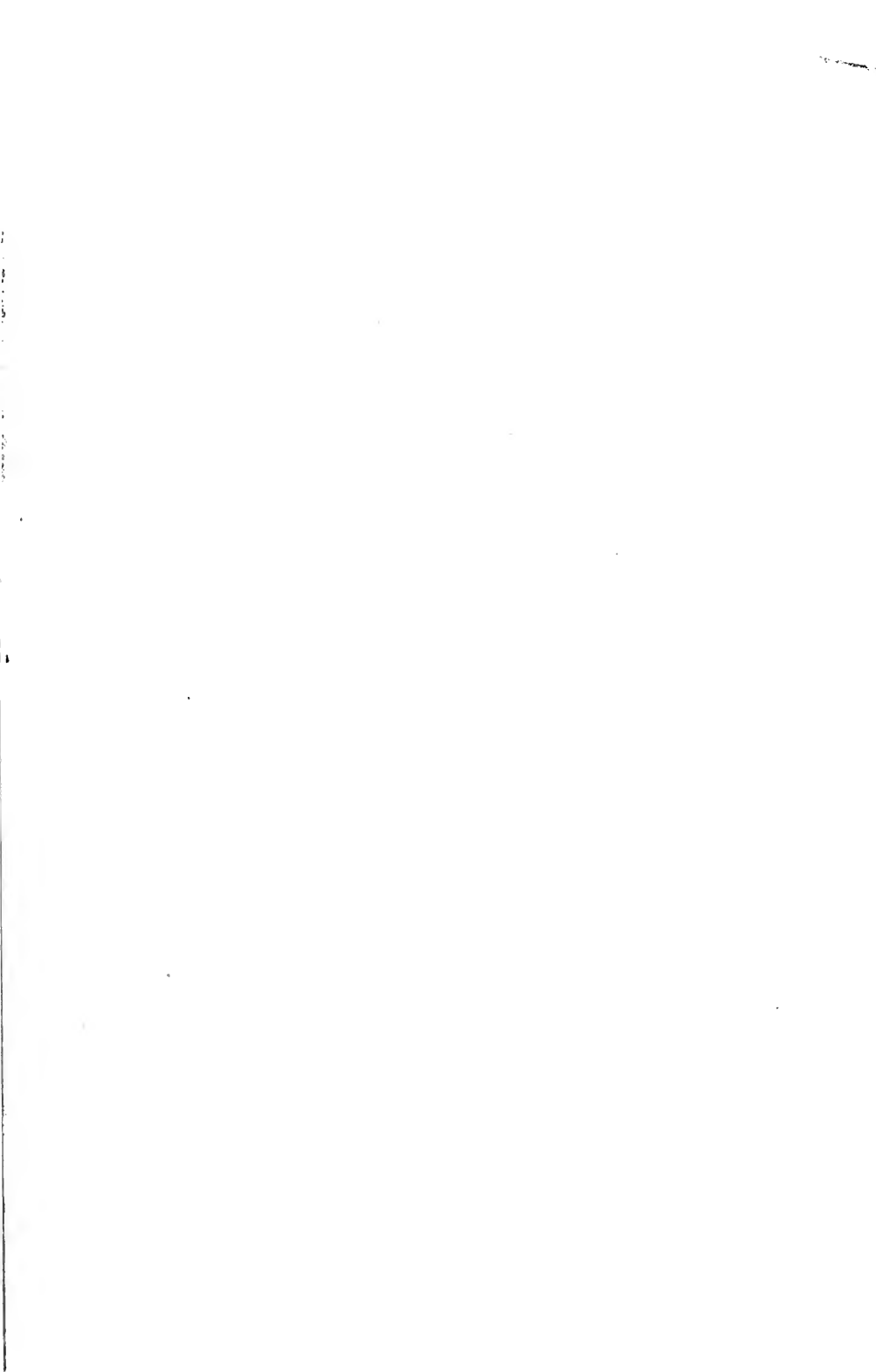
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